



Department of Trade and Industry

CONSULTATION DOCUMENT ON IMPLEMENTATION OF THE E-COMMERCE DIRECTIVE

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CHAPTER 1

INTRODUCTION

The E-Commerce Directive

The E-Commerce Directive¹ was adopted on 8 June 2000 and published in the Official Journal of the European Communities on 17 July 2000. The objective was to ensure that information society services benefit from the internal-market principles of free movement of services and freedom of establishment, in particular through the principle that they can be provided throughout the European Community if they comply with the law in the service provider's home Member State.

The Directive includes:

- requirements regarding the role of national authorities;
- transparency requirements for web advertising;
- principles relating to contracting online;
- limitations to the liability of Internet intermediaries; and
- requirements regarding disclosure of any codes of conduct, such as for online-dispute settlement, by which the service provider is bound.

The Directive covers information society services (i.e. services normally provided for remuneration, at a distance, by means of electronic equipment for the processing and storage of data and at the individual request of a recipient of a service), both business to business and business to consumer, including services provided free of charge to the recipient (e.g. funded by advertising or sponsorship revenue) and services allowing for online electronic transactions, such as interactive online shopping. Examples of sectors and activities covered include online newspapers, online databases, online financial services, online professional services (such as lawyers, doctors, accountants and estate agents), online entertainment services (such as video on demand), online direct marketing and advertising and services providing access to the Internet.

The chief aim of the Directive is to ensure that the Community reaps the full benefits of e-commerce by boosting consumer confidence and giving providers of information society services legal certainty, without excessive red tape. There are a number of reasons why the Directive is based on the Community's internal-market rules. E-commerce adds a new dimension to the internal market for consumers in terms of easier access to goods and services of better quality and at lower prices. E-commerce will also promote trade, stimulate innovation and competitiveness and create sustainable jobs.

¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1).

Draft Regulations

Member States now have until 16 January 2002 to implement the requirements of the Directive. The Government plans to implement the legislative requirements of the Directive by means of secondary legislation under Section 2(2) of the European Communities Act 1972 and by specific sectoral legislation where available. Draft Regulations will be prepared, taking account of responses to this document.

In order to ensure effective implementation in the specialised area of financial services a separate consultation document will be published by the Treasury. Anyone primarily interested in that area may therefore wish to address their reply to that document. The responses to both documents will of course be considered together by ministers.

The devolved administrations are also considering what separate implementing provisions may be necessary.

Public consultation

This document summarises the background to and options for implementing the Directive's detailed provisions. It is being sent to a wide range of individuals, companies and representative organisations as well as to those who participated in the previous consultation in 1999, before negotiations on the draft Directive, and others who have e-mailed their contact details to ecom@dti.gsi.gov.uk or sent them to the contact address below.

The deadline for submissions is 2 November 2001. Further copies of this document can be obtained from the DTI website at:

http://www.dti.gov.uk/cii/ecommerce/europeanpolicy/ecommerce_directive.shtml

Please refer to this site for information during this period concerning changes to these plans or for discussions and other events arranged by DTI and others.

Please supply your comments electronically if possible to ecom@dti.gsi.gov.uk, including a summary of no more than 300 words. Contributions may be used on DTI's website to inform and promote discussion. Please indicate whether any sections of your response are to be treated as confidential, in which case it would be helpful if you would also provide a non-confidential version or indicate whether only the summary may be published.

Guidance

Guidance for businesses and consumers will be drawn up partly by refining and expanding parts of this consultation document. Comments are therefore welcome on its coverage and on issues where further guidance would be welcome.

Regulatory Impact Assessment

The Regulations implementing the Directive are expected to provide substantial benefits for business, consumers and others. Some provisions will entail compliance costs.. The Government particularly invites any information that would assist in estimating accurately

benefits and compliance costs for business (and particularly for small businesses). To assist with this, a partial Regulatory Impact Assessment is attached to this document for comment.

Government contact

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Links

http://europa.eu.int/eur-lex/en/lif/dat/2000/en_300L0031.html (the e-Commerce Directive in PDF format, 106KB)

http://europa.eu.int/comm/internal_market/en/ecommerce/index.htm (E-Commerce pages on the Commission's website)

<http://www.ukonlineforbusiness.gov.uk> (UK Online for Business is the national strategy for encouraging the take-up and pursuit of e-commerce, including access to advice and publications)

http://europa.eu.int/ISPO/ecommerce/books/dont_panic.pdf ("Don't Panic - Do e-Commerce" - useful and informal advice prepared by consultants at the direction of the European Commission, in PDF format)

CHAPTER 2

OBJECTIVES AND SCOPE; DEFINITIONS; INTERNAL MARKET

The requirement

- Articles 1, 2, 3 and Annex
- Recitals 11-16 (scope), 17, 18 (information society services), 19, 57, 58 (establishment), 21 (coordinated field), 22-27 (supervision), 55, 56 (consumer contracts)

Article 3 has as its objective the implementation of the principle of freedom to provide services under Article 49 of the Treaty establishing the European Community. This is based, on the one hand, on determining the Member State responsible for ensuring compliance with legal requirements of the activities in an information society service and, on the other, on the prohibition of other Member States restricting the freedom to provide these services.

Thus, paragraph 1 requires the Member State in which the service provider is established to ensure that its activities comply with the national law of that Member State. Paragraph 2 prohibits in principle all forms of restriction on the freedom to provide information society services (i.e. any actions on the part of a Member State liable to hamper or otherwise make the provision of services less attractive).

Agreement by the European Parliament and Member States to this “country of origin” (or “place of establishment”) approach to regulation was based on the judgement that exposing service providers to 15 Member States’ sets of rules would be a disproportionate and unjustified burden, preventing them from realising economies of scale and offering competitive services and customer choice. The Directive aims to ensure that, within the scope of the regulated field, they need to comply only with one set of rules instead of 15 and that that set is the one with which they are likely to be most familiar.

The Government supports this approach. It should clarify the responsibilities of providers of information society services and lift a potentially substantial burden of regulation (and disincentive to business) from them.

Approach to the Regulations

There is some debate within and between Member States and the European Commission about the precise ambit of the country of origin provisions in the Directive, and particularly around the definition of “information society services” for the purposes of the Directive; the extent of the “coordinated field” of regulation to which it applies and the derogations and exclusions from it; and its relationship with private international law and other regulatory requirements.

These raise questions of both interpretation and implementation of the Directive. Generally speaking, the distinction is between those who argue that “host state” regulation (i.e. by the Member State of the recipient of the service) only applies insofar as it is covered by the stated

derogations and exceptions and that otherwise country of origin regulation applies, and those who take a narrow view of the ambit and therefore that the extent to which existing host-state regulation continues to apply is wider.

As the Community debate is continuing and there is, as yet, no consistency of detailed interpretation among Member States and the Commission, we propose to finalise Regulations in the light of responses to this consultation and, in particular, of the views of copy recipients on the implications for them. Specific questions on which we would particularly welcome views are set out below.

Questions for consultees

2.1 Is your business affected by UK legal requirements about the provider of services (e.g. that the provider be authorised or licensed) where the service may be supplied online? What would be the consequences for your business if the Directive prevented the UK from applying those requirements to a provider established in another EEA member state but supplying the service in the UK?

2.2 Is your business affected by UK legal requirements about things that may be done or may happen online (e.g. advertising) in relation to goods and/or services? What would be the consequences for your business if the Directive prevented that legislation from applying to online transactions where you are the recipient of services supplied by a provider established in another EEA member state?

2.3 What would be the consequences for your business (as a provider of, or as a customer for, online services) if UK legal requirements that apply for the benefit only of people within the UK were extended to apply also for the benefit of people in other EEA member states who were supplied with services by a UK-established provider?

2.4 Are you, or might you be in the future, a private consumer of online services (business consumers are covered above) or an organisation representing the interests of private consumers? If so, what would be the consequences for you or consumers generally if the Directive prevented UK legal requirements about

a. things that may be done or happen online in relation to goods and/or services (eg advertising) from applying to online transactions with a provider established in another EEA member state, or from applying to matters arising out of such a transaction?

and about

b. providers of services where the service may be provided online (e.g. that the provider be authorised or licensed) from applying to a provider established in another EEA member state but supplying the service in the UK?

CHAPTER 3

SERVICE PROVIDERS: EXCLUSION OF PRIOR AUTHORISATION; GENERAL INFORMATION TO BE PROVIDED

Exclusion of prior authorisation

The requirement

- Article 4
- Recital 28

The Directive prohibits Member States from imposing prior authorisation schemes for information society services which are not applied to the same services provided by other means.

The purpose of Article 4 is to encourage the take-up and pursuit of online business by entrenching the freedom to provide information society services and facilitating decisions by any individual, company or self-employed person to use the Internet to provide a service. Member States are prevented from making such provision of services subject to Internet-specific prior authorisation requirements but may make service providers subject to more general authorisation requirements if an equivalent offline requirement exists. This is a qualitative obligation covering not only formal authorisation requirements but also any procedures that might have the same effect. However, it is also made clear that this does not affect requirements on taking up or pursuing activities that are not specific to information society services or to certain telecommunications authorisations.

Implementation

The Government is not aware of any existing requirement covered by this Article; accordingly, no further implementation is needed. It will, of course, continue to apply so as to preclude any subsequent requirement being imposed.

General information to be provided

The requirement

- Article 5

This requires Member States to oblige providers of information society services to make information concerning their activities (including name, geographic and e-mail addresses, trade- or similar public-register number, authorisation and membership of professional bodies where applicable and VAT number) available to the recipients of the service and competent authorities in an easily, directly and permanently accessible form.

Policy background

Article 5 enhances transparency, and hence user trust, by obliging the service provider to supply information that supplements requirements established by Community law (e.g. as a result of the implementation of the Distance Selling Directive¹). The UK Regulations in respect of the latter—the Consumer Protection (Distance Selling) Regulations 2000²—broadly require the following information to be provided before making a purchase:

- the supplier's name and, if payment is required in advance, his address;
- a description of the goods or services;
- the price, including taxes and delivery costs, and how long the price or offer remains valid;
- arrangements for payment and for delivery of goods or performance of services. (If no date is specified, delivery or performance must be within 30 days of the order);
- the right to a seven-day cooling-off period, during which the customer may cancel for any reason. (There are exceptions);
- the cost if the consumer is to use a premium-rate telephone number;
- the minimum duration of any contract to supply goods or services continuously; and
- whether the supplier wants to be able to offer substitute goods or services.

The E-Commerce Directive therefore requires a few additional things—mainly information about the trader—that a typical web trader's site will have to display in future. The information requirements introduced by the Distance Selling Directive concern the protection of consumers in respect of other distance contracts as well as online contracts.

Approach to the Regulations

The Government intends to follow the E-Commerce Directive closely when transposing. This would suggest requiring a service provider to display for the benefit of customers and the authorities information allowing them to contact it and to see where it is located for the purpose of, for example, company registration, VAT or other supervision by the authorities. It would also require the display of membership of professional or other bodies (to whose details and rules the service provider should refer or link) and, where prices are quoted, require these to be prominent and to say whether they include taxes and delivery charges. Other information on terms and conditions and the steps that the consumer has to take to conclude a contract are dealt with in [Chapter 5](#).

The Government has not yet reached a view on the appropriate sanction for breach of this requirement.

¹ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19).

² SI 2000/2334.

Questions for consultees

- 3.1 How much information is already routinely made available by online service providers, whether or not in accordance with existing legislation?
- 3.2 From a consumer viewpoint, is it particularly desirable for the information to be made available in a specific form?
- 3.3 What would be the costs to businesses of any new requirements?

CHAPTER 4

COMMERCIAL COMMUNICATIONS

The requirement

- Articles 2, 5, 6, 7, 8
- Recitals 16, 29-33

Article 2(f) of the Directive defines what constitutes commercial communications (such as advertising and direct marketing). Article 6 makes these communications subject to certain transparency requirements to ensure consumer confidence and fair trading. In order to allow individuals to deal more easily with unwanted intrusion, Article 7 requires commercial communications by e-mail to be clearly identifiable and senders to consult and respect opt-out registers. Article 8 deals with regulated professions and requires them to respect certain rules of professional ethics in their use of commercial communications; these should be reflected in codes of conduct to be drawn up by professional associations.

The professions

Divergence in the rules on the advertising of regulated professions is an obstacle to the offer of professional services over the Internet. The use of a website by a professional service may be considered by national law or its professional body to be commercial communication. Some Member States prohibit advertising (e.g. in the case of lawyers and doctors), while the rules are more flexible in other Member States.

Information to be given

The transparency provisions in the Directive are intended, in part, to counter the restrictive effects of national rules on unfair competition in some Member States, which can result in prohibitions or restrictions on commercial practice such as promotional offers or rebates and discounts. In most Member States there is no clear and general obligation to indicate on a website that commercial communication is involved or to indicate on whose behalf it appears. The Directive requires the provider of the commercial communication to give contact details to assist the consumer in lodging and resolving complaints or securing enforcement by the authorities.

Unsolicited commercial communications under the Directive

Some commercial communication practices can be seen as intrusive and undermine the confident use of the Internet by consumers. The undisciplined sending of bulk e-mails can also impair the functioning of networks. Responsible and disciplined unsolicited advertising, respecting rules on the processing of the personal data of the target, is legitimate and well established in most forms of communication (e.g. mail or telephone), subject to safeguards in law and self-regulatory practice. In the case of online advertising, the Directive depends on empowering the recipient and on industry codes of conduct as the first lines of defence against these risks. However, it also introduces four new rules that seek to complement those

set out by, for example, the Data Protection Directive,¹ the Distance Selling Directive (see above) and the Telecoms Data Protection Directive.²

- Article 5 requires all providers of information society services (including advertisers) to give at least their name, geographic address, e-mail contact details and the particulars of any supervisory authority to which they belong so that recipients of unwanted e-mails can readily take action to avoid receiving such communications in future.
- Article 6 requires all commercial communications, solicited or unsolicited, to be identifiable as such and also requires the senders to identify clearly the natural or legal person on whose behalf the e-mail was sent.
- Article 7 provides that unsolicited commercial communications must be clearly identifiable as such as soon as they are received so that individuals or their Internet access service providers can delete them (or use filtering software to block or delete them) without the need to read them.
- Article 7 also requires Member States to ensure that senders of unsolicited commercial communications consult regularly and respect opt-out registers through which individuals can indicate that they do not want to receive such communications.

Together, these provisions—which are supported by the enforcement powers of the Information Commissioner with regard to the fair processing of data and industry codes of conduct (as envisaged in Article 16 of the E-Commerce Directive)—are designed to provide a high level of legislative and self-regulatory safeguards against unwanted e-mail.

Opt-out registers

The Directive requires Member States to provide for senders of unsolicited commercial communications to “consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.” Member States need to provide for this whether or not they effectively ban such communications by having national opt-in arrangements, maintaining national opt-out systems or having no national systems at all. The Directive is careful to avoid specifying that opt-out should necessarily be operated on a national basis since this may not be the most effective way of dealing with cross-border communications in a global market.

Application of national rules to cross-border unsolicited email

The exclusion of the “permissibility of unsolicited e-mail” from country of origin supervision in the Annex to the Directive indicates that Member States may continue to choose to apply their own national controls eg by enforcing an opt-in system. Article 21(2) of the Directive provides for possible proposals in 2003 on “the possibility of applying the internal market

¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

² Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ L 24, 30.1.98, p. 1).

principles to unsolicited commercial communications by electronic mail” in the light of legal, technical and economic developments.

Unsolicited commercial communications under the UK’s arrangements

The European Commission is separately arguing, in its proposed Communications Data Protection Directive,¹ that Member States harmonise their systems on the basis of opt-in. At the time of this consultation, the proposal is still under negotiation and discussion in the European Parliament and the Council of Ministers; agreement has not yet been reached. The Commission’s proposal appears to pre-empt the Article 21 review. The UK’s position has been that harmonised opt-in is a disproportionate response to the perceived problems of unsolicited commercial communications and that Member States should continue to be able to choose their approach at least until the outcome of that review.

In the meantime, mail and e-mail addresses would, in many cases, be covered by data-protection legislation, enabling the Information Commissioner to take action on behalf of the individual.

It may be helpful to set out the roles of the main players in the UK’s existing system for dealing with unsolicited commercial communications.

- **The Information Commissioner.** Where a data controller processes personal data in the form of e-mail addresses subject to the Data Protection Act 1998 and continues to send unsolicited commercial communications to those individuals who have expressly advised the company concerned that they do not wish to receive such communications or have registered free with e-MPS or another opt-out scheme, the Commissioner would take the view that this would involve unfair processing. The Commissioner has not received a significant number of complaints about this but could issue an Enforcement Notice (the breach of which would render the company liable for criminal prosecution and a fine of up to £5,000 in a magistrates court for each breach) where it seemed the only way to ensure compliance in the face of persistent transgression. Sending unsolicited commercial communications has a low marginal cost, and there is an absence of public directories from which e-mail addresses could, in the absence of any indication to the contrary, be collected fairly in the first place (unlike, for example, telephone or fax). Given that e-mail addresses often constitute personal data because they contain an individual’s name, those capturing individuals’ addresses should ensure that those individuals have an appreciation of any further use that might be made of the data.

The Information Commissioner also takes the view that direct marketing includes the promotion of an organisation’s aims and ideals and that, therefore, e-mails canvassing for political or charitable purposes are direct-marketing communications.

- **Direct Marketing Association (DMA).** Until now, promotion of the e-mail preference scheme (e-MPS) has largely been online, but the DMA is considering ways to make the service more widely known, including the supply of information to

¹ Proposal for a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM(2000)385).

citizens' advice bureaux, trading-standards offices and direct-marketing companies for use by their customer-services departments.

The DMA's online code for e-commerce stipulates that members must use the e-MPS and not send e-mail communications to individuals who have registered an objection to receiving such communications. In respect of this code, the DMA has obtained approval from TrustUK, a non-profit organisation run by the Alliance for Electronic Business (which includes the Confederation of British Industry, the Computing Software and Services Association, the DMA, e centre^{UK} and the Federation of the Electronics Industry) and the Consumers' Association.

- **Advertising Standards Authority (ASA).** Advertising and sales promotion in the non-broadcasting media in the UK is subject to a self-regulatory system of control overseen by the ASA. The ASA is an independent body, and the High Court has rejected an application for judicial review of its adjudication on the British Codes of Advertising and Sales Promotion (the code of conduct drawn up by the advertising industry's Committee of Advertising Practice by which all advertisers agree to abide). The Codes effectively require companies involved in direct-sales promotion to use their own, the e-MPS or another more appropriate preference service in respect of unsolicited e-mail.
- **Internet Service Providers Association (ISPA).** ISPA represents some 90 per cent of the UK dial-up market for Internet access. It is currently preparing information for its website on how individuals can deal with unwanted e-mails and is also encouraging ISPA members to provide information to their users if they do not already do so. Many Internet service providers (ISPs) already provide this information on their websites and in customer "starter" packs. ISPs' customer services assist any individual reporting unsolicited commercial communications so far as they are able. ISPs' contract terms and conditions require all customers to comply with UK legislation. In addition, ISPs' Acceptable Use Policies form the basis for ISPs to manage between themselves the optimum functioning of their networks by setting out clear prohibitions against potentially disruptive unsolicited e-mails sent in bulk. Therefore, ISPA and its members have a number of avenues to reduce the incidence of unwanted unsolicited commercial communications through contractual relations, codes of conduct and peer pressure on ISPs that allow their subscribers to send such communications.
- **The e-MPS.** The e-MPS is a global service hosted in the United States and supported by the DMA worldwide. It allows individuals to enter their details free on a register if they do not wish to receive unsolicited commercial communications and direct marketers to clean their names or e-mail addresses from lists of targets for a nominal charge, currently \$100 per year (see www.e-mps.org).

Approach to the Regulations

The Government intends to follow the detail of Articles 6 and 7(1) closely and envisages that copy-out into UK legislation will be sufficient. It has not yet reached a view on the appropriate sanction for breach of these requirements.

Article 8 is an instruction to Member States, and the Government is checking whether there are any restrictions in professional rules. Any that it discovers will need to be addressed accordingly.

Further consideration is being given to the means by which Article 7(2) can be implemented.

Questions for consultees

- 4.1 To receivers of unsolicited commercial communications: what is your experience of using voluntary opt-out schemes?
- 4.2 How could the functioning and advertising of this system be improved?
- 4.3 Have such schemes cut down on the amount of e-mail that you receive?

CHAPTER 5

CONTRACTS CONCLUDED BY ELECTRONIC MEANS

The requirement

- Articles 9, 10, 11
- Recitals 34-39

The Directive requires Member States to remove any prohibitions or restrictions on the use of electronic contracts, with certain permitted exceptions. When the contract is concluded between a business and a consumer via a website (but not when it is concluded between businesses—where they have otherwise agreed—or wholly by e-mail), the service provider must provide certain information to make clear before the consumer places his order what steps the consumer must take, how the full terms and conditions may be accessed and stored and how the consumer can spot and correct technical errors. Providers of information society services have to acknowledge receipt of the order, and order and receipt are deemed to be received when the recipients can access them.

Policy background

E-Commerce will not fully develop if online contracts are hampered by form and other requirements that are not appropriate to the online environment. These can result in a lack of legal certainty as to their lawfulness or validity. Examples of difficulty arise from the interpretation of requirements such as “in writing,” “in a durable medium” and “an original.” The Directive aims to increase certainty and guard against divergent approaches in the Member States. The e-Signatures Directive¹ does not deal with formal requirements other than signature.

In particular, the act of clicking on an “OK” icon may have different legal implications in different Member States. It might constitute either acceptance of an offer to provide a service or a customer’s offer to contract. This, in turn, could give rise to uncertainty as to the time at which the contract was concluded. It might be the time of receipt or of sending the acceptance. In cross-border contractual relations, particularly for consumers, there is a risk to the development of the trust that is necessary for e-commerce.

However, in negotiations on the E-Commerce Directive, it was finally agreed that it should not go so far as to harmonise the moment of conclusion of an electronic contract. Instead, the Directive adopts a minimalist approach through requiring the service provider to set out all the necessary steps so that consumers can have no doubt as to the point at which they are committed to the contract. Thus, the Directive touches as little as possible on national law provisions on contracts. The Directive also preserves the freedom for parties to a contract to agree under the law of which jurisdiction the contract is to be governed.

In principle, UK contract law continues to apply in its entirety online as well as offline. UK law imposes few requirements for contracts to be in writing. Perhaps the best known

¹ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (OJ L 13, 19.1.2000, p. 12).

examples in England and Wales are the requirement for writing in relation to creating and disposing of interests in land, found in section 53 of the Law of Property Act 1925, and the requirement for writing in relation to contracts for the sale of land, found in section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Others may include Lord Tenterden's Act 1828 (which relates to character references for obtaining credit). As for requirements that a contract be evidenced in writing, perhaps the best known example in England and Wales is the requirement, imposed by section 4 of the Statute of Frauds 1677, that a guarantee, to be enforceable, must be in writing or that "some memorandum or note thereof shall be in writing." (In all these cases, signature requirements are also imposed.)

Approach to the Regulations

The Government is still considering whether form requirements (e.g. notices or copy documents) must be disapplied, such as those which have to be satisfied for a contract to be enforceable and where the context makes it clear that a physical instrument is required. If so, this could require considerable amendment of the legislation concerned.

On the information to be given by providers of information society services to consumers and the placing of the order, we propose to follow the Directive closely. The provisions were negotiated keeping in mind existing best practice and the need to minimise regulatory burdens, as reflected in responses to the consultations carried out on the draft Directive in 1999. Attention will need to be given to the further encouragement of observance of these information requirements in relevant codes on conduct (see [Chapter 7](#)).

Questions for consultees

- 5.1 On Article 11: how should it be determined when a service provider has acknowledged receipt of the customer's order? Do you agree that the Regulations should require nothing other than that this is to be done "without undue delay"? The Government is still considering the consequences of failure to comply with this requirement and the other requirements in Articles 10 and 11.
- 5.2 We consider that the requirement for a form that can be stored and reproduced can be satisfied by the sending of an e-mail to the recipient. Do you agree?
- 5.3 The point at which the order and the acknowledgement of receipt will be deemed to be received has been defined in such a way as to avoid technologically specific terms relating to the time that the data enter the recipient's information system (e.g. stored on a server or available in his e-mail inbox.). Are there any likely circumstances in which it might not be straightforward to identify the point at which the parties to whom these messages are addressed are able to access them?
- 5.4 Do you agree that there is no need to specify for all cases the point at which the contract is concluded? Would the alternative be possible anyway?

CHAPTER 6

LIABILITY OF INTERMEDIARY SERVICE PROVIDERS

The requirement

- Articles 12, 13, 14, 15
- Recitals 40-50

Articles 12-14 of the Directive provide for graduated limitations on the liability of service providers. Article 15 prevents Member States from placing a general monitoring requirement on intermediaries.

“Mere conduit”

Article 12 establishes an exemption from liability as regards the provision of information society services that consist in the transmission of information in communication networks where the service provider plays a passive role as a conduit of information for third parties (the recipients of the service). This liability exemption covers cases in which a service provider could be held directly liable for an infringement and cases in which a service provider could be considered secondarily liable for someone else’s infringement (e.g. as an accomplice). As regards the types of activities covered by this Article, claims for damages cannot be directed against the provider for any form of liability. Equally, the provider cannot be subject to prosecution in a criminal case. However, the Article does not exclude the possibility of an action for injunctive relief.

The exemption requires the information transmitted to be “provided by the recipient of the service.” When the service provider is transmitting its own information, it can no longer be considered to be performing a mere-conduit activity as an intermediary. The same holds if the provider itself modifies the information during the course of the transmission. To be granted an exemption from liability, three conditions must be fulfilled cumulatively:

- the provider should not initiate the transmission. This means that the provider is not the person who makes the decision to carry out the transmission. The fact that a provider automatically initiates a transmission at the request of a recipient of its service does not mean that the service provider initiated the transmission in this sense;
- the provider should not select the receivers of the transmission. This does not imply that the provider is disqualified from the exemption if it is selecting receivers as an automatic response to the request of the person initiating the transmission (e.g. a user’s request to have an e-mail forwarded to a mailing-list broker); and
- the provider should neither select nor modify the information contained in the transmission.

Intermediate and transient storage taking place during the transmission of the information in order to carry it out is covered by the mere-conduit exemption. Only those acts of storage that take place during the course of transmitting the information and do not serve any purpose

other than carrying out the communication will benefit from the exemption. These acts of storage do not include copies made by the provider for the purpose of making the information available to subsequent users. This case is addressed in Article 13 on caching. The term “automatic” refers to the fact that the act of storage occurs through the ordinary operation of the technology. The term “intermediate” refers to the fact that the storage of information is made in the course of the transmission. The term “transient” refers to the fact that the storage is for a limited period of time (and is meant to denote that the information is not be stored beyond the time that is reasonably necessary for the transmission).

“Caching”

Article 13 addresses temporary forms of storage undertaken by the provider of information society services with a view to enhancing the performance and the speed of digital networks. It does not constitute as such a separate exploitation of the information transmitted. Thus, copies of the information, made available online and transmitted by third parties, are temporarily kept in the operator’s system or network for the purpose of facilitating the access of the user or subsequent users to such information. Such copies are the result of a technical and automatic process, and they are “intermediate” between the place in the network where the information was originally made available and the final user. To benefit from an exemption for potential liability arising from this type of storage, the provider must respect not only certain conditions similar to the case of mere conduit but also ones set at a voluntary level by the industry itself. This is to cater for technological variations and advances that would not be appropriate for detailed formal regulation and to ensure maximum freedom for exploitation of technology by industry for the benefit of e-commerce. Article 16 obliges Member States to encourage relevant codes of conduct.

“Hosting”

Article 14 establishes a limit on liability as regards the activity of storing information provided by recipients of the service and at their request (e.g. the provision of server space for a company’s or an individual’s website, a newsgroup etc.). A provider of information society services cannot be exempt from liability, as regards both civil and criminal liability, if it knows that the recipient of the service is undertaking illegal activity (actual knowledge). It also cannot be exempt from liability for damages if it is aware of facts and circumstances from which the illegal activity is apparent. Service providers will not lose exemption from liability if, after obtaining actual knowledge or becoming aware of facts and circumstances indicating illegal activity, they act expeditiously to remove or to disable access to the information. This principle provides a basis for notice-and-takedown procedures, which parties may identify and follow for notifying the service provider about information that is the subject of illegal activity and for obtaining the removal or disablement of such information. However, in all cases, the limitation of liability for hosting has no effect on the ability of courts to issue injunctions requiring the disabling of access.

No obligation to monitor

Article 15 establishes that no general obligation should be imposed on intermediary providers to screen or to actively monitor third-party content, including filtering it for evidence of illegal activity. It also permits Member States to require ISPs to inform a designated body if they receive information or knowledge of alleged illegal activity or content on their servers.

Policy background

There is a careful balance to be maintained between, on the one hand, protecting the interests of originators and users of Internet content and, on the other hand, encouraging new intermediaries (especially ISPs) to enter the market (and existing ones to continue). In striking this balance, the Directive seeks to stimulate cooperation between different parties and so reduce the risk of illegal activity online while ensuring that liability can be correctly apportioned. These Articles take into account the technical possibilities and limitations of e-commerce. They reflect the current international approach to liability, including US legislation. Any departure could be a serious disincentive to decisions to locate e-commerce firms in the Community and reduce Community effectiveness in international discussions on regulatory developments. These provisions have been earmarked for discussion in the first review of the Directive in 2003 so that they can be updated at the first opportunity in line with technological, legal and economic developments, as envisaged in Article 21.

Only the activities involved in serving as online intermediaries are covered. These activities are characterised by (a) the fact that the information is provided by recipients of the service and (b) the fact that the information is transmitted or stored at the request of recipients of the service. The term “recipient” of the service should be understood to cover a person who places information online as well as a person who accesses and/or retrieves such information. The term “information” as used in this section should be understood in a broad sense. What follows from this is that the Directive does not accommodate the interest in limited liability of the type of “intermediary” engaged in taking data (e.g. news items) from a number of sources and aggregating them into another form (e.g. a newsletter). This would appear not to fulfil the strict requirements of (a) and (b) above, with the consequence that the online activity could attract liability (e.g. for defamation) equivalent to that of a publisher of similar offline information.

It should be clear that the provisions of this section do not affect the underlying material law governing the different infringements that may be concerned. This section is restricted to the establishment of the limitations on the liability. If a service provider fails to qualify for such limitations, the nature and scope of its liability will be established on the basis of Member States’ legislation. The distinction as regards liability is not based on different categories of service provider but on the specific types of activities undertaken by service providers. The fact that a provider qualifies for an exemption from liability as regards a particular act does not provide him with an exemption for any of its other activities.

Approach to the Regulations

The Directive admits the possibility of introducing regulations on notice and takedown, as requested in negotiations by some Member States that already had legal arrangements for it. The Government believes that this is more suitable for industry codes of conduct so that emerging differences between Member States can be ironed out and there is the best prospect of evolving a Community-wide approach—and also a globally workable solution—at the earliest opportunity. The Government is considering the extent to which it is necessary to be more specific in relation to the conditions for liability, given that potentially serious criminal offences may be involved. It is also still considering whether legal backing would assist in making the UK the best place for e-commerce. The Directive steers Member States away from the idea at the risk of disturbing the fine balance of interests that were squared in negotiations, preferring to give national and Community-wide industry efforts a chance to

emerge (e.g. the development of Rightswatch in the copyright area). Moreover, it has already been agreed that the whole area of liability of intermediaries—and specifically notice and takedown—will be reviewed at Community level in 2003 (see Article 21). It is also understood that, in the second half of 2001, the European Commission will undertake an inventory and analysis of current notice-and-takedown initiatives, facilitated by discussions with Member States and industry interests arranged by the Belgian Presidency of the European Union, with a view to the specification of common elements for codes of conduct in this area.

Questions for consultees

- 6.1 Do you perceive a need for Regulations on notice and takedown, or do you agree that this is better dealt with by industry codes of conduct?

CHAPTER 7

CODES OF CONDUCT AND OTHER MEANS OF IMPLEMENTATION; MISCELLANEOUS PROVISIONS

Codes of conduct

The requirement

- Article 16
- Recital 49

Article 16 requires Member States to encourage the drawing-up and publication of codes of conduct (including codes on the protection of minors and human dignity) and the involvement of consumer organisations in code development and implementation.

The Government strongly supports such initiatives. It is encouraging and promoting the development of a number of self- and co-regulatory schemes. In relation to codes for retail e-commerce, the Government has supported work carried out by the Alliance for Electronic Business (AEB) and the Consumers' Association on TrustUK, which has set criteria for e-codes and approved four schemes. The Government is closely following the evolution of plans for a European scheme, based on the UK model, that is being co-ordinated under the European Commission's e-confidence initiative. It will also use the forthcoming Enterprise Bill to strengthen the powers of the Director-General of Fair Trading in relation to codes of practice. The Office of Fair Trading's response to its recent consultation on consumer codes of practice identified direct marketing as a priority for the new regime. TrustUK has recently been the subject of a review, the outcome of which is expected to be announced shortly by the AEB and the Consumers' Association.

Out-of-court dispute settlement

The requirement

- Article 17
- Recital 51

Article 17 requires Member States to ensure that their legislation does not hamper the use of out-of-court or alternative dispute-resolution (ADR) schemes (e.g. ombudsmen or arbitration). It also requires Member States to encourage out-of-court schemes to provide adequate procedural guarantees and to inform the European Commission of significant decisions on e-commerce cases.

The Government is keen to encourage wider use of ADR, particularly in consumers' contractual disputes with e-commerce traders. It has played a major role in the development of the European Extra-Judicial Network (EEJ-Net), which will give consumers easier access to ADR schemes in other Member States in cross-border cases. As part of this initiative, it is funding the National Association of Citizens Advice Bureaux to form the UK EEJ-Net Clearing House; the pilot phase of the scheme is expected to start later this year. The

Government has also drawn the attention of UK ADR bodies to European Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes¹ and Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.²

The Commission has launched a Community-wide complaints network (FIN-NET, http://europa.eu.int/comm/internal_market/en/finances/consumer/intro.htm) for consumers of cross-border financial services. Through this, consumer disputes are forwarded by consumer agencies (e.g. the Financial Ombudsman Service or citizens advice bureaux) to the relevant ADR scheme in the service provider's country of establishment.

Court actions

The requirement

- Article 18
- Recitals 52-53

Article 18 requires Member States to ensure that court action can be taken against infringements of the E-Commerce Directive and provides for it to be added to the list of consumer Directives in the Annex to the Injunctions Directive. The Stop Now Orders (E.C. Directive) Regulations 2001³ will be amended so that the powers to seek injunctions that are available to the Director-General of Fair Trading and qualified entities will apply in relation to breaches of legal requirements to which the E-Commerce Directive applies or that implement its provisions.

Cooperation

The requirement

- Article 19

Article 19 requires Member States to have adequate enforcement arrangements, to cooperate with other Member States and to provide information on contractual rights and obligations, redress and sources of further help.

The Government is still considering the extent to which there will need to be new powers to obtain information and what provision is needed to enable information obtained under these and other powers to be provided to other Member States.

The Government makes available information (including contractual rights and obligations) about legislation in a number of fields, not least consumer protection and financial services. It also directs users to further sources of information and advice. Government sites include:

- UK Online Citizens' Portal (<http://www.ukonline.gov.uk>)

¹ OJ L 115, 17.4.1998, p. 31.

² OJ L 109, 19.4.2001, p. 56.

³ SI 2001/1422.

- UK Online for Business (<http://www.ukonlineforbusiness.gov.uk>)
- The Consumer Gateway (<http://www.consumer.gov.uk/>)
- The Small Business Service (<http://www.businesslink.org>)
- The Office of Fair Trading (<http://www.oft.gov.uk/>)
- The Lord Chancellor's Department (<http://www.lcd.gov.uk/>)
- HM Treasury (<http://www.hm-treasury.gov.uk/>)
- The Home Office (<http://www.homeoffice.gov.uk>)

Sanctions

The requirement

- Article 20
- Recital 54

Article 20 requires Member States to ensure that sanctions for breaches of the rules established under the Directive are effective, proportionate, dissuasive and enforced.

Re-examination

The requirement

- Article 21

Article 21 provides for regular re-examination of the Directive. It is envisaged that this will take place every two years in order to reflect the rapid development of both technology and case law.

Questions for consultees

- 7.1 Are there provisions in UK law that you believe may hamper the use of out-of-court or online-dispute resolution in the consumer field?

DRAFT PARTIAL REGULATORY IMPACT ASSESSMENT

1. (i) Title of proposed measure:

The Information Society Services Regulations 2001¹

2. (i) The issue and objective:

Issue: Electronic commerce provides the UK and the rest of the European Community with an opportunity to stimulate economic growth, industrial competitiveness and employment. To facilitate this it is desirable to put in place an effective legal framework that would remove the chief obstacles to providing services electronically within the European Community. The Regulations will aim to do this and to meet legislative obligations in respect of the E-Commerce Directive. UK businesses will have to ensure that they are in compliance with the provisions of Regulations to be drafted and to come into force before the implementation date for the Directive in all member states, which is 17 January 2002.

Objective: The purpose of the Regulations will be to create a framework within which UK business, and SMEs in particular, and consumers will have the legal certainty needed to take full advantage of the opportunities offered by electronic commerce. The main areas to be addressed are:

- a) identifying and clarifying rules so that both consumers and business have greater confidence about whose laws apply to an online transaction;
- b) ensuring transparency and consistency in the information to be provided by sellers to consumers about themselves, their offerings and how to conclude a contract online;
- c) ensuring consistency in aspects of online commercial communications such as definitions of advertising, conditions for unsolicited emails, and lifting any restrictions on advertising online by the regulated professions;
- d) legal validity of electronic contracts;
- e) limiting the liability of intermediaries who transfer information from supplier to consumer, but are not aware of its content or legality; and
- f) encouraging business codes of conduct and alternative means of dispute settlement

2. (ii) Risk Assessment:

The risks discussed below correspond to the six areas identified in the previous paragraph:

¹ [Provisional title of draft Regulations] Transposing Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1). The text (PDF 106 KB) is at http://europa.eu.int/ISPO/ecommerce/legal/documents/2000_31ec/2000_31ec_en.pdf

- a) A substantial barrier to the more confident and widespread use of electronic commerce within the EC is the risk of unwitting breach of any of the 15 different sets of national legislation. As the UK is a nation with a relatively high proportion of foreign trade, UK business is particularly exposed to any obstacle or risk associated with doing online business abroad. Compliance with regulations prevailing in the Member State in which the recipient of the service is located entails considerable expense for business wishing to provide electronic services across borders, both in terms of ensuring activities are lawful and keeping abreast of any alterations to the legal framework. Moreover, the absence of a harmonised legal framework may create uncertainty for the recipient of the service. The Regulations will implement a partial harmonisation of single market rules so as to reduce the cost and time burden.
- b) Without specific information, the consumer will not know where to complain if necessary, and it will be difficult to ensure that the service in question is supervised at source. Information about the seller, the relevant authorities in the seller's home country, the products and services and their prices, and what to do to order online, needs to be clear. In particular, consumer take-up is also likely to be inhibited by a diversification of approaches.
- c) Similarly, unless the consumer has information about an online advertiser (or the person on whose behalf he is advertising), he will not be able to protect himself effectively against unwanted or unsolicited advertising emails. Without requirements that advertising emails are flagged as such, and that senders of unsolicited emails check opt-out registers, users may be discouraged from entering into e-commerce by the potential costs and difficulties of managing their electronic inboxes.
- d) Businesses and consumers may also be discouraged from using e-commerce if there is concern that electronic contracts may be invalid or unenforceable just because they are electronic, or because their validity or enforceability depends in part on something being done physically.
- e) Without some harmonisation of the conditions under which intermediary providers of access and storage services could limit their liability for illegal or harmful information and activities, disparities in treatment by national authorities may grow, and competitiveness suffer.
- f) Unless member states remove barriers to codes of conduct and settlement of disputes without going to court, consumers and businesses in the EC will not benefit as much as possible from these informal means of improving quality of service and mutual confidence, in which practice in Europe is at present among the best in the world.

There are also major risks associated with a failure to implement the provisions of the Directive correctly into UK law. This could lead to proceedings being brought by the Commission in the European Court. Failure could also lead to the Government being held liable by UK courts for any losses suffered by those denied their rights under the Directive.

3. (i) Identification of options:

Two principal options have been identified:

Option 1 - do nothing .

Option 2 – specific implementation of the provisions of the Directive, in general and in detail.

This assessment will be developed to cover the main options involved in each of the different subjects covered in the Regulations, in the light of consultation.

3. (ii) Issues of equity or fairness:

- The harmonisation resulting from the draft Regulations should reduce the exposure of the public to certain risks.
- The Regulations should improve the confidence of actual and potential consumers to engage in e-commerce and promote a level playing field for SMEs.
- The draft Regulations are intended to impact evenly across all sectors of online service provision.
- Though the Regulations will apply to large and small businesses alike, SMEs in general have less administrative capacity to ensure compliance. However, they stand to benefit disproportionately, through easier access to new markets. SMEs trade less abroad than large companies, but even those confined to the UK market stand to benefit from the Regulations as most of the information, advertising and other provisions apply also to domestic transactions.

4. Identification of the benefits:

Option 1: This has the benefit that there would be, for the time being at least, no change to the current legal framework. The immediate cost for government and business should therefore be lower, and consumers would continue to benefit from current levels of protection.

Option 2: This has the benefit of allowing UK providers of online services to comply with only one national legislation – that of the UK - in most matters, wherever they do business in the EC. It removes the need to track and comply with up to 15 national legislations when providing such services within the EC (or indeed up to 18 sets of legislation when implemented by Norway, Iceland and Liechtenstein under the EEA agreement). It ensures that services can be provided in all areas within the scope of the Directive without regulatory intervention other than in the service provider's home state (except where a derogation may apply). It also benefits businesses and consumers by strengthening contractual certainty. It has the potential for additional benefits through encouraging the adoption of codes of conduct at both the national and international level, and facilitating administrative cooperation between Member States, which should contribute to a lighter and more effective regulatory framework.

4. (ii) Quantifying and valuing the benefits:

The Regulations will implement a complex Directive, with implications across several major areas of EC law. Only broad, qualified estimates of its financial impact can be made. It is possible, however, to give an indication of the costs which service providers operating in a number of EC states currently bear, and which the Regulations would remove or decrease substantially.

The explanatory memorandum accompanying the original proposal for a Directive cites several examples of the costs associated with compliance with multiple sets of Regulations, following a survey carried out by the Commission. In order to ensure compliance with different regulations, respondents indicated that they require considerable legal advice: examples were 50 days of legal advice to set up an appropriate system; 3-4 days of advice per month; and half an hour per month to maintain the system. One German estimate was 70,000 Deutschemarks per year. Another operator estimated that a review of the regulatory framework for online services in the UK alone had cost 60,000 Euros. Assuming comparable review costs for each Member State, dependence on regulatory control in the state of destination might cost a company 900,000 Euros were it to cover all of the EC, with ongoing costs of around 70,000 Deutschemarks a year thereafter. Given the implications of the EEA and the requirements of the applicant states to implement the directive on or before accession, these costs can be roughly doubled in respect of pan-single market operation in the medium term. This compares to costs of regulatory control in the country of origin, which might for such a business be £40,000 initially, with minor recurrent costs thereafter. These are very general indicative illustrations. The simple calculation below takes much lower figures as its basis.

There were 3.7 million businesses in the UK at the start of 1999. Only 7,000 were large i.e. over 250 employees; and 24,000 were medium i.e. 50 - 249 employees. Small businesses (those with less than 50 employees) made up 38% of all turnover and most were micro i.e. 1 - 9 employees. 2.3 million businesses were sole traders or those without employees. The UK Online Annual Report 2000 indicated that 450,000 SMEs were actually trading online, and seven out of ten entrepreneurs were pursuing e-commerce opportunities. Over 81% of all British businesses are now online (and over half of micro-businesses)

Assuming the benefits of doing without one-off review costs are on average £15,000 and yearly costs thereafter are £5000 for the 31,000 large and medium companies (who are assumed to want or need to trade online widely in the single market), and respectively £3000 and £1000 for say 200,000 SMEs likely to trade online in Europe, this produces one-off benefits for the UK of about £1 billion and yearly savings of about £350 million.

This calculation leaves out sole traders, and businesses not yet online. It disregards the likelihood that many businesses will either have already done a one-off review, or would still want to do a substantial periodic review of legal conditions for trading across borders in Europe.

Whilst this example is only illustrative, it does suggest the order of magnitude of the savings which may accrue to businesses - and ultimately to the consumer - through Regulations implementing Option 2. The calculation is also sensitive to the precise scope of implementation in UK national law and that of the different member states. Option 1 would not yield these benefits, but would avoid the costs associated with transposition, implementation and enforcement of the Directive.

5. Compliance Costs for Business. Charities and Voluntary Organisations

5. (i) Business Sectors Affected:

The Regulations will affect everyone providing online services within the internal market, given the definition of "Information Society Services" as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. It follows that the Regulations will affect a large number of businesses, charities and voluntary organisations now and their numbers should increase as the attractiveness of e-commerce grows.

5. (ii) Compliance Costs for a "typical" business:

The following costs are for option 2; option 1 imposes no immediate direct additional costs on business.

There will be costs relating to ensuring that the provision of services complies with all the relevant national legislation. In some cases there may be a cost of changing to compliance with UK legislation instead of that of particular markets in the EC. If these costs are greater than those which businesses bear at the moment, however, it is likely to be because of compliance with other instruments (covering advertising, licensing etc), since the present Regulations will merely require compliance with home state controls in such areas.

There will be some additional expense involved in ensuring that the details provided on a website or other means of promoting the service are correct. However, the type of information provided is not expensive to procure, the majority of responsible businesses would aim to provide such information anyway, and the costs and effort concerned would probably be integrated with the burden of meeting the interrelated information requirements of the Distance Selling Regulations 2000.

There may also be some costs for certain businesses (those standing to benefit from the sending of unsolicited commercial communications) from the requirement for information provision and software changes, and consulting opt-out registers, though much of this is already undertaken by advertisers in accordance with industry standard practice.

The Regulations may result in some one-off expenses for affected organisations. These would result from any necessary alterations to the systems in place, and would vary according to the organisation. They are very hard to estimate with any degree of accuracy. None of the 100 respondents was able to give an estimate of any of these costs in DTI's consultation exercise on the draft Directive in 1999, and only one respondent felt able to suggest the areas in which costs would be reduced or increased, despite a specific question about this.

5. (iii) Total Compliance Costs:

The costs of compliance with these Regulations will depend on the size of the organisation, its current level of involvement in e-commerce, the extent of the changes required to comply with the Directive, the level of systems change required and the extent to which alterations resulting from this Directive are made as part of the process of updating and upgrading required to provide an effective online service

6. Consultation with Small Business: "The Litmus Test"

Small businesses and small business have not yet provided figures for compliance costs. In principle, costs for small businesses would in themselves be lower (but greater in proportion

to revenues) and benefits higher, than for larger businesses. During the remainder of the consultation process we shall have discussions with organisations representing small business interests and identify and contact a small cross section of small businesses trading online to obtain first hand views on cost/benefits of the options. The Small Business Service will continue to offer advice on the development of this assessment.

7. Identification of any other costs

Option 1: The absence of specific implementation of the Directive is likely to cause uncertainty that will inhibit the growth of electronic commerce, and therefore potentially impose costs on the UK resulting from e.g. reduced competitiveness, lower employment and less economic growth.

Option 2: Transposition of the Directive by legislative and non-legislative means and enforcement of the Regulations will entail additional costs for Government and other organisations as set out below.

There will be enforcement costs for UK national regulatory authorities (Director General of Fair Trading, Trading Standards Officers, Financial Services Authority etc) acting on behalf of consumers in other Member States and encouraging other Member States' authorities to act on behalf of UK consumers.

There will be additional costs for industry and consumer organisations and their members to develop and apply Codes of Conduct and means of alternative dispute resolution (though balanced by savings from necessarily having recourse to court procedures).

Additional administrative functions also flow from Articles 16, 17, 19 and 21 of the Directive that are not directly implemented by the Regulations. Activities that will need to be resourced include:

- Implementing and monitoring the Regulations and other obligations under the directive
- Encouraging the development of Codes of Conduct (eg in the areas of intermediaries' liability, consumer information, treatment of advertising) and means of alternative dispute resolution
- Establishing and acting as contact points for the provision of advice and assistance to business and consumers
- Forwarding information to the Commission on developments in the UK, attending discussions on the implementation of the Directive, and participating in the review of the Directive in 2003 and every two years thereafter
- Providing information and assistance when sought by other member states, co-operating with their requests for regulatory enforcement action and the search for acceptable solutions to cross-border problems before Community legal action is invoked.
- The operation of the procedures associated with the exercise of the possible derogations from the country of origin principle, whether invoked by the UK or by other member states in respect of services originating in the UK.

8. Results of Consultation

DTI consulted generally on the draft Directive in 1999 and received over 100 contributions from businesses, consumers, their representative organisations and others. In the course of general discussions with interested parties, a number of other unquantified points about the costs and benefits of the Directive have emerged. These are additional to points dealt with above and might be summarised as follows:

- Regulations which genuinely facilitate the use of electronic commerce are likely to reduce business costs by encouraging the use of cost-effective delivery mechanisms which are able to reach the maximum number of consumers;
- Regulations which eliminate the need to track and observe multiple sets of national legislation should keep business costs down (including say website development, promotional and advertising text development, legal and compliance costs);
- SMEs and microenterprises are particularly handicapped by inconsistent implementation of the Directive, since they are less likely to be able to afford sound legal advice, and are therefore discouraged from exploiting the opportunities afforded by the internal market and investing in the European development of their businesses.

This partial RIA is available on DTI's website with the documents for consultation. A revised partial RIA will also be published with the draft Regulations in due course. We would hope to be able to improve its accuracy in the light of comments received.

9. Summary and recommendation

Option 1 is not attractive, since it foregoes substantial likely net benefits, and could be in breach of EU legislation.

Option 2 will bring some costs in the form of business systems changes required to ensure compliance with the Directive; these should on the whole be relatively small, and may not apply to those entering the electronic market in the future, though clearly they will need to comply from day one. It will also bring costs with regard to transposition and enforcement. Offsetting these, business costs will be reduced considerably through the ability to rely on knowledge of and compliance with the rules of the home state when doing business with customers in other member states. Improved legal certainty will also benefit consumer and business confidence. The Department's assessment is that the benefits of draft Regulations are likely to outweigh the costs, and justify option 2.

10. Enforcement, Sanctions, Monitoring and Review

See Section 7 above.

DTI

August 2001