

Response to the DTI Consultation on the Electronic Commerce (EC Directive) Regulations 2002

The Alliance for Electronic Business

The Alliance for Electronic Business (AEB) was established in 1998 to promote trust and confidence in electronic trade for UK business, based both at home and abroad. This working coalition of 5 trade associations comprises the CBI, Computing Services and Software Association, Direct Marketing Association, e-centre (the Association for Standards and Practices in Electronic Trade), and the Federation of the Electronics Industry.

Introduction

The AEB welcomes the opportunity to respond to the DTI's consultation on the draft Electronic Commerce (EC Directive) Regulations 2002. We have already provided a Response Paper (dated 9th November 2001) to an earlier DTI consultation on the implementation in the United Kingdom of EU Directive 2000/31 (the 'E-commerce Directive'). The earlier paper has provided the background to this Response to the draft Regulations and the accompanying Guide for Business.

We also take the opportunity to thank the DTI for its willingness to meet on several separate occasions with members of the AEB during this round of consultation, and to present the government's view on its intended implementation of the Directive. The comments written in this Response have resulted partly from these round table discussions between the DTI and industry stakeholders, and have also included trade associations that are responding directly to the separate HM Treasury's consultation on implementing the Directive within the financial services sector

The AEB supports the principle of legal certainty to encourage the growth of e-commerce in the United Kingdom, and we believe that the Regulations must reflect this view. It is imperative that the proposed UK's implementation of the E-Commerce Directive is as supportive of UK e-commerce as those parallel proposals being adopted in other member states, particularly in relation to the country of origin principle. We believe that if the UK's implementation of the Directive remains close to those adopted by the Commission and in other member states, the Government's concerns on legal challenge become more apparent than real. Nothing in this Regulation should allow for gold plating of the provisions set down in the Directive.

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Regulation 7 – Internal Market

Country of Origin: The AEB believes that the UK government must adopt the strongest country of origin principle that is consistent with the interpretation of the E-commerce Directive. As we stated in our Response Paper (dated 9th November 2001) to last year's DTI consultation on the E-commerce Directive;

“The Alliance for Electronic Business supports the implementation and mutual international recognition of a country of origin principle, based upon a clear definition of ‘place of establishment’. We believe that the Government should ensure that other Member States, in their implementation of a ‘country of origin’ principle, remain consistent with the UK interpretation so as not to distort competition.”

In implementing the Directive, the AEB's strongly preferred outcome is that the courts in the United Kingdom should apply only UK law to a complaint against a UK-established business, even if the complaint relates to action whose consequences are felt in other Member States. This objective is clearly set out in Recital 22 of the Directive. In addition, the UK government has given its firm commitment to a clear country of origin principle at the highest level. For example, it states in the E-envoy's Monthly Report to the Prime Minister, dated 6th June 2000 and signed by both Patricia Hewitt and Andrew Pinder,

“On 4th May [2000], the European Parliament approved without an amendment the E-commerce Directive. This will ensure that e-commerce traders in the EU need comply only with the law in their home Member State.”

The Guide for Business, Part 4 (1) should also reflect the provisions of the Regulation by making a clear statement on the meaning of country of origin, as provided for in Article 3(1) of the Directive, to give businesses the necessary legal certainty in understanding how the principle should be applied.

Enforcement v Applicable Law: Article 3(1) aims to strike a correct balance between enforcement and applicable law, and yet Regulation 7(1), as drafted, only appears to cover a part concerning enforcement authorities. We are concerned that Regulation 7(1) is clumsily worded, and falsely reduces the country of origin principle to a mere supervision and enforcement provision. It also rather obscures the concept of applicable law. Neither do we understand exactly what is meant by the term an ‘enforcement authority’, and how this is meant to cover the various areas of law and practice in the co-ordinated field given that in many areas the legal framework will be set by legal precedent rather than the executive branch. We would ask the DTI to provide some clarity upon these issues.

UK-based Information Society Services are only subject to UK law: We believe that Regulation 7(1), as drafted, would disadvantage established service providers relative to their counterparts in the rest of the EU by not giving them legal certainty that the Directive intends to provide. Accordingly, the AEB seeks a provision specifying that information society services established in the United Kingdom shall be subject to the requirements of UK law even if the services are offered or rendered in another Member State.

We are convinced that provisions closer to the German implementation of the Directive should replace the current draft Regulation 7(1), and suggest the following words

“Information Society Services provided by a Service Provider which is established in the United Kingdom shall be subject to the laws of the United Kingdom which apply to such information society services and which fall within the co-ordinated field, irrespective of whether the information society service is provided to an end user in the United Kingdom or another member state.”

The Guide for Business must be adjusted also to reflect this proposal

Restrictions: We support the general principle that non-UK based service providers in the co-ordinated field should not be subject to restrictions on the supply of e-commerce services to the UK.

The AEB believes that a general provision regarding restrictions (such as in Regulation 7(2)) should be supplemented by the identification of specific items of legislation that restrict incoming services, which should be disapplied to incoming e-commerce services by immediate amendment of those items of legislation. This will increase legal certainty by removing the need to establish in court that specific legislation constitutes a restriction.

Pre-contractual Relationship With Consumers: The AEB is concerned about the interpretation of Regulation 7 (3) relating to the Schedule on disapplying Regulations 7 (1) and 7(2) to contractual obligations concerning consumer contracts. Whilst the Directive limits the carve-out to the contractual relationship, it remains silent on the pre-contractual relationship, an omission also reflected in the Regulation. The possibility of including pre-contractual matters as a derogation was discussed and rejected when the Directive was negotiated and in our view, Recital 56 does not provide a basis upon which to extend the derogation for contractual obligations concerning consumer contracts to cover pre-contractual matters.

However, in the Guide for Business section on exclusions, paragraph 4.8, bullet 3, sub-bullet 3, it states

“[The exclusion applies to] requirements applicable to such contractual obligations, including requirements to do certain things before entering into a contract.....”

The Guide for Business is misleading on this point as these provisions can be read to extend the scope of the exclusion to pre-contractual relations and obligations going beyond the context of an individual contractual relationship. The purpose of the Guide for Business is to inform UK businesses about what factors should be taken into consideration when doing business online. We believe that the Government should aim to help businesses by providing them with information on the meaning of ‘pre-contractual relationship’ in other Member States.

We therefore suggest that paragraph 4.8, bullet 3, sub-bullet 3 is drafted deleting all references to requirements to do certain things before entering into a contract.

We are also concerned that paragraph 4.8, bullet 3, sub-bullet 2 is based merely on a Recital to the Directive, which may be of questionable force. In any event, we would ask the DTI to clarify the meaning of the ‘determining influence’ on the decision to contract under paragraph 4.8 bullet 3, sub-bullet 2, and to identify to whom the exclusion applies. The AEB believes that it should be made clear that the exclusion applied to specific concluded contracts and, to the extent that it may apply to pre-contractual discussions, only to those leading to a concluded contract.

Regulation 2 – Interpretation

Information Society Service: The AEB asks for clarity in the definition of ‘information society service’, as it is not enough simply to refer the definition to Directive 98/34/EC as amended by 98/48/EC. It is our belief that the definition applies to both the electronic content of electronic material and the technical medium in which it is delivered. Advertising on-line would therefore come within the scope of the definition. We do not believe however, that the definition extends to the physical delivery of goods that may be supplied once the electronic process is completed.

Restriction: The AEB would welcome guidance on the meaning of ‘restriction’, given that the term restriction has many interpretations in EU jurisprudence. It is also not clear that the DTI’s interpretation of restriction is the only way in which the term may be interpreted under the Directive.

Regulation 5 – Private International Law

Regulation 5 aims to implement Article 1(4) of the Directive. This provision does not seem to amend substantive law and in our view, does not therefore require specific transposition in to UK law. We believe that this Regulation has the potential to significantly disadvantage UK based service providers by creating legal uncertainty. The AEB therefore believes that Regulation 5 should be deleted.

Regulation 6 – Diversity and Pluralism

We believe that Regulation 6 should be deleted on the grounds that it gives legal weight to Article 1(6) of the Directive, which was not originally intended. As it does not seek to modify substantive law, it is unnecessary, and only increases legal uncertainty. In further support of deletion, there is also an absence of any examples of legislation that the government believes require protection under Article 1(6) of the Directive.

Article 9 – Treatment of Contracts

We believe that the government is failing to implement properly Article 9 of the Directive. A contract should not be invalidated or deprived of legal effectiveness because it is made electronically. Nor should legal requirements applicable to the contractual process create obstacles for the use of electronic contracts. Yet, circumstances remain where, in practice contracts can only be concluded legally using hardcopy format, including consumer protection legislation. S8 of the Electronic Communications Act 2000 has allowed UK legislators to identify the legal barriers to allowing the conclusion of contracts by electronic means, and to amend them using Orders before Parliament.

However, if the government accepts (as it appears to do in the Guide for Business) that, notwithstanding the view expressed by the Law Commission on the meaning of ‘writing’, obstacles remain to contracting electronically that can in due course be cured by section 8 orders, it must follow that in the meantime the UK is in breach of its obligations to implement Article 9.

Regulation 14 – Meaning of the term ‘order’

This Regulation is obscure in the extreme. To the extent that we can understand it, it assumes (or possibly requires) for the purposes of Regulation 11(1)(c) and 13(1)(b) that an order will always constitute a contractual offer. This is not necessarily the case in an online transaction. The Regulations should not incorporate any assumptions or lay down any requirements as the contractual model to be adopted in an online transaction.

Regulation 16 – Right to cancel

We believe that the implementation of the prohibition on enforceability and the right to cancel under Regulation 16(1) goes beyond the scope of the Directive. It is open ended, as

“ ...he may give notice of cancellation of the agreement to the service provider at any time”.

The provisions are also likely to breach the Human Rights Act 1998. The Prohibition on enforceability is similar to that in the Consumer Credit Act 1974 that the Court of Appeal has already held to be incompatible with Convention Rights.

The effect of this provision is that the Regulations would provide different sanctions for breach of statutory duty as would otherwise be provided for under the Directive. We believe that a consumer's right to cancel should provide similar sanctions under these regulations as under the Distance Selling (Consumer Protection) Regulations 2000. Otherwise, disparity remains where a consumer could cancel on any minor issue, for example when a business fails to forward paperwork at the exact time that it said it would do so.

There remains the concern about the business' right to cancel the contract with another business. We believe that the Regulations should not allow a business to cancel a contract, but that the circumstances in which a business customer might want to cancel must be examined. Appropriate sanctions should be applied that are not disproportionate to the specific circumstances in question at the relevant time.

Regulation 21 – Defence in criminal proceedings

Reversal of 'burden of proof': The burden of proof to establish innocence is placed upon the intermediary (ie. the defence), an unusual approach under criminal law where the burden of proof rests solely with the prosecution, except under the rules of strict liability.

The AEB seeks further clarification on this point.

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Dated 1st May 2002

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