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Department of Trade and Industry
151 Buckingham Palace Road
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1st May 2002

Draft Electronic Commerce (EC Directive) Regulations 2002

I am writing to you on behalf of the Advertising Association with reference to the UK implementation of the E-Commerce Directive.

The Advertising Association (AA) is a federation of 24 trade associations and professional bodies representing the advertising and promotional marketing industry, including advertisers, agencies, the media and support services in the UK. It is the only body that speaks for all sides of an industry currently worth about £17 billion. Further information about the AA, its membership and remit is available on our website at www.adassoc.org.uk

The implementing Regulations, in their current draft form, will cause legal uncertainty for the UK advertising industry. The Directive intends for the full implementation of the country of origin control principle but this is not reflected in the draft Regulations. The transposition of the country of origin into UK law is of vital importance to the advertising community. Failure to ensure that UK information society services can derive legal security through compliance with only UK law will place UK e-commerce operators at a competitive disadvantage with companies established in those other EU Member States that are implementing the Directive on more favourable terms.

In a number of areas of critical importance, sections of the E-Commerce Directive have been transposed either too literally or with unnecessary additions. The draft Regulations and accompanying Guide for Business have attempted to go further than the Directive (e.g. Private International Law), whilst in others vital components have not been transposed with clarity (e.g. liability). This 'steering away' from the intentions of the Directive is causing deep concern, especially in terms of the country of origin control.

I have pleasure in enclosing the AA submission on the draft Electronic Commerce (EC Directive) Regulations 2002 and if you have any further questions, please do not hesitate to contact either myself, Sara Soltani (Director of Public Affairs) or Phil Murphy (European Public Affairs Manager)

Yours sincerely,

Andrew Brown
Director General



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Advertising Association Submission

Draft Electronic Commerce (EC Directive) Regulations 2002

The AA welcomes the opportunity to comment on the draft Regulations that will implement Directive 2000/31/EC *on certain legal aspects of information society services, in particular electronic commerce in the Internal Market* (E-Commerce Directive). Individual AA members will also contribute directly to the consultation.

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Introduction

The implementing Regulations, in their current draft form, will cause legal uncertainty for the advertising industry. The Directive's intention is the full implementation of the country of origin control principle. A full and proper transposition of the country of origin principle into UK law is of vital importance to the advertising community. Failure to ensure that UK information society services can derive legal security through compliance with only UK law will place UK e-commerce operators at a competitive disadvantage with companies established in those other EU Member States that are implementing the Directive on more favourable terms.

The DTI indicated from an early stage that the Government would be adopting broadly a 'copy-and-paste' approach to the implementation of the Directive. In a number of areas of critical importance to the advertising industry this has been taken too literally with sections being transposed that are unnecessary. The draft Regulations and accompanying Guide for Business have attempted to go further than the Directive (e.g. Private International Law), whilst in others vital components have not been transposed with clarity (e.g. liability). This 'steering away' from the intentions of the Directive is causing deep concern, especially in terms of the country of origin control.

General comments

E-Commerce offers considerable benefits, dramatic growth and potential¹ for UK and European Union (EU) businesses; in particular for those small and medium-sized

¹ e-commerce@its.best.uk, A Performance and Innovation Unit Report, September 1999. The foreword from the Prime Minister, Tony Blair, noted "We also have to give a higher political priority to electronic commerce and ensure that all parts of Government are pulling together effectively to improve the UK's performance"

enterprises (SMEs) that do not have the means to be legally or operationally present in every EU Member State. The E-Commerce Directive represents a very real opportunity to enable businesses to utilise a rapid, economic instrument allowing them to market their products or services in any or all EU countries. The free circulation of goods and services within the EU, enabled and epitomised by e-commerce and based upon the country of origin control, provides a guiding light for the Internal Market.

The achievement of a true Internal Market is a fundamental aim of our industry that will benefit business and consumers alike. The commitment of the EU Member States to the creation of an Internal Market is long-standing but yet to be delivered. It is our belief that there cannot be a true Internal Market without a true country of origin regime for E-Commerce. The EU Member States cannot afford to cast into question the principles of the Internal Market.

Country of Origin Control

The E-Commerce Directive has the objective of enshrining the freedom of movement of services based on the country of origin control. The two parts of the main aims of the Directive are important to emphasise, namely that information society providers are subject only to the law of that Member State in which they are established², and that Member States may not prohibit the freedom to provide services from another Member State. If the E-Commerce Directive is not implemented into UK law on the basis of a true country of origin, the aims³ of the measure will remain unrealised. This would have a significant & detrimental effect upon the growth and success of the UK (and EU) e-commerce services sector. If the country of origin principle is not given its proper effect as foreseen by the Directive, it would undermine both the UK's market leadership and its competitiveness in the e-commerce field.

The AA urges the UK Government to remain vigilant in the transposition of the Directive and use the implementation to reaffirm the commitment to a true Internal Market based on the country of origin control. This was a commitment seen during the original negotiation stage of the measure at the EU level, and most recently with agreement at the European Council held in Barcelona. The UK fully supported the country of origin control mechanism, and negotiated against those countries that sought to undermine this principle. It has become evident from the implementation across the EU that other Member States (Luxembourg, Austria and Germany⁴) have taken a more purist view than that of the UK. The UK faces the very real danger of creating an unfavourable situation for information society services established and operating from the UK.

² The objective [of the Directive] 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. DTI Consultation document on implementation of the E-Commerce Directive, 11 August 2001, Chapter 1.

³ 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. DTI Consultation document on implementation of the E-Commerce Directive, op.cit.

⁴ Service providers established in the Federal Republic of Germany and the teleservices thereof shall be subject to the requirements of German law even if the teleservices are offered or rendered commercially in another state within the scope of 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 (OJ L 178, p. 1). Part 1.§4(1), German implementation of E-Commerce Directive Article 3.1.

Regulation point 7

Article 3(1) of the E-Commerce Directive lays down that the law applicable to information society services is the law of the country in which the service provider is established. This covers all areas of law regardless of whether they are public, private or criminal law. The country of origin principle must be implemented clearly and strongly otherwise UK companies will be exposed to legal insecurity given the potential for application of the laws of 15 different Member States. The current draft point 7, read together with point 5, appears to reduce the country of origin principle to a mere supervisory and enforcement rule and thus undermine the intention that UK information society services are submitted only to UK law for their e-commerce activities. An unambiguous definition for industry is required in both the implementing legislation and the accompanying Guide for Business to ensure understanding of the application of the country of origin principle.

Regulation point 5

The Private International Law aspects of the Directive are clear in that they would continue to apply in terms of matters related to contractual obligations in consumer contracts or the freedom of the parties to choose the applicable law. The Guide to Business (point 4.8) extends the Directive's annex list of derogations to Article 3 to 'requirements applicable to such contractual obligations, *including requirements to do certain things before entering into a contract*' and '*essential information that has a determining influence on the decision to contract*'. The Directive was clear that in other areas such as non-contractual liability, defamation, unfair competition or misleading advertising, these would fall under the country of origin control. During the European Parliament and Council negotiations⁵ leading up to agreement over the Directive, the UK remained steadfast in its position that derogations in the area of Private International Law to cover pre-contractual obligations would not be extended. The current draft document incorrectly interprets the Directive.

If applied to the Internet, the principle of the country of destination (even through derogation) would result in making all information society services subject to the entire legislation of each of the 15 Member States. The practical and economic consequences of such a situation would be severely damaging for the UK advertising industry and to all those engaged in E-commerce activity. Studying, understanding and respecting the various different laws would place highly restrictive burdens upon legally established businesses.

Practical examples

It is vitally important to look at this from a very practical angle. Article 3 of the Directive, if correctly implemented, would allow the UK laws to apply to UK on-line companies concerning pre-contractual obligations, thus the 1995 Private International Law Act would not need to come into play. If the implementation stands as at present, the following situations could arise which would be detrimental to UK on-line companies⁶ and hamper the principles of the Internal Market:

⁵ 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 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. DTI Consultation document on implementation of the E-Commerce Directive, chapter 2, op.cit.

⁶ E-commerce will also promote trade, stimulate innovation and competitiveness and create sustainable jobs. DTI Consultation document on implementation of the E-Commerce Directive, op.cit.

A UK company selling hi-fi's on-line runs a promotional campaign where, in return for buying a hi-fi, the purchaser is given a free hi-fi stand on which to place the hi-fi equipment. This is permitted in the UK, however, in France since the value of the stand exceeds 7% of the value of the hi-fi purchased, this offer constitutes an illegal premium and as such is actionable under French unfair competition law by a competitor. A large French electrical retailer brings an action in the UK, alleging that the offer creates unfair competition in France. In this situation the Courts could apply French law on the basis of the Private International Law Act. This destroys the essence of the E-Commerce Directive.

A UK company carrying out an on-line advertising campaign offers a DVD for £1. This is permitted in the UK, however, a Belgian distributor of DVDs brings an action in the UK courts on the basis that the UK company is engaging in unfair competitive practices which are prohibited in Belgium, i.e. selling below cost. The Courts could apply Belgian law on the basis of the Private International Law Act. This destroys the essence of the E-Commerce Directive.

Positive DTI assessment of country of origin

It must be borne in mind that the DTI draft Partial Regulatory Impact Assessment (August 2001) indicated that the full implementation of the country of origin principle would have *“one-off benefits for the UK of about £1 billion and yearly savings of about £350 million”*, whilst also pointing out:

“2.ii.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.

The DTI report continued by identifying the benefits of the country of origin control,

“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)”.

Avoiding a political and economic ‘own-goal’

For online publishers, Internet service providers and e-commerce sites, it is essential that the on-line industry can derive legal certainty through the implementation of this Directive, and the AA urges the UK Government to remain committed to the resolve to become *“the best place for e-commerce anywhere in the world”*⁷. The Prime Minister spoke of the economic opportunity of E-Commerce on 13th September 1999:

“To budding entrepreneurs in Britain and abroad I say: this is the place to make your money. Help make Britain a rival to anywhere in the world.... there is a clear role for public

⁷ Speech by the Prime Minister on E-commerce, ‘The knowledge economy’, 13th September 1999.

policy.. promoting competition, minimising regulation.... last autumn [1998] we set the target that Britain should be the best place in the world to trade electronically by 2002.... Too often Britain has made a good start, only to see others exploit the full benefits of new technology.... think European. E-commerce abolishes frontiers even for the smallest firms, bringing the 380m people in the Single Market within reach. So companies need to think European, because the single market is their home market. And governments need to think European to turn Europe into the world's most vibrant virtual market. I know Romano Prodi agrees with me about the importance of this challenge. Europe's goal must be not following but setting trends in electronic business over the next five years.... British government needs to put in place the right framework and lead by example.... we can truly make Britain the best place for e-commerce anywhere in the world".⁸

Legal insecurity and uncertainty will inhibit the development of E-Commerce in the UK and will have a knock-on effect on the EU economy in general. Such a situation is highly undesirable and would be counter to the repeated aims of the UK Government position.

Removing the restrictions

Restrictions to the freedom to provide goods and services in E-Commerce can only truly be abolished by rigorously implementing the country of origin control. The UK has the potential to create the most favourable situation out of all the EU Member States for E-Commerce, therein encouraging development of this sector of the economy and by default attracting information society services to the UK for their operations. This is especially pertinent if SMEs are to be encouraged to take up the challenge of E-Commerce. According to the Commission Directorate-General for Enterprise,

"There are 19 million small and medium-sized enterprises in the European Union representing 99.8 % of all EU enterprises and employing more than 74 million people. These enterprises are a source of employment, innovation, entrepreneurship and growth."⁹

Summary of the DTI consultation on E-Commerce implementation

The DTI's initial consultation carried out in the last quarter of 2001 concluded that of the 94 responses received, "The clearest view emerging from the consultation is support for the 'country of origin' regulatory principle. This support was often coupled with a call for vigilance by HMG and the Commission in preventing more than a bare minimum of exclusions and derogations by Member States".

Specifically with reference to the country of origin,

"15. Almost all of the 40+ respondents who addressed this issue strongly favoured country-of-origin regulation. Many enthusiastically rehearsed the arguments for it, quoting with approval the Directive's recitals, the consultation paper's restatement of them, and the Commission's backing for the approach. The main point made was that it would be difficult, costly, or even impossible for a service provider to adhere to 15 or more national laws or sets of regulations. 'Host State' regulation would cause legal uncertainty and act as a barrier to market entry, particularly for SMEs, and would thus stifle the growth of e-commerce, effectively restricting the free movement of goods and services. This in turn would deprive consumers of choice and the other benefits of real competition.

⁸ Speech by the Prime Minister on E-commerce, op. cit.

⁹ http://europa.eu.int/comm/enterprise/consultations/sme_definition/index.htm, 26th October 2001.

16. Many coupled their support for country of origin regulation with opposition to any extension at all to the exceptions and derogations. They argued for the narrowest possible use and interpretation of the derogations by Member States, including the UK. In particular, respondents wanted to prevent the derogation on 'contractual obligations concerning consumer contracts being applied to pre-contractual matters, or to any aspects of consumer protection other than contractual obligations'.

Information requirements

The AA supports the transposition of the provision of information by information society services noting that the necessary requirements should be available '*in a form which is easily, directly and permanently accessible*'. The advertising community strives to foster consumer trust and confidence. Information should be easily accessible and available to recipients/users of services. The AA welcomes the Part 5 of the Guide to Business, and notably 5.3 wherein the Government recognises '*technological constraints*' together with that '*the criteria should be capable of being met if the information is accessible by other means (e.g. inclusion on a website)*' would suffice in this area.

Notice and Take Down Requirements

The AA supports the use of self-regulatory systems to provide for notice and take down of harmful and/or illegal content and supports the views as referred to in the Guide for Business point 6.9 not to establish statutory procedures in this area. Self-regulation can deliver the flexible solution through legislative backing as provided for in the E-Commerce Directive.

Liability of intermediary service providers: Mere Conduit, Hosting, Caching

The liability provisions in the Directive should be transposed into UK law in a way that makes clear the exemptions/limitations to liability relating to both civil and criminal forms of liability. Draft Regulation points 17, 18 and 19 cover only that information society services '*shall not be liable in damages*' i.e. civil liability. This fails to implement the intention of the Directive with sufficient clarity that a service provider '*is not liable*' i.e. covering both civil and criminal liability. Point 21 (1) attempts to cover the criminal angle, but the AA believes this could be better dealt with through explicit reference within points 17,18 and 19. The meaning of Point 21 (2) is unclear.

Codes of conduct

Article 16 of the Directive notes that the Member States *shall encourage* the drawing up and use of codes. The AA advocates and actively encourages the use of self-regulatory alternatives for both the handling of disputes and the drawing up of codes of conduct. Such schemes operate in a fast, flexible, and efficient manner and the AA welcomes the UK Government's support in these areas as contained within certain aspects of the transposition of the Directive.

Summary

'*Don't Panic! Do E-Commerce – A Beginner's Guide to European Law Affecting E-Commerce*'¹⁰ has been cited by the DTI¹¹ as providing useful and informal advice prepared by consultants at the direction of the European Commission (Information Society Directorate-General). The problem faced is that without legal certainty through the full

¹⁰ http://europa.eu.int/ISPO/ecommerce/books/dont_panic.pdf

¹¹ http://www.dti.gov.uk/cii/ecommerce/europeanpolicy/ecommerce_directive.shtml

implementation of the country of origin control, many companies won't just panic, they won't do e-commerce with other Member States if the pitfalls are not removed.

Only the consistent application of country of origin control can ensure that the internal market functions effectively and that consumers are able to benefit from the extended choice and opportunities presented by true freedom of movement for goods and services.

The AA welcomes the opportunity to assist the DTI in its contribution to ensuring legal certainty on the basis of country of origin control for information society services. Following the closure of the consultation on the draft Regulations the AA would very much welcome an opportunity to comment further in order to assist in the finalisation of the UK implementation.

For further information please contact Sara Soltani or Phil Murphy at the Advertising Association on 020.7828.2771
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1st May 2002