

## **DTI Consultation on the Electronic Commerce (EC Directive) Regulations 2002**

### **PERIODICAL PUBLISHERS ASSOCIATION POSITION PAPER**

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PPA represents magazine publishers in the UK. Magazine media form the main content base for the Internet – from interactive brands of print titles to database and search tools. Business publishers are major drivers of on-line services in the rapidly expanding business-to-business sector. This sector is a major contributor to UK international influence as well as export revenues, with important opportunities to lead the world in e-commerce – from The Economist and Metal Bulletin to Lloyds and FT.com.

#### **Regulation 2 – Interpretation**

##### Information Society Service

The definition of 'information society service' should be clarified. It is not enough to refer the definition to Directive 98/34/EC as amended by 98/48/EC. The definition clearly applies to both the electronic content of electronic material and the technical medium in which it is delivered. Advertising on-line would therefore come within the scope of the definition. We do not believe however, that the definition extends to the physical delivery of goods that may be supplied once the electronic process is completed.

##### Restrictions

The term restriction has many interpretations in EU jurisprudence and accordingly business would welcome guidance on how it should be interpreted in this context.

#### **Regulation 5 – Private International Law**

Regulation 5 repeats Article 1(4) of the Directive but does not seem to amend substantive law and accordingly should be deleted.

#### **Regulation 6 – Diversity and Pluralism**

We recommend that Regulation 6 be deleted as it increases legal uncertainty and the Government has provided no instances of where it may be required.

#### **Regulation 7 – Internal Market**

As a general principle the UK government should adopt the strongest country of origin principle that is consistent with the interpretation of the E-commerce Directive.

##### UK-based Information Society Services are only subject to UK law:

Regulation 7(1), as drafted, does not give UK established service providers the legal reassurance that other member states have implemented, namely that information society services established in the United Kingdom shall be subject to the requirements of UK law even if the end user is in another Member-State.

We suggest that the regulation contain a provision in similar form to that adopted by other member-states such as:

“Information Society Services provided by a Service Provider which is established in the United Kingdom shall be subject to the laws of the United Kingdom which apply to such information society services and which fall within the co-ordinated field, irrespective of whether the information society service is provided to an end user in the United Kingdom or another member state.”

The Guide for Business should be amended accordingly.

#### Enforcement Authority Responsibilities for services intended for another member-state

Regulation 7(1) imposes requirements on UK enforcement authorities when services are intended for a person in another member-state. There are no such requirements in the directive and the provision should be deleted.

#### Applicable Law

Courts in the United Kingdom should apply only UK law to a complaint relating to services provided from a UK-established business, even if the complaint relates to consequences in another Member State.

#### Restrictions

Non-UK based service providers should not be subject to restrictions on the supply of e-commerce services to the UK.

Accordingly as well as the general provision regarding restrictions in the co-ordinated field legislation should be disapplied to incoming e-commerce services by immediate amendment of those items of legislation that restrict incoming services. This will increase legal certainty by removing the need to establish in court that specific legislation constitutes a restriction.

#### Pre-contractual Relationship with Consumers

The possibility of including pre-contractual matters as a derogation was discussed and rejected when the Directive was negotiated and in our view, Recital 56 does not provide a basis upon which to extend the derogation for contractual obligations concerning consumer contracts to cover pre-contractual matters.

Whilst the Directive limits the carve-out to the contractual relationship, it remains silent on pre-contractual relationship as does Regulation 7 (3) relating to the Schedule on disapplying Regulations 7 (1) and 7(2) to contractual obligations concerning consumer contracts. However the Guide for Business section on exclusions, paragraph 4.8, bullet 3, sub-bullet 3 states

*“[The exclusion applies to] requirements applicable to such contractual obligations, including requirements to do certain things before entering into a contract.....”*

We believe that this is incorrect and that in paragraph 4.8, bullet 3, sub-bullet 3 all references to requirements before entering into a contract should be deleted.

Paragraph 4.8, bullet 3, sub-bullet 2 should make clear that the exclusion applies to specific concluded contracts and, to the extent that it may apply to pre-contractual discussions, only to those leading to a concluded contract. It should clarify the meaning of the ‘determining influence’ on the decision to contract under paragraph 4.8 bullet 3, sub-bullet 2, and identify to whom the exclusion applies.

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## **Article 9 – Validity of Contracts Concluded by Electronic Means**

The Regulations contain no provisions implementing this Article and action should be taken accordingly. S8 of the Electronic Communications Act 2000 has allowed UK legislators to identify the legal barriers to allowing the conclusion of contracts by electronic means, and to amend them by Order. Until then the UK is in breach of its obligations to implement Article 9.

(The government appears to accept in the Guide for Business that, notwithstanding the view expressed by the Law Commission on the meaning of 'writing', obstacles remain to contracting electronically that can in due course be cured by section 8 orders)

## **Regulation 14 – Meaning of the term 'order'**

The Regulation says that an "order" may be but need not be a contractual offer. Which is it meant to be?

## **Regulation 16 – Right to cancel**

The Regulation goes beyond the scope of the Directive. A consumer's right to cancel is already dealt with under the Distance Selling (Consumer Protection) Regulations 2000.

The Regulations should not allow a business to cancel a contract in such circumstances, but apply proportionate sanctions.

## **Regulations 17-19- Mere conduit, caching and hosting**

We would welcome exemption for ISPs from liability for any removal of information done in accordance with a relevant industry code of conduct supported by the content industries. Any such code must observe freedom of expression principles and should distinguish between material which is improper and material an individual may want to be removed but which is being published for legitimate reasons. To this end any code should also provide a mechanism for "counter-notice", i.e. a procedure whereby a content provider may dispute a take-down notice, and the course of action to be followed in such a case.

## **Regulation 21 – Defence in criminal proceedings**

### Reversal of 'burden of proof':

This provision does not appear in the directive. Under it the burden of proof to establish innocence appears to be placed upon the intermediary (i.e. the defence), an unusual approach under criminal law where the burden of proof rests with the prosecution, except under the rules of strict liability.