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Dear Mr Russell,

Consultation on the Implementation of the Electronic Commerce Directive

I refer to the above consultation and attach the Memorandum of Comments by the Electronic Commerce Committee of the Law Society of Scotland. I confirm that a hard copy will follow by post.

Yours sincerely,

Sarah Fleming
Head of International Relations

MEMORANDUM OF COMMENTS
BY THE ELECTRONIC COMMERCE COMMITTEE
OF THE LAW SOCIETY OF SCOTLAND
TO DTI CONSULTATION ON THE
DRAFT ELECTRONIC COMMERCE (EC DIRECTIVE) REGULATIONS 2002

(May 2002)

The Electronic Commerce Committee of the Law Society of Scotland (“the Committee”) welcomes the opportunity to respond to the DTI consultation on the draft Regulations to implement the Electronic Commerce Directive. The Committee’s views are set out below.

Regulation 2

The Committee has concerns regarding some of the definitions set out at Regulation 2:-

The definition of “Consumer” is given as any natural person who is acting for purposes which are outside his trade, business or profession. It is assumed that the Regulations are intended to apply to potential consumers having no trade, business or profession or to retired persons, and the Committee considers this should be made clear.

“Information Society Services” is defined simply by reference to Directives 98/34/C and 98/48/EC. Arguably the carriage of goods following an electronic order is outwith the definition as presently drafted.

Regulation 3

The exclusions occurring in draft Regulation 3(1)(d)(i) and (ii) are not understood. Firstly it is not clear which professions are “equivalent to” a public notary. Secondly, it is uncertain as to which activities of those professionals would involve a “direct and specific connection with the exercise of public authority”. In sub-paragraph (ii) the representation of a client and the defence of his or her interests before the Courts is but one aspect of the solicitor/client relationship and it is unclear as to why the draft Regulation focuses upon only this aspect. At the very least the Committee would suggest this definition be amended so as to read “The representation of any client or clients and the prosecution or defence of his interests before any Court, Tribunal, or equivalent authority, including arbitration and alternative dispute resolution”.

Regulation 5

The Committee considers that, since this draft Regulation does not enact any measure, it should be deleted.

Regulation 6

The Committee is not clear as to the meaning or intent of this draft Regulation. It is noted that no laws are amended or affected by it. Further, the “defence of pluralism” is a concept unknown to the Law of Scotland and, the Committee understands, also to the Law of England and Wales. Inclusion of this provision merely adds uncertainty and should be deleted.

Regulation 7 - Internal Market

The Committee notes that the Government’s oft-stated objective has been to create a legal framework engendering conditions whereby the UK will be come

“the best place in the world to do e-business”. With this objective in mind, the Office of the E-Envoy was created. The Committee would refer in particular to the following statement of the E-Envoy (reported at <http://www.e-envoy.gov.uk/publications/reports/pmreports/rep6jun.htm/>). This web page provides details of a report from both the E-Minister (then Patricia Hewitt) and the E-Envoy (Andrew Pinder) to the Prime Minister. The Committee notes in particular the following remarks.

“Our commitment to making the UK the best place in the world for e-commerce took a major step forward this month, when the Electronic Communications Bill received Royal Assent. The new legislation will create confidence in doing business electronically, giving legal certainty to electronic signatures and encouraging the development of secure and trusted e-commerce services.on 4th May the European Parliament approved without an amendment the E-Commerce Directive. This will ensure that E-Commerce traders in the EU *need comply only with the law in their home member state*.....we will work with the Commission and other member states to develop [the draft E Europe action plan] into a focused strategy to address the key barriers to the further uptake of the internet in Europe, in time for consideration at the Feira Summit on 19-20 June”.

The Committee feels that it is significant that attention was drawn to the fact that approval of the E-Commerce Directive by the European Parliament “without an amendment” in this report and that it was specifically stated that E-Commerce traders in the EU would require to comply only with the law in their home member state.

The Committee is, however, unconvinced that Regulation 7, and particularly Regulation 7(1) as presently drafted, recognises this intention. If, in June 2000 the Government’s public position was that it supported the “Country of Origin”

principle, then the Committee considers that Regulation 7 could have been drafted in a far more positive manner, containing a simple statement along the lines that UK Law would apply to an ISSP trading in the UK regardless of where the information society service was provided in the EU.

Regulation 8

The Committee considers that a number of the definitions contained within Regulation 8 are opaque and require clarification. The Committee would cite, in particular:-

- *“Any relevant enforcement authority”* - it is not what enforcement authorities are referred to here.
- *“Easily, directly and permanently accessible”* - the expression “directly” is very vague. Further, is information “permanently” available if it is posted on a website?
- *“The geographic address at which the service provider is established”* – the Committee assumes that this is intended to denote the principal place of business and not every outlet. The Regulation should state this.
- *“Communicate with him in a direct and effective manner”* - again, “effective” is unsatisfactory. Does this impose obligations in regard to time scale within which the service provider must reply? Does it impose obligations as to the language in which communications must occur?
- *“Clearly and unambiguously”* - this expression occurs both in Regulation 8 and Regulation 9. The degree of subjectivity involved in assessing whether information is sufficiently clear and unambiguous is readily apparent. Such uncertainty is undesirable.

Regulations 11 and 13

The Committee considers that the sanctions for failure to comply with Regulations 11 and 13 are draconian. Therefore, business and business advisers should be afforded the maximum possible assistance by the wording of the Regulation with a view to understanding what it is that businesses are required to do. Regrettably, however, Regulations 11 and 13 – as presently drafted – adopt a number of terms that the Committee considers are almost wholly lacking in precision. For example:-

- “Comprehensible”
- “Unambiguous”
- “Appropriate”
- “Effective”
- “Accessible”

The Committee considers that existing draft wordings require to be tightened up quite considerably in order to provide greater clarity.

Regulation 14

This Regulation is simply not understood. It should be for the parties to a contract to determine the status of the order.

Regulation 16

The Committee recalls that, when the draft Distance Selling (Consumer Protection) Regulations 2000 were promulgated, an open-ended right of cancellation formed part of the wording. When the final Distance Selling Regulations were enacted, this right of cancellation had been substantially

diluted, and a three month cancellation period had been substituted. It is undesirable that the draft Electronic Commerce Directive Regulations should contain sanctions that are materially different to those found within the Distance Selling Regulations. Further, it appears to the Committee that an open-ended right of cancellation (which arguably may become operable for the most trivial of reasons) is well beyond the intention of the European legislative bodies expressed in the Directive. The provisions in Regulation 16 should be brought into line with the Distance Selling Regulations.

Regulation 21

The Committee had difficulty in comprehending the intended scope and purpose of the compliance defence. It is also unclear as to why paragraph 19(a)(2) is not to apply in criminal proceedings.