

## **CONSULTATION ON DRAFT ELECTRONIC COMMERCE (EC DIRECTIVE) REGULATIONS 2002 - THE DRAFT REGULATIONS**

This is Consignia plc's response to the DTI's consultation on the draft Regulations. Consignia is a major provider of online services and is interested in extending those services into Europe. Consignia is also the parent company of ViaCode Limited, a UK based certification service provider. Consignia therefore has a strong interest in the Regulations.

Consignia responded to the DTI's consultation on the implementation of the E-Commerce Directive in the UK. That response provides the background to some of the points raised in this response.

### **Summary**

- The Regulations and/or the associated Guide for Business need to clarify the following points:
  - how the Directive applies to hybrid online/offline services;
  - that Regulation 8(1) information will be considered "permanently accessible" if it is provided to the recipient in printable or downloadable form with clear instructions on how to print or download it;
  - that Regulation 9 applies only to "push" communications and not "pull" communications such as website advertisements or hyperlinks;
  - that the requirement in Regulation 11(3) for terms and conditions to be able to be stored and reproduced will be satisfied if the terms and conditions are provided to the recipient in printable or downloadable form with clear instructions on how to print or download them;
  - that "damages" used in Regulations 17, 18 and 19 includes restitutionary and punitive awards as well as compensation; and
  - that Regulation 21 does not reverse the burden of proof in either civil or criminal cases.
- The right to cancel in Regulation 16 needs to be made consistent with the cancellation right in the Consumer Protection (Distance Selling) Regulations 2000, including by disapplying it to business-to-business transactions.
- There needs to be a transitional period built in to the Regulations sufficient to allow businesses to make the necessary technical changes.

## **Hybrid services**

Although not explicit in the Directive, Consignia considers that Article 11, and probably also Article 10, are intended to apply only to contracts that are concluded entirely online. For example, if a service provider advertises on the Internet but requires orders to be placed by telephone, it may not be practicable to provide the customer with an acknowledgement “by electronic means”. This raises the wider question of whether activities that involve some online and some offline elements are information society services within the definition in Directive 1998/34/EC. Consignia thinks that they are not and that this should be made clear in the definition of “information society services” in the Regulations.

## **Printability and downloadability**

The Guide for Business says that the “easily, directly and permanently accessible” requirement in Regulation 8(1) could be met by making the required information available on a website (instead of, for example, emailing it to the recipient). However, if a service provider ceased to provide a relevant service and took down the information on its website (or the website itself) the service provider could be in breach of the permanency requirement. To prevent this the Regulations or Guide for Business should clarify that Regulation 8(1) information will be considered “permanently accessible” if it is provided to the recipient in printable or downloadable form with clear instructions on how to print or download it.

It is not clear when terms and conditions will be considered to have been “provided to the recipient” for the purposes of Regulation 11(3). If it includes terms and conditions that are presented to the recipient on-screen, it is important that the storage and reproduction requirements be able to be satisfied by making the terms and conditions printable or downloadable. This is all the more important because failure to comply with Regulation 11(3) makes the contract voidable (Regulation 16).

## **Commercial communications**

Consignia notes that the word “sent” has been introduced in Regulation 9 (the requirement for the communication to be sent is not present in Article 6 of the Directive). Consignia considers that it would be cumbersome for service providers to need to comply with Regulation 9 for “pull” communications (such as website advertisements and hyperlinks), which but for the presence of “sent” would be the proper interpretation of Regulation 9. To make the significance of “sent” clearer, the Guide for Business should confirm that regulation 9 only applies to “push” communications, such as emails and SMS messages.

## **Damages**

Articles 12, 13 and 14 of the Directive protect service providers from liability for transmitting, caching and hosting in certain circumstances. However, Regulations 17, 18 and 19 only protect service providers from liability “in damages”, which could be interpreted as not encompassing some financial remedies. In order to properly implement the Directive the wording of Regulations 17, 18 and 19 needs to be changed to make it clear that all financial remedies are covered, including restitutionary and punitive awards and compensation.

## **Burden of proof**

Regulation 21 should be deleted because its presence implies that the burden of proof in cases concerning Regulations 17, 18 and 19 is reversed. This is clearly not Government's intention, as evidenced by paragraph 6.8 of the Guide for Business:

It is expected that the onus will be on the party alleging that liability has arisen to demonstrate that a service provider has actual knowledge or awareness but did not act upon it appropriately.

### **Right to cancel**

The right to cancel in regulation 16 is open-ended – it allows the recipient to “give notice of cancellation of the agreement to the service provider at any time.” This can be contrasted with the cancellation right in the Distance Selling Regulations, which has a maximum duration of three months and seven working days. Consignia considers that the same time limit should be put on the cancellation right in the Regulations.

The Distance Selling Regulations also contain provisions about how a cancellation notice is to be given, recovery of payments and goods and exceptions to the right to cancel (for example, in the case of services that have already begun with the recipient's consent). In Consignia's view these provisions represent a sensible compromise between the interests of buyers and sellers and, as far as possible, should be carried over into the Regulations. Consistency between the Regulations and the Distance Selling Regulations has obvious benefits in terms of business certainty and compliance.

Consignia does not consider that the cancellation right in the Regulations should apply between businesses, at least not in relation to a failure to provide terms and conditions in accordance with Regulation 11(3) or a failure to acknowledge receipt of an order in accordance with Regulation 13(1).

### **Transitional period**

There needs to be a transitional period before Regulations 9, 10, 11 and 13 become effective during which service providers can make their services compatible. Inadvertent failure to comply with the Regulations is a significant risk for businesses given the remedies they are exposed to under regulations 15 and 16.