

**BT PLC'S RESPONSE TO CONSULTATION ON UK IMPLEMENTATION
OF EU DIRECTIVE 2001/31/EC
DRAFT IMPLEMENTING REGULATIONS AND
INTERIM GUIDANCE FOR BUSINESS**

Definitions (draft Regulation 2.)

The term “enforcement authority” is defined and it excludes the courts. The definition is central to draft Regulation 7, in particular. We do not understand how the term can be applied in relation to many laws which are potentially subject to consideration under the draft Regulation, since an “enforcement authority” as defined in the UK does not exist in every case. Many laws are subject to enforcement only through the courts. How is it intended that draft Regulation 7 can be applied in all the cases where no “enforcement authority” exists?

There is further confusion in the use of the different and undefined term “administrative authority” in draft Regulation 20 (2).

Balanced implementation of Directive

The reason for the Directive is to ensure that there is free movement of information society services between the Member States and to approximate the rules on certain matters to achieve this. A key consideration, mentioned in several Recitals is the creation of a clear, simple, predictable legal framework. A central element to provide legal certainty, which the UK advocated strongly in Council is the proposition that information society service providers be supervised at the source of their activities and in principle be subject to the law of the Member State in which the service provider is established (“country of origin” principle).

The draft Regulations fail to establish a clear framework or to implement the country of origin principle to the maximum degree possible. Indeed, the drafting in Regulations 4 to 6 emphasises and gives undue weight to matters which dilute the country of origin principle. Furthermore, draft Regulation 7, fails even to state the principle in clear terms - it concentrates instead on enforcement issues without stating the underlying basis.

The UK approach differs from that of other Member States in these respects and the result is to create uncertainty for UK providers, and therefore, disadvantage them compared to providers established in other Member States. This result is not consistent with the UK’s Government’s stated aim to make the UK the prime place for e-Commerce activities in the EU.

We suggest that the draft is amended to reflect the wording and intent of the Directive and that the interim guidance is amended correspondingly.

Level of protection (draft Regulation 4.)

BT sees no justification for the inclusion of this draft Regulation as it does not seek to change UK law and would therefore be over-legislating.

Private International Law (draft Regulation 5.)

BT sees no justification for the inclusion of this draft Regulation as it does not seek to change UK law and would therefore be over-legislating. We therefore ask the Department of Trade and Industry (DTI) to delete this draft Regulation. Those Member States that have already implemented the Directive have not seen the need to transpose Article 1(4).

Diversity and pluralism (draft Regulation 6.)

During industry meeting discussions the DTI have explained that the wording of this draft Regulation (transposing Article 1(6)) would not present Member States with the opportunity to derogate from Article 3(1) and 3(2) on grounds of public policy. However, BT has concerns that this draft Regulation as currently drafted could indeed provide an exclusion from the country of origin principle for measures concerning linguistic diversity e.g. a Member State could impose contract language requirements. The 'fit' with the restrictions test is not clear and would need to be legislated for if this Regulation is to be retained. This concern is reinforced by the fact that the DTI has changed the meaning of Article 1(6) by omitting to include a reference to the need for measures taken to be done so 'in the respect of Community law', which includes the Directive. Furthermore, those Member States who have already implemented the Directive have not seen the need to transpose Article 1(6).

Internal Market (draft Regulation 7)

BT has concerns that draft Regulation 7 (1) is unnecessarily complex and does not correctly transpose Articles 3 (1) and 3 (2) of the Directive. This draft Regulation is not entirely consistent with Part 4 of the interim guidance for business and has the effect of making UK service providers subject to enforcement of applicable law by "an enforcement authority" but not specifically made subject to UK law. This creates legal uncertainty for UK businesses. Paragraph 4.1 of the interim guidance clearly expresses the relevant applicable law principle and we wish to see such a clear statement in the draft Regulations, and not simply in the guidance document. To ensure that the country of origin principle as provided for in the Directive is accurately implemented we would ask the DTI to redraft this draft Regulation, with words which replicate the wording of Article 3(1) more closely, for example by putting the wording of 4.1 of the interim guidance into the Regulation or along the lines of the German implementing legislation which is:

Part 1.§4(1). " 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)."

*Law available in <http://www.iid.de/iukdg/EGG/index.html>

The revised wording we have in mind for draft Regulation 7 is as follows: -

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.

We consider that the requirements of the Directive [Recital 22 '.... Such information society services should in principle be subject to the law of the Member State in which the Service Provider is established' and Article 3(1) compliance with national provisions] are both met because if the information society services are subject to the relevant laws of the Member State of establishment, then it logically follows that enforcement to ensure compliance will be the responsibility of the relevant enforcement authorities.

With regard to this latter point, we do not understand the reasons for excluding 'the Courts' from the definition of 'enforcement authority' as the Courts would be the only relevant authority for this purpose in the case of breach of copyright or other related IPR issues.

Furthermore, at an industry discussion meeting (CBI, March 2002) the DTI explained that the draft Regulations do not provide for "pure" country of origin regulation. Instead UK businesses wanting to trade with other Member States would be subject to a "restrictions" test i.e. national legislation going beyond Community law would be subject to a restriction test. However, we are concerned that the draft Regulations have no provision for a UK court to disapply a law (determined to be the applicable law under private international rules) that would restrict the freedom to provide cross border services between Member States. Recital 23 states that "provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services "

In addition, the test explained by the DTI would be applicable in few circumstances because there is comparatively little Community law which specifies restrictions precisely in the way that the Distance Selling and Timeshare Directives (which were given as examples) do. The majority of Community law (in the form of Directives) allow each Member State a fair margin of discretion, rather than prescribing a "restriction" in specific terms.

We are also unclear whether "restriction" can be confined to the meaning given by the DTI. For example, would "restrictions" that have been considered in relation to the Treaty Articles dealing with freedom of establishment of good

and services (e.g. Cassis de Dijon case) or with competition law be relevant restrictions under the Directive and these draft Regulations?

We are also concerned that the proposed restrictions test in the terms proposed by the DTI could lead to instances of discrimination against UK established service providers supplying information society services in the United Kingdom, as opposed to such services incoming from other Member States. This could arise in the event of 'gold plating' of Community requirements in UK implementations which go beyond basic requirements of relevant Directives. Any such law would have to be disapplied in the case of incoming information society services as being a restriction, but would still be applicable to information society services provided in the United Kingdom by UK established service providers.

We therefore welcome from the DTI guidance/information on which UK laws could be deemed by other Member States as going beyond Community law and which other Member States laws would or would not be deemed to be a restriction. We also welcome an indication of in which circumstances 'restrictions' would be disapplied to UK established service providers.

Exclusions 4.8 of the interim guidance for business

BT has concerns about the wording "essential information that has a determining influence on the decision to contract" in 4.8 Exclusions of the interim guidance for business. This wording is taken from Recital 56 of the Directive but the DTI causes confusion and legal uncertainty by missing out the words "content of the contract" which would result in the inclusion of pre-contractual information. BT therefore asks the DTI to delete this wording from the interim guidance or at very least copy Recital 56 verbatim. If pre-contractual information were subject to derogation, it would have been included in the Annex of derogations in the Directive. In any event, what amounts to a 'determining' influence would be a subjective view in each case.

Meaning of the term "order" (draft Regulation 14)

As currently worded this draft Regulation is ambiguous and confusing. It could be read to mean that in relation to draft Regulation 11(1)(c) and draft Regulation 13(1)(b) an order is always a contractual offer, which, we assume, is not meant. It is also confusing as draft Regulation 14 appears to imply the word "order" is used throughout draft Regulations 11 and 13, whereas, apart from draft Regulation 11(1)(c) and draft Regulation 13(1)(b), it is only used in 13(1)(a).

We are hopeful that we have correctly understood what draft Regulation 14 is trying to say and suggest the following amendments:

In the event a service provider has not acted in accordance with regulation 11(1)(c) or regulation 13(1)(b), any order placed will not be contractually binding on the party placing it (unless parties who are not consumers have agreed otherwise).

Right to cancel contract (draft Regulation 16 (1))

The wording “the contract shall not be enforceable against him and he may give notice of cancellation of the agreement to the service provider at any time” in draft Regulation 16 (1) could be abused by clients searching for exits from contracts, even after a contract performance has already commenced. To cancel a contract “at any time” because of a service providers' non-adherence to the prescribed information disclosure and order processing requirements is an open-ended invitation. We are not aware that this right to cancel the contract is provided for in the Directive and we consider that adequate protection is given to consumers by virtue of the Consumer Protection (Distance Selling) Regulations 2000. There is no specific right to be given contract terms and conditions in the Directive; they should only be made available in a way that allows the recipient of the service to store and reproduce them if in fact provided by the service provider. We consider this remedy, given its primary relevance in the business market, to be disproportionate and should be deleted.

Liability of the service provider – Hosting (draft Regulation 19)

BT acknowledges that, in the light of the specificities associated with different types of illegal content, it is impracticable to define a comprehensive horizontal framework for notice-and-takedown in UK legislation.

We nevertheless believe that changes can and should be made to the currently proposed text in order to minimise the risks faced by hosting ISPs and their customers, and to avoid situations where hosting ISPs are forced to make judgements more properly delivered by a court.

Article 14 of the Directive requires Member States to ensure service providers are not liable in all respects not just “in damages”.

The first change concerns the concept of “actual knowledge” in draft Regulation 19(a)(i). BT recognises the difficulty of providing a definition of “actual knowledge”. However, we suggest that the government should at least consider providing a definition of what “actual knowledge” is not so that, for example, a company cannot be found liable as a result of a casual conversation with a member of its cleaning staff. More specifically, we suggest the inclusion of the following additional Regulation:

1. *For the purpose of Regulations 18(b)(v) and 19(a)(i) a service provider does not have actual knowledge if it has not received a notice complying in all respects with 2 below either*
 - a) *in writing at the address specified in Regulation 8(1)(b), or*
 - b) *by electronic mail at the address specified in Regulation 8(1)(c)*
2. *Any notice to which paragraph 1 applies shall:-*
 - (1) *provide sufficient details to allow the service provider to determine, without unreasonable effort, what action to take, and shall include:*
 - a) *the full name and address of the sender of the notice.*

- b) the location of the information in question*
- c) full details of the unlawful nature of the information in question*
- d) a statement that the sender of the notice believes the information provided to be true in all material respects and*

(2) if the notice alleges infringement of any property or intellectual property right, be sent by the owner of such right or his legal representative and provide full details of the owner's rights.

Secondly, it should be made an offence knowingly to make a false declaration to a hosting service provider regarding the legality of information it is storing. It is not practicable for self-regulation to deliver the same effect as such a provision which is needed to provide hosting ISPs and their customers with some shield against frivolous or malicious claims. In the US, false claims in the context of the DMCA count as perjury and this fact has clearly played a large role in the legislation's success. Accordingly, we suggest the addition of a third paragraph to the new draft Regulation on "actual knowledge" proposed above:

3. *(1) A person commits an offence if he*
- (a) submits a notice to which paragraph 1 applies, and*
 - (b) the notice contains information which is false in a material respect, and*
 - (c) at the time he submits the notice he knows or has reason to believe such information is false .*
- (2) A person guilty of an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum.*

Thirdly, for the purposes of draft Regulation 19 (a), it should be made clear that, where the information stored is a hypertext link, a service provider may only be considered to have actual knowledge or awareness following receipt of notification from a relevant enforcement authority. It is problematic enough that an e-mail complaint from an unknown source may force a hosting ISP to judge the legality of any one of the millions of pages of information hosted on its servers. If a similar e-mail can also force the ISP to judge material which it does itself not host, but is merely cross-referenced in the material that it hosts, the company is submitted to burdens and risks which are absurdly disproportionate. On the other hand, it does not seem unreasonable that a hosting ISP should be obliged to remove material containing a hypertext link if a court has already determined that the link is illegal, and notified the ISP accordingly.

Finally, regarding approaches to notice-and-takedown which cover specific categories of illegal content, BT maintains the view outlined in its earlier submission. In other words, self-regulation has the potential to add value in some areas, but needs to be underpinned at by legislation. In the particular case of copyright infringements, the RightsWatch project has demonstrated that a "safe harbour" such as that enjoyed by US ISPs under the DMCA

cannot easily be replicated in self-regulatory form. BT would therefore be keen to explore the opportunity for introduction of relevant legislation.

Limiting Liability of providers of Hyperlinks and Location Tools Services

BT would welcome the inclusion of wording in the draft Regulations that limits the liability of providing hyperlinks and location tools services. The Directive itself recognises the need to address this issue before July 2003 and therefore does not prevent Member States from implementing appropriate legislation now. Austria already has included such a provision and Spain and Portugal have such provisions in their draft implementing legislation. We therefore suggest the following wording (originated by Yahoo UK) based on Article 12-14 of the Directive.

Where an information society service is provided which consists of the creation or provision of any hyperlink, location tool (automated or human-compiled) or content aggregation services, the service provider (if he otherwise would) shall not be liable as a result of such creation or provision where-

- a. the service provider-*
 - i. does not have actual knowledge that an activity or information accessed via such hyperlink, location tool or content aggregation service was in breach of any law; and*
 - ii. is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or*
- b. upon obtaining such knowledge or awareness the service provider acts expeditiously to remove the hyperlink or location tool or disable access via the service provider's hyperlink, location tool or content aggregation service to the information, and*

the recipient of the service was not acting under the authority or the control of the service provider.

“No general obligation to monitor”

BT is concerned that the DTI has omitted Article 15 from the draft Regulations and asks for it to be inserted in the draft Regulations verbatim. This would give legal certainty to UK businesses when questions of third party liability and general monitoring requirements surely arise in the future and not just to rely on the interim guidance for business which have no legal force.

Defence in Criminal Proceedings (21)

BT notes with surprise that the draft Regulation 19 (a) (ii) is excluded from draft Regulation 21(1) thereby not offering a defence in criminal proceedings.

This exclusion could result in a lower threshold of knowledge for a UK service provider to incur liability in criminal proceedings i.e. the service provider should have known of those facts and circumstances. Article 14 of the Directive does not provide for exceptions in criminal cases but applies a blanket “actual knowledge” test. We therefore ask the DTI to delete draft Regulation 21 (1).

The Directive contemplates that the exemptions from liability for mere conduit, caching and hosting activities are horizontal – i.e. apply to both potential civil and criminal liabilities. Draft Regulation 21 miss-implements the Directive’s provisions by formulating the relevant tests in relation to criminal matters simply in terms of a defence, and not as a substantive exemption from liability as the Directive requires. One means of correcting this would be to amend the references in each of draft Regulation 17, 18 and 19 by deleting the words “in damages” where it appears after “liable”.

Failing this we ask the DTI to provide guidance on the possible implications for a UK service provider as a result of 19 (a) (ii) not applying in criminal proceedings e.g. what would be the liability implications of employees/agents of UK service providers resulting from criminal proceeding?

DTI Guidance/Information on other Member State implementation

To aid UK businesses in operating across other Member States BT would like the DTI to provide information on how other Member State have implemented the Directive and to provide guidance on interpreting this implementation. This information should include which UK laws could be deemed by other Member States as going beyond Community law and which other Member States laws would or would not be deemed to be a restriction. This guidance/information should be readily available and accessible for example by a website.