

LACORS RESPONSE TO THE DEPARTMENT OF TRADE AND INDUSTRY

Public consultation on draft implementing regulations to the E-Commerce Directive, partial Regulatory Impact Assessment and interim guidance for business

1. Summary

- 1.1 This paper details LACORS response to the Department of Trade and Industry (DTI) on the public consultation on the draft implementing Regulations to the Electronic Commerce Directive (00/31/EC) ('the Directive'). The Directive aims to ensure the free movement of information society services across the European Community.
- 1.2 We recognise that the draft Electronic Commerce (EC Directive) Regulations 2002 ('the Regulations') are very similar in content to the Directive with no 'gold plating', however, there are a number of areas where we believe a greater degree of clarity could assist consumers, businesses and enforcement agencies. These matters are considered below.
- 1.3 The DTI has also invited comments on the interim guidance for business and draft partial Regulatory Impact Assessment, which is also covered in this paper. In particular LACOTS would like to draw the Government's attention to the additional enforcement costs that local authorities in England, Wales and Scotland will face on implementation of the Directive.

2. Draft Electronic Commerce (EC Directive) Regulations 2002

Level of protection (Regulation 4)

- 2.1 LACORS welcomes the provision that the Regulations will not affect any national legislation, where it establishes levels of protection with regard to public health or consumer interests. However, there could be some concerns where the existing national legislation exceeds the requirements of Community law and could be subject to the same restrictions imposed under Regulation 7(4) – 7(6).

Internal market (Regulation 7)

- 2.2 LACORS still finds the jurisdictional issue slightly confusing and unclear. Whilst the adoption of the 'country of origin' approach would require service providers to only comply with the national law of the Member State where they are established. Consumers & enforcement agencies will have to consider service provider's other legal systems, when purchasing goods and services.
- 2.3 Regulation 7(1) shifts the responsibility for enforcement so that trading standards services in the UK and other UK enforcement authorities will regulate information services provided in the UK, wherever in the EEA they are delivered. Similarly the enforcement authorities in other Member States will regulate those information society services provided elsewhere in the EEA, and used by UK consumers and business. The Regulations will apply to online trade and advertising, which includes the internet, email and mobile phones whether the goods or services are themselves delivered electronically. However, this could lead to additional enforcement costs for local authorities.
- 2.4 Regulation 7(2) provides for any applicable UK law that falls within the coordinated field may not be applied to an information society service provided by the service provider who is

established in another Member State, where the application would restrict the freedom to provide information services to a person in the UK.

- 2.5 We generally support the view that the 'host-state' should regulate the information services provided within their Member State, however, we believe that better harmonisation of Member States legislation is essential. At present there are too many interpretational differences across the EEA.
- 2.6 Trading standards authorities have suggested that electronic communications could contain a 'statutory warning' to make the recipient aware that the transaction is subject to another Member States legislation. We fear that at present consumers could be unable to make an informed choice.

Information (Regulations 8 and 11)

- 2.7 Regulations 8 or 11 do not prescribe how the requirement to make information 'easily, directly and permanently accessible' should be met. Sending an email to the recipient could satisfy this requirement. Although this may be acceptable in the majority of e-commerce transactions, trading standards authorities are concerned that there will be a small proportion of purchasers who will use cyber cafés, local authority libraries etc for their transactions and this may cause problems.
- 2.8 Although it may be onerous to require a trader to provide an instant response that could be recorded/printed by the consumer, it would assist in these situations and we believe it would be the preferable requirement. Certainly we believe that it is insufficient for the listed information to be provided on web sites, which can be easily hidden and quickly changed.
- 2.9 We believe that it would be helpful if the DTI Guide for Business were to expressly provide guidance on these issues and advocate the various methods, which could be used to provide information.

Commercial communications (Regulation 9)

- 2.10 Again the Regulations do not prescribe how the requirement to make the commercial communication 'clearly identifiable' should be met. LACORS recognises that there is a need to be flexible but believes that the DTI Guide for Business should try to clarify this position.

Unsolicited commercial communication (Regulation 10)

- 2.11 Regulation 10 will ensure that unsolicited commercial communications, which are sent by electronic mail, where permitted, should be clearly and unambiguously identified. However, it is disappointing that there is no specific provision in respect of 'opt-in' schemes. Article 7(2) of the Directive requires Member States to ensure that service providers undertaking commercial communications by email consult regularly and respect the opt-out registers of people not wishing to receiving such communications.
- 2.12 We recognise that the Government may be reluctant to legislate on 'opt-in' schemes, due to the intended provisions of the European Commission's Directive on Data Protection in E-Communications (COM (385) 2000 final). However, LACORS still advocates the adoption of an 'opt-in' scheme which would mean that consumers and businesses would have to

consciously consent to receive 'spam' mail, and could therefore avoid unsolicited commercial emails, which promote 'get rich quick' schemes, pyramid selling, chain letters etc.

Placing of the order (Regulation 13)

- 2.13 Although we recognise that in the negotiations on the E-Commerce Directive it was agreed that the Directive would not go so far as harmonising the moment of conclusion of an electronic contract, we still believe that both UK consumers and businesses require further guidance to enable them to recognise when they are committed to an e-commerce contract. It is important to ensure both the consumer and internet know what contractual rights they have, especially as the Directive also preserves the freedom for parties to agree under which jurisdiction the contract is to be governed.
- 2.14 LACORS still remains very concerned that Regulation 13(1)(a) only requires an order to be acknowledged 'without undue delay'. Although this is the term used in the Directive we believe that problems are likely to arise when consumers do not know the status of their order. LACORS would suggest that responses should be made immediately or within a specified time period (eg within 48 hours). If an automated electronic response system was used, we believe that this should not be a burden to industry and the service providers.
- 2.15 Any uncertainty about when an on-line contract is concluded will cause problems with the application of the Consumer Protection (Distance Selling) Regulations 2000 and the start of the statutory cooling-off period.
- 2.16 Already there may be some uncertainty in law as to whether the trader's website is the 'offer' or merely an 'invitation to treat'. Indeed in recent case-law business have argued that confirmation by email was not acceptance of the contract. The Regulations are still very unclear on the timing, in law, of contractual offer and acceptance. Acknowledging receipt of the customers order is vital if that is 'acceptance' of a contract between the two parties. LACORS would welcome clarification on this area.

Meaning of the term 'order' (Regulation 14)

- 2.17 LACORS finds Regulation 14 very unhelpful and uncertain. Although we recognise that contract formation will still be subject to common law, we believe that it would have been more helpful to expressly confirm whether the term 'order' formed part of the contract.

Other matters

- 2.18 At present the Regulations have no criminal sanctions for non-compliance. In order to ensure compliance, LACORS agrees with the London Trading Standards Association belief the Regulations should clarify and strengthen the criminal offences and enforcement provisions, as a matter of urgency. Recent local authority surveys indicate large numbers of web sites fail to comply with the Distance Selling Regulations and other consumer protection legislation, on transactions conducted over the internet. A more robust system of enforcement should be provided.
- 2.19 Unfortunately the Regulations do not establish statutory obligations for service providers to promptly inform public authorities of alleged illegal activities undertaken or information provided by the recipients of their services (see Article 15(2) of the Directive). Nor do they impose

obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements (see Article 15(2)(b)). LACORS believes that these would have been very helpful provisions for trading standards authorities. They would have enabled authorities to obtain valuable information and take enforcement action where necessary and proportionate. We would ask the Government to reconsider including such a provision within the Regulations.

- 2.20 In relation to UK consumer credit legislation, it is uncertain whether the Regulations will have any specific impact, particularly as the current credit regime is under a fundamental review. We would support clarification on the remit of section 75 of the Consumer Credit Act 1974 in the global market place, should that provision remain.

3. Interim guidance for businesses

- 3.1 LACORS welcomes the production of some interim guidance for business in the publication 'A Guide for Business to the Electronic Commerce (EC Directive) Regulations 2002'. Generally we find that this information is quite technical and may not answer the frequently asked questions that many businesses may have on the Regulations.
- 3.2 In the 'Foreword - Key features of the Regulations' it states that if the trader is 'established' in the UK and sells or advertises online, the trader will be subject to UK law. It would be helpful if clarification could be provided on the term 'established'. Must there be a registered office in the UK? Some traders may register their business abroad to avoid being subject to UK legislation.
- 3.3 Introduction 1.3 – in the reference to online trade and advertising it may be useful to also include a reference to digital TV.
- 3.4 Key Definitions 2.11 – this refers to the place of establishment of a company as where 'it pursues its economic activity'. We still believe that this could occur in a number of Member States and greater information or guidance is required on this definition.
- 3.5 Unsolicited commercial communications 5.9 - we believe that it would be helpful if the guide could give some view on how these could be 'clearly and unambiguously identifiable'.
- 3.6 Information to be provided 5.13, 5.16 – again we believe that guidance could be given by the DTI on how the recipient could be given information in a 'clear, comprehensible and unambiguous manner'.
- 3.7 Information to be provided 5.19 – terms should be provided in a format that allows them to be stored and reproduced ie email, post, fax or any other formats? Any guidance or preference should be given to assist businesses. Again we believe that the lack of clarification on express contractual terms will be a concern for both businesses and consumers.

4. Draft partial Regulatory Impact Assessment

- 4.1 As previously indicated, LACORS agrees with the DTI comments in section 7, option 2 of the draft partial Regulatory Impact Assessment. This states that transposition of the Directive by legislative and non-legislative means and enforcement will entail additional costs for national regulatory authorities such as local trading standards authorities, acting on behalf of consumers.

- 4.2 The implementation of the Directive will place a substantial resource demand on local authorities in England, Wales and Scotland to effectively ensure compliance with the Regulations.
- 4.3 There will be publicity on implementation of the Directive and is likely to give rise to an initial increase in demand for consumer and business advice, which again will have a start up resource implication. There may also be an expectation on local authorities to undertake promotional and educational work for consumers and traders on the new legislation.
- 4.4 Additional resources will be required to provide adequate IT equipment and training on its use. Training will also be required to equip staff with the skills and knowledge to carry out inspections and investigations on the world-wide-web. In the MidCOTS survey¹ one trading standards authority commented: *“The use of the Internet will pose major problems for enforcement and advice agencies as its use develops. Without the proper training and funding of enforcement staff, the problem can only get bigger.”*
- 4.5 Further information on projected costs can be provided by LACORS when the DTI considers it most helpful.

5. Conclusions

- 5.1 [E-Commerce@its.best.uk](mailto:its.best.uk) identified trust and confidence as crucial to ensure consumers willingness to participate in electronic markets. Local trading standards authorities believe that in order to secure on-line trust and confidence consumers must be properly protected against unfair or illegal trading practices. It is essential that the UK should reap the full benefits of e-commerce, boosting consumer confidence and promoting a competitive and innovative global market place. We believe that further work needs to be done on the draft Regulations and Guidance to Business to ensure that the Government can achieve this.
- 5.2 LACOTS recognises the growing importance of e-commerce for our economic community. It is essential that the global market should protect both consumers and traders, providing a fair and competitive market place, with effective redress mechanisms. UK consumers will lose confidence in making purchases online from non-UK providers if they cannot access their UK legal rights, and the level of protection provided by other member states is less than given under UK legislation.

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¹ MidCOTS is a partnership of eleven local trading standards authorities in the Midlands which comprises; Birmingham, Coventry, Dudley, Herefordshire, Sandwell, Solihull, Staffordshire, Stoke, Telford & Wrekin, Walsall, and Wolverhampton. ‘Creating Trust and Confidence in Electronic Markets’ was a survey carried out by MidCOTS through the DTI funded project ‘Protecting Consumers and the Economy in the Information Age’ in January 2001