



The Law Society

**THE LAW SOCIETY'S
RESPONSE TO THE CONSULTATION
ON THE DRAFT
E-COMMERCE REGULATIONS**

MAY 2001

Introduction

The Law Society welcomes this opportunity to comment on the Department of Trade and Industry's implementation of the provisions of the E-Commerce Directive. We are disappointed to note that the draft Regulations, despite being published later than originally envisaged, are in many places simply a direct transposition of the text of the Directive. The basic purpose of the E-Commerce Directive was to clarify complex issues, such as jurisdiction and applicable law, thereby reducing the risk of doing business online. However, several critical parts of the Directive which required more detailed implementation guidance from the DTI have been simply transposed. The benefits to the UK of a detailed and constructive implementation of the E-Commerce Directive will be the lost if the final Regulations do not offer greater clarity and certainty to providers of information society services.

(The numbering below refers to items in the Interim Guidance to the E-Commerce Directive Regulations 2002).

2.10; Established service provider

The definition is not very precise. Unfortunately, this is a problem with the face of the Directive. We believe that the Regulations could do more to illustrate the definition.

3.5 & 3.6; Private international law

The Regulations will implement only a 'partial harmonisation of single market rules' (Draft Regulatory Impact Assessment 2(ii)(b)). Information society service providers must act in compliance with home country rules. However, in the case of disputes involving non-UK entities, the Private International Law (Miscellaneous Provisions) Act 1995 will apply. The use of applicable law will be subject to a restriction test to ensure that the freedom to provide information society services is not undermined. The Law Society believes that it is important that the Regulations implement a home-country approach to applicable law to the maximum extent. The UK's interpretation of this Article seems out of step with implementations in other member states.

5.3; General information to be provided

In the Interim Guide for Business the DTI says the Government envisages that the requirement to make information 'easily, directly and permanently accessible' should be capable of being met 'if the information is accessible by other means (e.g. inclusion on a website). This is welcome news but it should be in the body of the Draft Regulations themselves.

5.11; Regulated professions

The Draft Regulations do not transpose Article 8 (on the conduct and development of codes of practice by the regulated professions) because the Government understands that no such conduct requirements exist. The Government reminds regulated professions that the introduction of such

requirements 'would be incompatible with the requirements of the Directive'. (I don't get what we're trying to say here.)

5.22; Placing of the order, and 5.29; Right to cancel contract

The Draft Regulations simply transpose Article 11 which states that receipt of orders must be acknowledged 'without undue delay and by electronic means', and that customers must have 'appropriate, effective and accessible technical means' to identify and correct errors in the order. The practical implications for service providers of these requirements are not entirely clear, and the Interim Guide for Business simply transposes the Directive with almost no further information. It simply states that 'the onus is likely to be on the service provider to demonstrate that he has complied' with the requirements. For example, there is no guidance on how this is to be done.

Because contracts will not be enforceable unless the service provider has provide means to identify and correct errors in the order (5.29), it is particularly important that this issue is clarified.

The Regulations should give further clarity on this difficult Article.

6.6, 6.7, & 6.8; Caching and hosting – liability of intermediary service providers

Both the Draft Regulations and the Interim Guide for Business simply transpose the Directive's article on the 'actual knowledge' of offending content. The Guide only adds that 'it is expected that the onus will be on the enforcement authorities to demonstrate that a service provider had actual knowledge but did not act appropriately upon obtaining it.' This clarification would be of more use in the Regulations than in the Guide for Business. Also, the Regulations and Interim Guidance make it no clearer what 'actual knowledge' is. This vital area should be clarified.

6.9 'notice and takedown' procedures

This section declines to establish any guidelines for the removal or disabling of access to information. The Government expects that industry self-regulation, codes of conduct and a 'sectoral approach' constitute the best way to deal with this issue. However, this seems to leave the way open for practice to develop in quite an ad hoc fashion. The outcome of the Demon Internet case may be leading to ISP's taking an extremely cautious response to notice and takedown orders in the future, with potentially chilling effects on freedom of expression. It is not clear what, if any, effect the DTI Guidance will have on the developing body of law. There is also no guidance on what ISP's should do when the removal / access to information is disputed. The Law Society believes that it is very important that proper Guidance is given on this issue.