

## DEPARTMENT OF TRADE AND INDUSTRY CONSULTATION ON IMPLEMENTATION OF THE E-COMMERCE DIRECTIVE - LOVELLS' RESPONSE

### 1. INTRODUCTION

- 1.1 Lovells welcomes the opportunity to respond to the Department of Trade and Industry's Consultation on the draft Electronic Commerce (EC Directive) Regulations 2002. This response focuses on issues that have not been addressed in the various draft responses we have seen.
- 1.2 As an overall comment, we are concerned that the lack of clarity in certain key areas will create uncertainty in relation to the scope of activities covered by the Regulations and of compliance requirements under the Regulations. This, together with the severe sanctions applicable for non compliance in some cases, may well detract from a key aim of the Directive and the Regulations, by discouraging the development of e-commerce.

### 2. DEFINITIONS

#### 2.1 Information Society Services

- (a) This is a key definition, dealt with by reference back to the Directive, which itself refers to another Directive<sup>1</sup>. As a matter of principle we consider that a definition should be intelligible without having to cross refer to other documents. As it stands it is not easy to interpret and should be clarified.
- (b) The issues are well illustrated by application to website based information.
- (i) Where information about a supplier's products is freely available but is not part of a service whereby a prospective customer can apply online for a product, is not paid for by a third party and is hosted on the supplier's own server and supporting infrastructure, can this be said to be a service "normally provided for remuneration"?
- (ii) Website based information is available generally to the world at large. Can it therefore be said to be provided "at the individual request of a recipient"? The Interim Guidance for Business clearly envisages that such information provision does constitute an information society service but the point does not appear to be entirely free from doubt. Website information could on one view be likened to a broadcast, which is specifically referred to in the Guidance as not constituting an ISS.

It is acknowledged that there is a difference between (1) broadcast services such as TV or radio, where there is a general transmission which can only be received when transmitted; and (2) services such as film on demand over telephone line or information accessed through an Internet

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<sup>1</sup> Directive 98/34/EC as amended by Directive 98/48/EC

Service Provider or via the Internet on a website, where content is accessible when the individual chooses to access it. This does not necessarily however, in the latter case, result in the information being provided "at the individual request of a recipient".

## 2.2 Commercial Communication

- (a) The scope of this definition is also not immediately clear. It could be argued that any communication by a business will be designed, indirectly at least, to promote the image of that business, even if not promoting particular products. Therefore a communication to a customer in the course of administering a product or service could be deemed to be a commercial communication. The Interim Guidance, by stating that the "essential purpose is one of advertising", appears to support the view that such a communication would not be covered. It would be helpful to introduce this qualification into the definition.
- (b) We have a particular problem with the exemption in paragraph (b). Is this intended to exempt communications prepared by A and sent to his friend B promoting/recommending services provided by C (A being "independent" of C)? As it stands, the exemption could be read as if prepared "independently" means prepared by "that person" on his own i.e. without the assistance or involvement of anyone else.

## 2.3 Order

There is no definition of an "order". Draft Regulation 14 provides that except in relation to certain provisions, "order" may be, but need not be, the contractual offer. This does not appear greatly to aid clarity. It is most important to identify what constitutes the order as there are severe consequences for failure to comply with required steps in relation to orders. The contractual offer may of course be made by the service provider and in those and other circumstances there may be a number of views as to what constitutes the order placed by the recipient of the service.

## 3. OTHER ISSUES

### 3.1 Part Online and Part Offline

In many cases there is likely to be a "mixed" process for conclusion of an agreement so that, for example, the application process is dealt with on-line but the agreement is concluded off-line. It may well be that there is an online application process and then the contractual offer and acceptance are made in paper form and effected by post. Is it intended that such processes should be within the scope of the Regulations?

### 3.2 "Sent" Commercial Communications

The requirements of draft Regulation 9 apply to commercial communications "sent" by a service provider which constitute or form part of an information society service.

There are inconsistencies here that cause confusion:-

- (a) The definition of "commercial communication" clearly covers websites and the Interim Guidance confirms this.
- (b) Website information is not "sent" to third parties: it is accessible by third parties. Websites therefore seem to fall outside Regulation 9 and the Interim Guidance, which makes no reference to websites in relation to Regulation 9, appears to confirm this.

- (c) Regulation 10 refers to commercial communications sent by electronic mail. This implies that Regulation 9 is intended to cover other forms of commercial communication. Is this intended? If so, what form of communication might be covered?

### 3.3 Sanctions Under Draft Regulation 16

- (a) Failure to comply with Regulations 11(3) or 13(1) would result in the contract not being enforceable against the customer and would give the customer the right to cancel the agreement at any time. The service provider would also, as far as possible, have to put the customer back in the same position he was in prior to the contract.
- (b) This sanction may not be proportionate where either there has been a technical failure to comply without prejudice to the customer or where failure to comply is due to a technological failure outside the control of the service provider. An example of the latter case would be where an electronic acknowledgement of an order is sent by a service provider but never reaches the recipient of the service due to a breakdown somewhere in the transmission process or to the failure of the service recipient's own equipment.
- (c) If there are to be sanctions and remedies of this nature, then provision for return of goods and/or repayment of credit provided under the cancelled agreement should be included, perhaps following the approach taken in the Consumer Protection (Distance Selling) Regulations 2000.

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A9/RT/EHR  
2nd May 2002