

Guy Russell
Department of Trade and Industry
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Dear Mr Russell

Consultation on Regulations Implementing the E-Commerce Directive

The Operators Group is grateful for the opportunity to respond to this consultation.

Level of Protections

Draft regulation 4(1). The Operators Group believes that this regulation is unnecessary and should be deleted as regulation 7(3) and the Schedule more than adequately accommodate the provisions of the Directive relating to consumer protection and public health.

In the event that the Regulation remains and notwithstanding that guidance note 3.4 states that legislation going beyond the requirements of Community law remains subject to the restrictions test we would like regulation 4.1 to be changed as follows to make this clear:

“These 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, insofar as national legislation implements only the minimum requirements of Community acts.”

Internal Market

Draft Regulation 7. We believe that the way Article 3 of the Directive on the Internal Market has been transposed does not give proper effect to the Directive. We believe that Article 3.1 of the Directive implements a true country of origin principle in the sense that a Member State must ensure that information society service providers established on its territory comply with national law that regulates the “coordinated field of the Directive”. In other words, the Directive provides that the applicable law in the coordinated field with which an information society service provider has to comply is that of the Member State in which he is established. This intent of the Directive is also made clear in Recital 22 which states that “information society services should in principle be subject to the law of the Member State in question”. It is true that the coordinated field laid down by the Directive is subject to a number of exclusions set out in the Annex to the Directive. However within the coordinated field the Directive unequivocally provides that the country of origin principle should apply and that the applicable law should be that of the country of establishment.

Draft Regulation 7.1 does not say this but merely states that a service provider established in the UK would have to comply with the enforcement actions of enforcement authorities. Regulation 2.1 makes clear that courts do not fall under the definition of enforcement authority. We are concerned that this inaccurate and insufficient implementation of Article 3.1 of the Directive could have serious implications for information society service providers in the UK. To illustrate this, one

could consider the situation in which a German company wants to sue a UK service provider providing services to Germany for breach of German unfair competition law. The German company would be able to sue in a UK court which would be forced to conclude that the Regulation 7(1) does not apply to it. Instead the UK court would have to look to private international law which dictates that the applicable law (under the Rome Convention) is the law of the country in which the activity takes place, i.e. Germany. Thus the UK company would not derive any benefit from the fact that E-Commerce Directive actually provides that the applicable law in this case should have been that of the UK.

The Directive requires in our opinion that “country of origin” application is an underlying principle and that exceptions from it should be minimal. We therefore support a redrafting of Regulation 7(1) to make clear that service providers established in the UK are subject to UK law rather than being subject to a mere supervisory and enforcement provision. It is imperative that Regulation 7(1) is faithful to the text of Article 3.1 of the Directive.

In addition we believe that the words “United Kingdom” should be inserted prior to the two references to “enactment” and the single reference to “legal requirement” in draft Regulation 7(1); in addition insert the words “United Kingdom” in front of “enactment” and “legal requirement” in draft regulation 7(2).

We believe that reordering the Regulations so that Regulation 7 comes before Regulation 4 would make it clearer that the exceptions mentioned in 4 are exceptions from the general rule in 7. We feel that this would also be consistent with best practice in terms of aiding comprehension by those having to implement the regulations, thus reducing costs and improving compliance.

We support the wording of Regulation 7(1) which allows only those persons who are the recipients of an information society service to be able to seek damages rather than allowing class actions.

Clarification of “Equivalent Individual Communications”

Draft regulations 11 (4) and 13 (3). These relate to the requirements to provide information about completing online transactions and placing orders, and non application of these requirements where contracts are concluded offline or “exclusively by exchange of electronic mail or by equivalent individual communications”. The DTI should make clear in its explanatory note that this exception is technology neutral and would also include by way of example contracts concluded by mobile messaging.

Meaning of the Term “Order”

Regulation 14. We understand that the intent of Regulation 14 is to try and make it clear that these Regulations do not interfere with normal contract law. We think that an explicit statement in the Regulations to that effect might be better than the existing wording of Regulation 14. The current wording says that ““order” **may be but need not be** the contractual offer”. We do not see how this imposed ambiguity helps to make it clear that normal contract law applies.

Mere Conduit, Caching and Hosting

Regulations 17, 18 and 19. These Regulations represent a narrowing of the limitation to liability by introducing the words "in damages". The Directive makes no such limitation. These words should therefore be deleted.

The exemption from liability regime applies to information about activities excluded from the scope of the Directive. However, the guidance notes appear to limit the applicability of the liability regime to on-line gambling services. The guidance notes for Regulations 17-19 should be explicit that the liability regime extends to all services excluded from the Directive.

Defence in Criminal Proceedings

Regulation 21(1) reduces compliance with Regulations 17-19 as a mere defence in proceedings relating to criminal content. The Directive makes no such distinction between civil and criminal liability. It is our understanding that Directive meant to extend the liability regime to all forms of content. We therefore call for Regulation 21(1) to be deleted.

Furthermore, Regulation 21(2). This introduces a different knowledge threshold for criminal content, i.e.: constructive rather than actual knowledge. This was not the intention of the Directive. Articles 13-15 make no distinction between types of proceedings (criminal or otherwise). We believe that this reference should also be deleted.

Notice and Take Down

Notice and Take Down. The current draft of the regulations lack any specificity regarding, for example, what constitutes a valid notice; whether a user should be given a chance to respond prior to take down for the intermediary; the meaning of constructive knowledge in the context of online services; and the meaning of 'expeditious' take down.

We understand and welcome the fact that the DTI is prepared to act as a host for industry initiatives on how to deal with notice and take down procedures which may have as objectives providing industry guidance or industry proposals for regulation. However we believe that there are some basic requirements which could be spelled out at this stage prior to industry action:

We believe that the guidance notes should state as a minimum that:

a/ a notice must meet certain minimum requirements before an intermediary needs to consider whether it is valid. The minimum requirements would be the inclusion of : a) the name and email of notifier; b) details of the offending content; c) the specific location of the content; d) the grounds for the "complaint"; e) a statement that the notifier has a good faith, honest and reasonable belief that the contents of the notice are true and accurate; f) provision of an indemnity for matters of civil liability, or a provision that compliance with an industry agreed code of practice would exempt an intermediary for liability. Also, each intermediary should provide one email address for receipt of notices and all notices must be sent to that address;

b/ if agreement on even these basics is left to self-regulatory initiatives, then intermediaries will be required to live with legal uncertainty for months, if not years to come.

The principal self-regulatory initiative to date, namely the EU funded RightsWatch process, has been unable to meet its stated objectives, namely a notice and take down pilot. There is therefore a need for a safe harbour for intermediaries supplemented by a mechanism for disputes to be expedited (for example, by an arbitrator appointed to facilitate arrival at a fair and workable solution).

In the contentious area of copyright infringement for example intermediaries are still exposed to potential liability for wrongful take down. While they may seek to limit such liability in their user terms and conditions there is still some uncertainty whether this may breach Unfair Contract Terms legislation. Consequently a clear steer from the government is also required in the absence of confirmation regarding a safe harbour/ indemnity provision.

We are also concerned that there appears to growing calls from some content providers for EU mandated Digital Rights Management technologies. We understand that their argument is that a mandatory, interoperable DRM solution is now necessary to "plug the gaps" (i.e., to prevent the distribution of pirate/infringing material). However the danger of such a proposal is that it could turn intermediaries into "network policemen" for content providers, forcing them to implement possibly invasive, expensive and unwieldy DRM solutions and to monitor their effectiveness or else face potential liability for infringements that escape the DRM. We are very concerned that this would risk saddling intermediaries with liability for all infringements occurring on their networks. This would be disastrous for ISPs. An effective notice and take down regime may soothe fears on all sides.

Hyperlinks, location tools and content aggregation services

We would like the provisions limiting liability to be extended to hyperlinks between information society services, location tools (provided to third party providers offering location based services) and content aggregation services included. In respect of location driven services operators have no knowledge of the location services offered by third party content providers to end users. It is for content providers to gain customer consent for their content services and to handle any related customer complaints.

Individual Responses

In the event that any of the operators listed below submit individual responses to this consultation those responses take precedence.

Yours sincerely

Andrew Gorton
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Vodafone

On behalf of the following members of the Operators Group:

C&W
Energis
Hutchison 3G
Telewest
Tiscali
T-Mobile
Vodafone
Worldcom
Your Communications