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Department of Trade and Industry
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Dear Mr Russell

Consultation on Regulations Implementing the E-Commerce Directive

I enclose Orange's comments on the implementing of the E-Commerce Directive

Exclusions

Draft regulation 3(1)b is inaccurate or incomplete. It should be a) removed; or b) make reference to the applicable UK law; or c) refer to data protection generically (in the same way that 3(1)c refers to "cartel law").

If generic references are to be made then the Guidance Notes should specify the current laws, and that this will include future legislation on the same subject matter.

Draft regulation 3(2). The references for Cartel and Data Protection should be specific to the relevant UK law and all future enactments in the said areas. The main reason for this is that Directives have direct effect upon the State, but not on others.

Level of Protections

Draft regulation 4(1). EU legislation with respect to public health and consumer interests is implemented in national jurisdictions on a minimum required set of rules basis. Member States are free to add to the minimum set of requirements. However, exceptions from the requirement to comply with the E-Commerce Directive should be based on the minimum requirements of EU health and safety legislation. To provide clarity draft regulation 4.1 could be changed as follows:

"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."

In draft regulation 4(1) and 4(3) reference is made to "Community acts". It would be helpful to include a reference and provide examples as to what "Community acts" may be in the Guidance Notes. This would be helpful to ensure that it is understood that this is wider than just Directives.



Internal Market

Draft Regulation 7. The way Article 3 of the Directive on the Internal Market has been transposed does not give proper effect to the Directive. Article 3.1 of the Directive implements a true country of origin principle i.e. 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”. The Directive provides that the applicable law in the coordinated field with which a information society service provider has to comply is that of the Member State in which it 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” (notwithstanding the 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 reflect 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. Orange urges the DTI to review and implement Article 3.1 of the Directive to give full effect to the country of origin principle and to remove the restrictions test.

The Directive requires that “country of origin” application is an underlying principle. Regulation 7(1) must be re-drafted 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. The restrictions test does not implement the Directive. As currently drafted the Regulations provide more access to the UK market (with lower compliance costs) for those established outside of the UK. This reduces the incentive to establish in the UK and at the same time does not provide a harmonised approach. Correspondingly there are increased burdens on UK established information service providers wishing to address the coordinated field. The DTI can ensure that UK established information service providers have the ability to compete on equal footing.

In addition “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).

Reordering of the draft Regulations so that Regulation 7 comes before Regulation 4 would make it clear that the exceptions mentioned in 4 are exceptions from the general rule in 7. This would aid understanding and provide clarity.

Placing of the Order

Draft Regulation 13(1). “technological” is ambiguous. The Guidance Notes should provide clarity that this is electronic means.

Clarification of “Equivalent Individual Communications”



Draft Regulations 11 (4) and 13 (3) (on how to complete online transactions and how the service provider should place an order) do not apply to contracts concluded offline or “exclusively by exchange of electronic mail or by equivalent individual communications”. It would be helpful for the DTI to make clear in its Guidance Note that this is technology neutral and includes for example contracts concluded by mobile messaging and dedicated websites (where often it is a “click through” process).

Meaning of the Term “Order”

Draft Regulation 14 is to make clear that the Regulations do not interfere with established contract law. 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”. It must be made clear that established contract law applies.

Liability of Service Provider

Draft Regulation 15 requires a limitation period. For example the implementation of the Distance Selling Directive has two – 1) 3 months and 7 days for those who do not comply and 2) 7 days for those who do comply. This type of limitation period would provide information service providers with the certainty required for business planning.

Mere Conduit, Caching and Hosting

Draft Regulations 17, 18 and 19. These Regulations narrow the limitation of liability by introducing the words “in damages”. The Directive makes no such limitation. These words should be deleted.

Referring to the exceptions in draft Regulation 3 the Guidance Notes make it clear the activities excluded from the scope of the Directive. However, the guidance notes limit this 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

Draft Regulation 21(1) is only a defence in proceedings relating to criminal content. However, the Directive does not make this distinction between civil and criminal proceedings. The Regulations must include all proceedings (both civil and criminal). On this basis draft Regulations 21(1) must be deleted.

Draft Regulation 21(2) 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). This must also be deleted.

Notice and Take Down

Notice and Take Down. Guidance note 6.9 recognises that the Regulations do not establish statutory procedures governing the removal or disabling of access to information. However, guidance on non-sector specific issues such as, what constitutes a ‘notice’ and ‘actual



knowledge' is still required. Orange welcomes that the DTI is prepared to act as a host for industry initiatives on how to deal with notice and take down procedures (the objective of which may be to provide industry guidance or industry proposals for regulation).

Hyperlinks, location tools and content aggregation services

The DTI must take the opportunity now to extend limiting liability to hyperlinks between information society services, location tools (provided to third party providers offering location based services) and content aggregation services included. For location driven services mobile operators have no knowledge of the location services offered by third party content providers to end users. It must be clear that it is for content providers to gain customer consent for their content services and to handle any related customer complaints. Orange request that this is reflected in the implementing Regulation.

Other Information

Orange is no longer a member of the Operators Group. We request that the DTI take this into account when taking forward discussions with industry e.g. on procedures for notice and takedown. Orange is still keen to work with industry and this does not detract from Orange working with others on industry initiatives.

Please contact me if you have any queries.

Yours sincerely

(by e-mail)

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