



INTERNATIONAL
COMMUNICATIONS
ROUND TABLE

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The Rt. Hon. Patricia Hewitt MP
Secretary of State for Trade and Industry
1 Victoria Street
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Brussels, 30 April 2002

UK IMPLEMENTATION OF THE E-COMMERCE DIRECTIVE

Dear Secretary of State,

The International Communications Round Table (ICRT), a cross sectoral group of about 25 leading publishing, media, internet financial services, computer, and communications companies, welcomes this opportunity to comment on the UK's proposed Electronic Commerce (EC Directive) Regulations (the "Regulations").

The ICRT strongly supported the E-Commerce Directive and establishment of an Internal Market in the field of e-commerce. The Internet enables businesses, including small and medium-sized enterprises, to sell throughout the EU without having to set up shop in each Member State. By increasing the number of companies that sell EU-wide, the Internet enhances competition and gives consumers access to a wider variety of goods and services than ever before.

Internal Market Directives seek to promote and facilitate cross-border business in the EU by, among other things, simplifying and clarifying legal requirements for providers of services. The trend, started by the Television without Frontiers Directive in 1989 (revised 1997), is to apply the country of origin principle with regard to the law applicable. According to this principle, an entity that provides a service throughout the EU need comply only with the laws of the Member State in which it is established. You will no doubt recall the long debates in the Council of Ministers regarding the need for such a principle to be applied to information society services under the auspices of the E-Commerce Directive, and the UK's sterling defence of the principle.

In this respect, the ICRT believes that it is important for the UK to implement accurately the Directive's applicable law provisions. Unfortunately, the Regulations fail to do so. Unless they are amended, the growth of e-commerce in the UK may be impeded.

The Regulations fail to implement properly the Directive in several ways. They do not provide that UK service providers are subject to UK law. They fail to exclude applicability of other laws in the UK Courts to a complaint from an entity in another State. They overreach the scope of derogations in the Directive and they do not properly implement the provisions on public health and consumer legislation and cultural and linguistic diversity.

1. The UK should ensure that service providers established on its territory are subject to UK law

The Directive clearly provides that providers of information society services must comply with the law of the country in which they are established. As Recital 22 notes, "information society services should in principle be subject to the law of the Member State in which the service provider is established". Because Directives are addressed to Member States, Article 3.1 phrases this requirement in terms of a demand on Member States: "Member States shall ensure that [...] a service provider established on its territory comply with the national provisions [...] in the Member State in question". In order to implement

this provision, Member States must transpose it as an obligation on service providers established there to comply with the requirements of that State's legal system.

The Directive expects service providers to comply with all applicable laws in the country of their establishment. Limiting the regulation to an enforcement focus only addresses part of the objective. The regulation should unambiguously require service providers to comply as stated in the Directive.

The Directive Article 3 refers to "applicable national provisions", which extends to a broader category of legislation than purely regulatory. The duty of care, for instance in the law of tort is a "national provision" to which entities are subject. This should be clarified and the regulations amended to include all laws applicable to information service providers.

2. The UK should make every effort to create legal certainty

The restrictions test envisaged by the regulations leaves importing businesses very unclear as to what requirement they should comply with and which are likely to be struck down. This is detrimental to e-commerce and equally risks creating an uneven playing field between domestic service providers and service providers not established in the UK.

In sum, Regulation 7 should be rewritten to provide that service providers established in the UK are subject to UK domestic law. Germany has taken this approach.¹ An even better formulation would be to follow Austria's and Luxembourg's implementations and provide that service providers established in the EU are subject to the domestic law of their Member State of establishment.²

3. The UK should not extend the derogation for contractual obligations to pre-contractual measures

The Regulations correctly transpose verbatim the derogation for contractual obligations. However, the Guidance for Business incorrectly takes this a stage further by extending the derogation to pre-contractual information. Had it been the Directive's intention to do so, it would have been explicitly mentioned in the Directive's Annex, along with all other derogations.

The confusion arises from a partially incorrect interpretation of Recital 56 of the Directive, which states, "As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract".

The Guidance for Business erroneously splits the above Recital in two and manipulates the wording with the effect of broadening the scope of the derogation. This is contrary to the European Court of Justice's guidance on derogations, which states that derogations to provisions must be applied narrowly.

¹ Germany

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 at <http://www.iid.de/iukdq/EGG/index.html>

² Luxembourg

Art 2.4 "The legislation of the place of business of the information society service provider shall be applicable to providers and the services they provide, without prejudice to the freedom of the parties to choose the law applicable to their contract."

Law available at http://www.etat.lu/memorial/T01_a/tableaip.html

Austria

Part 6, § 20(1) "In the co-ordinated field (§ 3(8)), the legal requirements for a service provider established in a Member State shall be determined in accordance with the law of such state."

Law available at <http://www.bgbl.at/CIC/BASIS/bgblpdf/www/pdf/DDD/2001a15201>

We believe it is unnecessary to include any reference to Recital 56 in the Guidance for Business, especially an inaccurate one, and urge the UK to follow Germany's approach to this derogation. The explanatory memorandum to the German law states: "In accordance with the restrictions laid down in the Annex the exemption will not apply to pre- and post-contractual obligations. It also does not cover general provisions with respect to consumer contracts".

4. The Regulations' provisions on public health and consumer legislation and cultural and linguistic diversity should be redrafted

Regulation 4 provides the Regulations "do not affect any national legislation implementing Community acts where it establishes the level of protection in particular as regards public health and consumer interests". In our view, the words "do not affect" establish an incorrect hierarchy between the Regulations and UK law implementing other EU legislation. In fact, they are of equal validity, as reflected by Article 1.3's statement that the Directive "complements Community law applicable to information society services". The UK should instead either directly copy the language of Article 1.3 into the Regulations or, better, recognise 1.3 as the mere declaratory statement that it is and delete Regulation 4 in toto.

Likewise Regulation 6 provides that "these Regulations are without prejudice to measures taken at national level in order to promote cultural and linguistic diversity and to ensure the defence of pluralism". The proposed Regulations change the meaning of Article 1.6 by omitting its qualification that such measures must be taken "in the respect of Community law". Again, the UK should either directly copy the language of Article 1.6 into the Regulations, or recognise 1.6 as the mere declaratory statement that it is and delete Regulation 6 in toto.

* * *

We fear that if the Regulations are adopted as proposed, they will impair the Government's goal of making the UK "the world's best environment for electronic commerce", as set forth in the Performance and Innovation Unit report *e-commerce@its.best.uk*. If followed by other EU countries, they could create a disincentive to UK businesses offering services abroad. For the reasons set forth in this letter, we urge the Government to adopt Regulations that fully implement the Directive as enacted and interpret derogations from it strictly.

Yours sincerely,



John Stephens
Chairman ICRT

Cc: Mr Douglas Alexander MP, Minister of State for e-Commerce and Competitiveness
Mr Guy Russell, CII, Department of Trade and Industry
Mr Matthew Conway, CII, Department of Trade and Industry (by e-mail)

Attached: list ICRT members