

01 May 2002

Guy Russell
Department of Trade and Industry
151 Buckingham Palace Road
London
SW1W 9SS

Dear Mr Russell,

THE ELECTRONIC COMMERCE DIRECTIVE (00/31/EC)

IEE is pleased to have this opportunity to contribute to the consultation on the draft implementation Regulations, for the Electronic Commerce Directive. This is a very complex issue, both legally and technically, but certainly on the latter aspects, IEE is most willing to help where at all possible.

The documents set-about improving the good practice with regard to British e-commerce service providers, but there is much opportunity for interpretation. The guidance document appears to intend that the acceptability of the application of much of this will be left to the courts to resolve. This makes it very difficult for those seeking to comply, to establish whether or not they do.

Further details identifying the providers who fall within the scope of this directive, would also have been useful.

Detailed comments on specific regulations can be found at Annex A. Annex B contains comments on the interim guidance for businesses. Some information about IEE is also attached.

If you have any queries on any part of the response, please do not hesitate to contact me.

Yours sincerely,

Dr Mike Rodd,
Director Knowledge Services

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Annex A – The Draft Implementing Regulations

Regulation 2: ‘Interpretation’

As most terms in the draft Regulations are copied almost word for word from the Directive, and given that the Directive is vague and capable of a range of legal interpretations, scope exists for some contrast between flexibility and uncertainty - in the precise meaning of “commercial communication”, for example.

Regulation 7: ‘The Internal Market’

IEE is concerned that neither the draft Regulations nor the Interim Guidance give a sufficiently clear indication of the extent to which a UK-established service provider can be confident that it will not be subject to the laws of other member states into which it supplies services. The extent to which UK law will be disapplied to service providers established in other member states is also unclear.

Naturally, it is difficult for the Government to predict how other member states will interpret ‘country of origin’ and thus the extent to which they will disapply their national laws to UK service providers. It would be helpful however, if the Interim Guidance gave some indication of what legislative provisions the Government views as restrictions on the freedom to provide services into the UK, and which will thus not be enforced against service providers established outside the UK. Currently, it seems that an extra-UK service provider could only be certain that a particular law would not apply to it if this proposition had been tested in court. The Government should amend the relevant legislation to expressly state that it does not apply to extra-UK service providers - as the Treasury has done in respect of certain financial services legislation.

‘Country of Origin’

According to the draft Regulations, the applicable law to any cross border dispute will continue to be determined by existing conflict of law principles. We understand that certain sections of the Commission argue that, on a correct interpretation of the Directive, the country of origin principle should, within the co-ordinated field, take precedence over private international law. If this were the case, a UK service provider sued in the UK would be subjected only to UK law. The interests of UK business would be best served by giving country of origin as wide as possible a scope, along the lines of the Commission’s interpretation. In this context, the current draft Regulation 7, which appears to state that UK law is only applicable to UK service providers’ extra-UK activities insofar as such law is enforceable by “enforcement authorities”, is too narrow an implementation of Article 3(1) of the Directive. The current draft Regulation 7 should be replaced with a provision which follows Article 3(1) of the Directive more closely. Taking this approach would also seem to minimise the risk of allegations that the UK has incorrectly implemented the Directive.

Regulations 8 & 9: ‘General Information to be provided/Commercial Communications’

The issue of flexibility versus uncertainty (see above) is raised here once again. The Regulations do not mention how the information provisions should be achieved in practice: whether one can provide information on a web site even if the service is provided over a mobile telephone, for example. The principle Service Provider information should be made available in a standard way and in a standard format. In the case of a web-based service it is logical that the Trademark or Logo on the entry page is at least, always linked to a page which in a Standard Format summarizes the provider information requested. This may be minimum information and links to other pages may be included. Also, further clarification is required on whether the requirement for a business to keep “permanently” the details of a transaction, means that it must keep the information forever.

Regarding sub-section (2) of regulation 8, some explanation is needed as to whether the information required about prices is concerned with presentation only, or does it go to the correctness of the price? If the latter, it overlaps with the legislation on misleading price indications - that legislation provided a due diligence defence, whereas these provisions do not.

Regulations 10: ‘Unsolicited Commercial Communications’

Providers of unsolicited communications should provide a facility, clearly indicated on such postings, whereby specific recipients and entire domains can be removed from future postings.

Regulations 11–14: ‘Contracts Concluded by Electronic Means/Placing of Order’

Further explanation is necessary to clarify whether the terms and conditions of a contract should be made available before the conclusion of the contract. The aim of this Directive appears to be to change the information requirements of a contract, rather than the actual formation of a contract, and the drafting of the Regulation should be altered to clarify this difference.

Regulation 13: ‘Placing of the Order’

Sub-section (2) does not provide sufficient protection for recipients of a service, from rogue traders. Being able to access something, and actually accessing it, are very different things. Orders and Notices need to be specifically acknowledged as proof, and should be acknowledged via a system where password identification of the user is facilitated. This should be to the address of where the service is to be provided.

Regulation 15: ‘Liability of the Service Provider’

Further clarification at this stage, on statutory notice and take down procedures would be useful.

Regulation 16: ‘Right to Cancel Contract’

There is concern about the introduction in draft Regulation 16 of an indefinite right for a service recipient to cancel contracts where draft Regulations 11(3) and 13(1) have not been complied with. Consumers buying online already have cancellation rights under the Distance Selling Regulations in very similar circumstances. Under the Distance Selling Regulations however, this right of cancellation is time limited and the consumer has certain obligations in respect of goods or services provided to him prior to cancellation. The introduction of draft Regulation 16 would give consumers conflicting and wider cancellation rights. More importantly, draft Regulation 16 would appear to extend such cancellation rights to business customers. Article 20 of the Directive only requires member states to introduce sanctions for breach of the Directive which are necessary and proportionate. Giving business customers rights of cancellation for breaches of draft Regulations 11(3) and 13(1) is unnecessary and disproportionate, as the right for businesses to sue for damages under Regulation 15 is sufficient.

Regulation 18: ‘Caching’

More detail is required on what is an “administrative authority” for the purposes of caching.

Annex B – Interim Guidance for Business

Guide 2.2: ‘Commercial Communication’

Services, not just Activity or Regulated Profession, should be included in section 2.2(a), and maybe distributed services should also be included; the so-called free digital image storage and publication services, for example. The actual storage and web-publication may be at several locations around the world, and the revenue stream from printing the images may also be located in several geographic locations. If the storage/publication service is being operated by a UK company, then its head-office address should be used for location, even though the service is essentially free. The paid-for printing services may be physically outside of Europe/UK but should be regulated by the same head-office location.

Guide 4.1: ‘Outbound Services’

There is no guidance on when the situation arises where a service is reflected. It is quite common today for electronic payment to be actually handled invisibly on the web by integration of the facilities of a third party site. Further guidance is required on what the position is with regard to the provision of geographic/business information for these third party sites. All the time that one is in a site operated by the principle service provider, a corporate style should be used which links them. The provision of a small logo on each page, maybe linked to the corporate coordinates, would suffice. Where a third party service is linked in, their logo should also be present.

Guide 5.2: ‘General Information to be Provided’

In subsection (b), the issue of geographic location of the service arises once again. A provider may provide several services, and they may be in different or distributed locations. There is no reason why the supplier should hide this, it may be unreasonable to try and identify each one of them. The key issue is where the responsibilities lie; and that can be one physical location.