

Comments on the UK's Proposed E-Commerce Regulations

May 2002

Microsoft¹ appreciates this opportunity to submit comments on the UK Government's Consultation on the proposed Electronic Commerce (EC Directive) Regulations 2002 (the "Regulations"). As we noted in our submission in response to DTI's initial consultation on implementation of the Directive, the UK has been a leader in Europe in creating an environment that promotes the uptake of e-commerce. Implementation of the E-Commerce Directive – and, in particular, its country of origin rule – will further encourage the growth of e-commerce, as it will give service providers certainty regarding which law applies to their online activities.

The country of origin rule is the centrepiece of the Directive. In e-commerce, businesses – especially SMEs – cannot afford to learn and comply with the complex regulations of every Member State. The country of origin rule solves this problem by providing that an entity that provides information society services throughout the EU need comply only with the laws of the Member State in which it is established. For this reason, we urged the UK Government, in our comments on the initial consultation on implementing the Directive, to adopt a "pure" implementation of the country of origin rule – one in which UK service providers are subject only to UK law and services providers established elsewhere in the EU are subject only the law of the their country of establishment (subject to the derogations set forth in the Annex to the Directive). According to the summary of responses to the consultation, all of the commenters who addressed this issue took the same position.

Unfortunately, the Regulations do not embody a "pure" country of origin approach. Unless they are amended, they could impede the growth of e-commerce in the UK. Companies established in other Member States may not sell to UK consumers, in order to avoid the costs and complexities of determining which UK laws apply to them. And, if other countries were to follow the UK and not to implement fully the country of origin principle, UK companies may avoid offering services to customers in other Member States for fear of being held liable under a national law of which they were unaware.

KEY MESSAGES

- **The Regulations should be redrafted to make clear that service providers established in the UK are subject to the whole of UK law.**
- **The country of origin rule supersedes private international law.**
- **The Guide to Business should be amended to reflect the narrow scope of the derogation for contractual obligation concerning consumer contracts.**
- **The Regulations transposing Articles 1.3 and 1.6 of the Directive should be deleted or, alternatively, should reflect the exact wording of those Articles.**

¹ Founded in 1975, Microsoft is the worldwide leader in software for personal computers. The company offers a wide range of products and services for business and personal use, each designed with the mission of making it easier and more enjoyable for people to take advantage of the full power of personal computing every day.

1. The Regulations should be redrafted to make clear that service providers established in the UK are subject to the whole of UK law.

The Directive's country of origin rule clearly provides that providers of information society services must comply with the law of the country in which they are established. The proposed Regulations, however, do not provide that service providers established in the UK are subject to UK law. Instead, they would merely require the UK government to enforce UK laws and regulations against providers of information society services established in the UK, irrespective of where they sell services in the EU. Although this is one aspect of the country of origin rule, it is far from a full implementation. It does not address what law applies to a service provider in the event of a private, civil law dispute between it and a customer. Nor does it address what law applies to a service provider in the criminal law context. In sum, the proposed Regulations turn the country of origin principle into a mere enforcement rule, contrary to the express intent and language of the Directive.

The UK's approach is understandable, given the phrasing of Article 3.1, which states that "Member States shall ensure that [...] a service provider established on its territory compl[ies]" with its law. But this language is an artefact of how Directives, which are addressed to Member States, are structured. In transposing the E-Commerce Directive into national law, Member States must "translate" this language into an obligation on domestic service providers to comply with the substantive domestic law of the Member State in question – including public law, private law, and criminal law.

2. The country of origin rule supersedes private international law.

Some commentators have suggested that the country of origin principle does not apply where private international law provides otherwise – a view reflected in the Regulations. This is simply not the case. During the Council negotiations, some Member States sought a provision stating that the Directive would be without prejudice to private international law. This proposal was rejected. Instead, the Directive merely "does not establish additional rules on private international law".

This statement makes clear that the country of origin rule is not a private international law rule. Indeed, contrary to private international law rules, which apply only where there is a conflict of laws question, the country of origin principle applies to all cases. It prevents conflict of laws questions from arising by subjecting a service provider only to the law of its country of establishment. Moreover, unlike private international law, which governs only private legal relationships, the country of origin principle applies to all branches of law – private, public, and criminal.

Within the EU, the country of origin rule supersedes conflicting rules – including those of private international law – in the areas covered by the Directive. Indeed, several of the Directive's derogations from the country of origin principle – such as the derogation for rules regarding the freedom of parties to choose the law applicable to their contract – relate to private international law. If the country of origin principle were subordinate to private international law, there would be no need for these derogations, as private international law would continue to apply in these areas. In sum, the inclusion of derogations for areas covered by private international law demonstrates that the Council of Ministers and the European Parliament recognized that the country of origin rule superseded private international law in areas falling within the scope of the Directive.

From a practical standpoint, giving primacy to private international law impairs the Directive's objective of "ensuring the free movement of information society services between the Member States". Under the Regulations' approach, a company seeking to learn what law applies to its activities would first have to determine whether private international law would apply the law of its home country or the law of the customer's country. If the law of the customer's country governs, the business would then have to determine whether that law restricted the free flow of information society services in order to determine whether that law could be enforced. The country of origin rule was designed to short-circuit this

complex, time-consuming, and costly analysis in favour of a simple direct result – providers of information society services are subject only to the laws of their country of establishment (with limited, narrow exceptions set forth in the Annex to the Directive).

Nor would applying UK law in this manner increase protection for UK consumers. If UK law is more stringent than that of the service provider's home country, it cannot be enforced, as it would restrict the provision of information society services. If UK law is more lenient, then it would come into play only if, for some reason, the service provider had failed to comply with its stricter domestic law. The right way to protect UK consumers in those cases is to seek compliance by the service provider with the law of its country of establishment.

In our view, the UK should follow the approach taken by Austria and Luxembourg by providing that (1) service providers established in the UK are subject to UK law and (2) service providers established in other EU Member States are subject to the law of their country of establishment.²

3. The Guide to Business should be amended to reflect the narrow scope of the derogation for contractual obligation concerning consumer contracts.

The Regulations correctly transpose the Directive's derogation from the country of origin rule for contractual obligations concerning consumer contracts. The Guide to Business, however, states that the UK will apply this derogation not just to the consumer contract itself, but also to pre-contractual measures, such as "information that has a determining influence on the decision to the contract" and "requirements to do certain things before entering into a contract". We believe that this interpretation of the derogation is mistaken. The Annex to the Directive sets forth an exhaustive list of exemptions from the country of origin rule. If pre-contractual measures were exempt, the Annex would expressly state so. The exact scope of the derogation for contractual obligations was discussed intensively in the Council, and ultimately the decision was taken not to extend it to pre-contractual measures.

Presumably, the language in the Guide for Business derives from Recital 56 of the Directive, which states "As regards the derogation [...] regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract". But the Guide for Business takes a far more expansive approach to the derogation than does Recital 56. The Recital, like the derogation itself, is expressly limited to the content of the consumer contract itself – it does not extend to pre-contractual measures, as suggested by the Guide to Business.

The Guide to Business's expansive approach to the derogation for consumer contracts, if applied in practice, would remove large parts of business-to-consumer (B2C) e-commerce from the scope of the

² **Luxembourg**

Art 2.4. " The legislation of the place of business of the information society service provider shall be applicable to providers and the services they provide, without prejudice to the freedom of the parties to choose the law applicable to their contract."

Law available at http://www.etat.lu/memorial/T01_a/tablealp.html

Austria

Part 6, § 20(1) "In the co-ordinated field (§ 3(8)), the legal requirements for a service provider established in a Member State shall be determined in accordance with the law of such state".

Law available at <http://www.bgb.at/CIC/BASIS/bgb/pdf/www/pdf/DDD/2001a15201>

country of origin rule. Most B2C e-commerce involves the sale of goods or services. This means that most B2C transactions involve contracts of some sort. If pre-contractual obligations were excluded from the scope of the country of origin rule along with contractual obligations, almost all B2C e-commerce would be exempt from the country of origin rule. In effect, the exemption would swallow up the rule. This result would be contrary to the case law of the European Court of Justice, which requires derogations contained in EU legislation to be interpreted strictly so as not to deprive operative provisions of their intended effect.

The Guide to Business should reflect the approach taken in the explanatory memorandum to the German law, which states: “[I]n accordance with the restrictions laid down in the Annex the exemption will not apply to pre- and post-contractual obligations. It also does not cover general provisions with respect to consumer contracts.”

4. The Regulations transposing Articles 1.3 and 1.6 of the Directive should be deleted or, alternatively, should reflect the exact wording of those Articles.

Regulation 4 implements Article 1.3 of the Directive by stating that the Regulations “do not affect any national legislation implementing Community acts where it establishes the level of protection in particular as regards public health and consumer interests”. This formulation gives UK legislation implementing EU legislation on public health and consumer protection precedence over the Regulations. By contrast, Article 1.3 places such EU legislation and the E-Commerce Directive on an even footing; it provides that the Directive “complements” such EU legislation, not supersedes it. In Microsoft’s view, Article 1.3 is a mere declaratory statement that does not require transposition. If the UK Government nonetheless wishes to incorporate it into the Regulations, it should copy Article 1.3’s language verbatim.

Regulation 6 implement Article 1.6 of the Directive by stating that “[t]hese Regulations are without prejudice to measures taken at national level in order to promote cultural and linguistic diversity and to ensure the defence of pluralism”. Article 1.6, however, does not cover all national measures taken to promote cultural and linguistic diversity, but only those taken “in the respect of Community law”. If the UK feels the need to implement Article 1.6 (which is a mere declaratory statement), it should do so verbatim.

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Microsoft appreciates this opportunity to comment on the Regulations. We would welcome opportunities to discuss these views in greater detail. For further queries regarding these comments, please contact Matt Lambert at +44.207.434 6536 or by email at mlambert@microsoft.com.