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BRC represents the whole range of retailers, from the large multiples and department stores through to independents, selling a wide selection of products through centre of town, out of town, rural and virtual stores. The development of electronic commerce is one of the new challenges where there is both rapid change and legal uncertainty surrounding the trading environment, customer expectations and the recognition of its global nature. The legislation should be simple and easy to understand, in order to encourage and enable the development of electronic commerce and not to inhibit adoption by consumers and business.

The following comments are based on the proposed Electronic Commerce Regulations 2002 and the accompanying Guidance notes for business.

## 1. **General Comments**

1.1 BRC is concerned that the Regulations are complicated and unclear in several areas. However it is recognised that this is largely due to the original text of the Directive which itself is often unclear in places. BRC is aware that the Commission is required to review the applications of the Directive by July 2003; we will therefore provide additional comments on the Directive itself to DTI in order to assist in this process.

1.2 BRC recognises the general tension between providing business with flexibility versus uncertainty at the margins. However it is felt that by leaving it up to businesses to decide how to interpret a definition within the Regulation and assess whether this is a sensible risk to take many smaller retailers may be deterred from trading online.

1.3 It is recognised that DTI have avoided being overly prescriptive in defining what is meant by some definitions and terms in the Regulations. However BRC would urge DTI to reconsider the accompanying guidance notes in order to provide clarification and include real life examples in some cases. As the customer has the right to cancel the contract at any time it is crucial that business has access to practical guidance advising how they might comply with the Regulations.

1.4 BRC is aware that DTI intend to produce additional guidance for SMEs and are happy to be consulted if appropriate. Many retailers have reported that the guidance notes produced for SMEs to accompany the Distance Selling Regulations are particularly helpful in clarifying the requirements of the Regulation; perhaps a similar approach could be taken for the Electronic Commerce Regulations. It would be extremely useful if a booklet was produced which included guidance on all areas of electronic business including the Electronic Commerce Regulations, Distance Selling Regulations and Data Protection Act. This would provide a complete guide for SMEs trading at a distance and online.

1.5 Generally it would be helpful if the guidance explained how the restrictions test will work and what may be considered as a restriction. BRC members believe that a clear explanation should be provided by DTI on this issue. It would be helpful if this provided an explanation of the test and guidance on how this will be dealt with on an ongoing basis by DTI.

## 2. **Definitions**

2.1 The foreword on page 4 of the guidance provides advice to businesses on where the Regulations will apply. At present it appears to restrict this to “Internet or by email”. BRC is concerned that this is not sufficiently broad and does not include technologies such as WAP iTV, SMS text or account for any new forms of electronic communication that may be developed and will need to be covered.

2.2 In the Directive and Regulation there appear to be inconsistencies in the use of email/other technologies. Generally it would be helpful to clarify where the Regulations apply to all such means and where they apply only to email.

2.3 Whilst it is acknowledged that DTI cannot give more flexibility than the Directive and therefore have avoided being prescriptive it is felt that the following terms require additional clarification in the guidance:

- Recipient of service and consumer - Both terms are defined in the Regulations and accompanying guidance. It is assumed that these definitions are not the same and in order to make this clear a further explanation of how they differ is requested. It would be helpful if the guidance clarified that ‘recipient of service’ includes a consumer or user for professional purposes.
- Advertise – The term ‘advertise’ is not used in the Directive or U.K implementing Regulations. Therefore it would be helpful to explain what is meant by its use in the guidance notes. The Advertising Standards Authority has prepared a set of guidelines for the Internet indicating what it considers to be an advert. For example certain communications and adverts for sites are considered to be an advert whilst almost all web content is not. Is it intended that the Electronic Commerce Regulations will share the same definitions as the Advertising Standards Authority or a broader definition? BRC would suggest that as business is familiar with the Advertising Standards Authority guidelines it would be more helpful to make the Regulations consistent with this rather than preparing a new set. Alternatively if the term is used to describe a commercial communication perhaps the words simple or pure could be added before the word ‘advertising’, in order to clarify exactly what is meant.
- Unsolicited commercial communications - whilst it is noted that the implementing Regulations for the proposed Data Protection Directive will deal with unsolicited commercial communications this does not provide guidance for businesses wishing to use this form of communication in the meantime. At present the Electronic Commerce Regulations are extremely vague in determining what constitutes an unsolicited commercial communication. Therefore we would appreciate further explanation and examples, in the guidance note, of what is currently considered to constitute an unsolicited commercial communication.

We would also recommend that the heading of Regulation 10 be amended to make clear that it is restricted to email.

**3. General Information to be provided by a person providing an information society service**

3.1 8 (1) It would be extremely useful to business if the guidance note provides examples/suggestions of how to comply with the term ‘easily, directly and permanently accessible’. For example is it sufficient for a company name to be displayed on a website? When a customer places an order via WAP technology is it sufficient that they can access information such as terms and conditions via the Internet on a website?

3.2 Further clarification is required on exactly what is meant by the term ‘permanently’. There is confusion as to what the purpose of keeping such information is and how long it should be made permanently accessible. For example should it be 6 years for contractual limitation or 7 years for tax purposes? Will it be necessary for traders to retain a disk of their website showing the information the customer had available at the time of their transaction and each time a change is made?

3.3 8 (1)(c) Are there any additional details which should be provided beyond an email address in order for business to comply with Regulation 8 (1)(c)? The Regulation states that it must be made ‘..possible to contact him rapidly’, we would question what is meant by the term rapidly. For example many retailers have a customer helpline, to facilitate this process, but these will not always be manned 24 hours of the day. Therefore if a customer places a complaint on Friday evening and it is not dealt with until Monday morning would it be deemed that the complaint was not dealt with rapidly? The guidance note should make it clear that what is considered to be rapid is a question of common sense appropriate to the particular service provided. Ideally this would be within the supplier’s hours of business.

3.4 8 (1)(d) requires that ‘where the service provider is registered in a trade or similar register available to the public, the register in which the service provider is entered and his registration number, or equivalent means of identification in that register’. It should be made clear in the guidance that this requirement only refers to registers that relate to the provision of an information society service e.g. Trust U.K, and not other registers which the service provider may belong to which are not related to the provision of the information society service.

3.5 Some BRC members are concerned that the requirement in Regulation 8 (1)(d) is unduly onerous. The term ‘available to the public’ suggests that any register a retailer is signed up to, such as trade associations or other bodies, that is available to the public has to be shown on a website. It is not considered necessary for this information to be included on a website if it does not add value to the consumer. There is limited space available to communicate essential information to consumers on a website, details of irrelevant membership of associations or bodies will only distract consumers from this.

3.6 8 (1)(e) It is suggested that DTI, which has moved from the original wording in the Directive, for this requirement ‘where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;’ use the word ‘service’ or ‘information society service’ consistently. The word ‘service’ on its own is considered to be confusing as for many traders it has a different meaning than ‘information society service’.

It would be extremely helpful if further clarification is provided in the guidance in order to determine what is meant by 'authorisation schemes'. For example would the authorisation required for a retailer to supply offline be covered where the information society service consisted of online advertising and sale which itself does not require authorisation. The relevant authorisation applying to the goods sold themselves and their delivery, which are not being done online, is not an information society service.

To fully understand the explanation in the above paragraph businesses must understand the split of a proposed service into the sale of the service or the goods of various information society services e.g. advertising goods online, sale transaction online, delivery either online or offline. This is not clear from the Regulations or guidance currently and if businesses are to understand how to comply it is essential this is clarified.

#### **4. Commercial Communication**

4.1 As noted in the guidance the Regulations do not prescribe how the requirement for information about commercial communications to be 'clearly identifiable' should be met. For example should a commercial communication be identified in the header before the communication is opened or is it sufficient on opening? The requirement stated in 9 applies to both solicited and unsolicited commercial communications. However this is not clear in the guidance and requires further clarification.

4.2 5.7 in the guidance notes clarify that unsolicited commercial communications must be identified by a means that allows their deletion before being opened. In the current technological environment this will probably involve notification in the subject header. The guidance notes are silent regarding solicited commercial communication and as an absolute minimum should specifically exclude this requirement for solicited communication.

4.3 While BRC appreciates the intention of DTI to retain flexibility for businesses, by avoiding prescriptive requirements, it would give business a level of certainty if examples of how this requirement could be met were included in the guidance. For example does the mail have to state that it is a commercial communication or would DTI advise that if it comes from a business then it is clearly identifiable?

#### **5. Unsolicited Commercial Communications**

5.1 As previously indicated there is still uncertainty with regards to what constitutes an unsolicited commercial communication and whether the requirements for information are different from that of a commercial communication. Businesses need a definition or at least clear guidance on what is unsolicited in order that they are aware when they need to comply with Regulations regarding commercial and unsolicited communication. We would suggest the Data Protection Commissioner has an opportunity to provide comments on the guidance in this area.

5.2 Regulation 10 states that 'A service provider shall ensure that any unsolicited commercial communication sent by him by electronic mail, where permitted, is clearly and unambiguously identifiable as such as soon as it is received'. There is general confusion as to when or could this 'permitted' circumstance arise?

#### **6. Information to be provided where contracts are concluded by electronic means**

6.1 11(1)(b) states that 'whether or not the concluded contract will be filed by the service provider and whether it will be accessible;' At present it is not clear exactly what is meant by

the term 'filed' and also whether there is a time specification on this requirement. Does the term accessible mean that it should be accessible to the consumer? It would be helpful if the guidance could explain exactly what is meant by these terms. BRC is of the view that the concept of filing may be a result of a legal concept in other jurisdictions which would apply in the U.K only where contracts are made with a third party from another European country. If this is the case it should be made clear in the guidance notes.

6.2 11(2) BRC would suggest adding the following text 'if any' after the wording "which relevant Codes he subscribes to".

It is felt that the addition of 'if any' provides clarification that not all retailers will belong to a Code of Conduct. Whilst the BRC and its members recognise that Codes have a useful role to play in some circumstances, where they can help the responsible consumer and the reputable trader to recognise each other, it should be recognised that it is only minimum standards that can be guaranteed by a Code of Practice. In the retail industry many companies believe that a competitive edge is provided by observing practices well above the minimum and that their reputation is a better guarantor of good practice than any Code. For this reason a retailer may not wish to belong to a Code of Practice.

6.3 11(3) states that 'Where terms and conditions applicable to the contract are provided to the recipient, they must be made available to him in a way that allows him to store and reproduce them'. It is essential that the guidance clarifies exactly what forms of communication or web information are caught by the term "allows him to store and reproduce". In 5.16 of the guidance notes, it states that the placement of an order 'in a clear, comprehensive and unambiguous manner' could be met if the information is accessible by means other than the one which the service provider transacts with recipients of his services. However, in 5.19 of the guidance notes, it does not provide the same advice with regard to the 'store and reproduce' provision. This is equally important and perhaps more so to service providers. It is essential the guidance notes clarify what this means and whether this can be in a form other than the original method of conducting the transaction, e.g. via a printed receipt sent with the goods rather than being able to download or copy the terms and conditions from a website.

## **7. Placing of the Order**

7.1 13(1) uses the term 'technological means'. It is unclear whether this means the same as electronic means or if it has a broader definition.

7.2 13(2) creates a rule that 'the order and acknowledgement of receipt will be deemed to be received when the parties to whom they are addressed are able to access them'. However it is possible that due to technical problems e.g. a consumer's personal computer crashed that these are never accessed and the parties are not aware of this problem. Although this will vary depending on the means of technology it is difficult to foresee how either party can prove that the information was available or not for access? In reality the sender will be able to prove they sent the confirmation, via a sent box etc, but a receiver will not be able to prove they were unable to access the information.

BRC would suggest that DTI include in the guidance advice to courts on sensible action to take when deeming whether a consumer has had access to acknowledgement of receipt. A similar arrangement to the current postal rule, which states that within 3 days of the communication being sent the recipient is deemed to have received it, would be appropriate.

8. **Right to Cancel Contract**

As 16(1) affords the consumer the right to cancel at any time it is crucial that business is provided with a means of proving this requirement has been complied with. It should be made clearer in the guidance that ‘the right to cancel or the contract shall not be enforceable’ can only be used if the requirements stated in 16 (b) have not been met.

Incorporating the final provision of recital 34, ‘the acknowledgment of receipt by a service provider may take the form of the on-line provision of the service paid for’ may mean customers who had received the benefit of a good or service would not be able to cancel the contract. It is hoped that this would avoid duplicitous customers unfairly being able to cancel after receiving the benefit of a good or service.

It is also essential that a time limit on the right to withdraw from the contract due to a failure of the service provider to comply with the Regulations is included. A similar timescale to the Distance Selling Regulations which allows 30 days + 7 could be included in the guidance. It would make sense to use the same requirements as that for the Distance Selling Regulations as both Regulations should work in tandem with each other and therefore should be consistent in terms of timescale. There are a number of exemptions to this rule in the Distance Selling Regulations such as perishable goods, will there be a similar arrangement for the Electronic Commerce Regulations?