

Department of Government & Regulatory Affairs

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Guy Russell
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Dear Mr. Russell

I am writing with Reuters response to the *DTI Consultation on the Electronic Commerce (EC Directive) Regulations 2002* and on the *Guide for Business*.

Reuters will also be responding to the parallel HMT Consultation.

We have already notified DTI of certain suggestions with regard to the Regulations relating to the *Liability of Intermediaries* and we would be grateful if those comments could also be taken into account as if they were incorporated in this letter.

Introduction

Reuters, a UK based company, is one of the world's principal suppliers of on-line information and transactional services to business and, in particular, to the global financial services community. Reuters has a massive commercial interest, therefore, in measures that dismantle duplicative and/or inconsistent national barriers to trade.

The E-Commerce Directive (ECD)-and particularly its internal market provision (Article 3)- is a fundamental and groundbreaking instrument towards the objective of creating a barrier-free market for the supply of on-line services across the national borders of the European Union.

Our understanding of the intended consequences of Article 3 essentially matches that of Patricia Hewitt and Andrew Pinder in their co-signed *E-Envoy's Monthly Report* to the Prime Minister of 6th June 2000:

*"On 4 May [2000] the European Parliament approved without an amendment the e-commerce Directive. **This will ensure that e-commerce traders in the EU need comply only with the law in their home Member State.**"*
(emphasis added)

We view the internal market provisions of E-Commerce Directive as, to a large extent, aligning the regulatory approach to Europe-wide e-commerce services with the already existing Europe-wide approach for broadcasting services in the (similarly worded) TV Without Frontiers Directive. That approach is summarised in the following excerpt from the Report of the European Commission to the Council on the TVWF Directive of 15.1.2001:

*“The revised Directive lays down a firm legal framework allowing television operators to develop their activities in the EU. The main objective is to create the necessary conditions for free movement of TV broadcasts. The revised Directive has spelled out and clarified a number of provisions, **including the principle of regulation only in the originating Member State and the criteria for making broadcasters subject to that state's legal system**” (emphasis again added).*

The excerpts from the two reports confirm that the regulatory objectives of the two directives are intended to be very similar, if not identical. That makes perfect sense in an age of increasingly convergent technologies.

Our assessment of the UK's approach to transposition of the ECD is, therefore, predicated on HMG's approach to Article 3, and, in particular, how successfully it:

- Delivers the Hewitt/Pinder objectives as communicated to the Prime Minister, with which Reuters wholeheartedly concurs; and
- Compares with transposition of Article 3 by other Member States.

As explained below in greater detail, we regret that our assessment is unfavourable under both heads. In summary, we do not believe that the draft Regulations deliver the objectives that the (now) Secretary of State and E-Envoy communicated jointly to the Prime Minister, and with which Reuters, and it seems the majority of UK businesses, concur. Secondly, and most worryingly in terms of the UK's international competitiveness, the UK Regulations appear less successful in delivering those objectives than the equivalent regulations published by other Member States.

Furthermore, implementation of the ECD according to the DTI's present proposals will, in our view, create quite unnecessary discrepancies in the regulatory approaches to on-line services and broadcasting, even though the applicable directives for these two types of (converging) communications use very similar text and structures in their approaches to the European single market.

When they are enacted, the E-Commerce Regulations will be fundamental to the success of UK-based e-commerce enterprise. Bad implementation could be disastrous to the UK's aspirations to e-commerce success and, indeed, leadership. It is clear to us that unless the UK is now preparing to abandon these aspirations, the Regulations must be redrafted to give effect to the joint vision of Patricia Hewitt and Andrew Pinder.

Although the UK is already well behind schedule in transposition of the ECD, a further delay to rectify the transposition of its crucial internal market aspects is, in our view, preferable to proceeding with the current approach to Article 3.

Finally, and as already expressed to DTI and HMT, there are a number of apparently unnecessary mere drafting discrepancies between the DTI and HMT Regulations that we would like to see eliminated in the final texts.

Our detailed comments are as follows:

Regulation 2: Interpretation

Definition of “Enforcement authority”. We are unclear, and concerned at, the express removal of the courts from this definition. In the UK, courts are often the sole bodies with enforcement competence. What is intended to be the position where no other enforcement instrument other than a court order exists?

Recommendation: The definition of enforcement authority should comprehend decisions by courts and other judicial authorities.

Separately, we suggest:

1. Amending the definition of “enactment” so that it reads “any enactment or instrument of any of the legislatures of Great Britain and Northern Ireland;” and

2. Adding a new definition: “*National legislation means legislation enacted by any of the legislatures of Great Britain and Northern Ireland.*”

Finally, we suggest that Regulations 7(1), 7(2) and 7(3) be amended to insert “UK” before “*legal requirement.*”

Regulation 4: Levels of Protection.

It is our understanding that the DTI does not intend that Regulation 4 will amend any UK laws. Nevertheless, and in line with our reservations expressed below on Regulation 6, we are concerned that some unintended change could result.

Recommendation: In our view, this Regulation is unnecessary and should be removed.

Regulation 5: Private International Law & Guidance 3.5 & 3.6.

In our judgement, Regulation 5, as explained by the Guidelines, is incompatible with the Hewitt/Pinder report to the Prime Minister that the ECD “*will ensure that e-commerce traders in the EU need comply only with the law in their home Member State.*”

Recommendation: In our view, Regulation 5 should be removed and not replaced. Alternatively, we urge the DTI to substitute text, with supporting Guidance, which provides UK-based suppliers with equivalent legal certainty to that contained in German and other Member States implementing ECD texts. In other words, UK-based information society service suppliers into the EU will be subject only to UK law.

Regulation 6: Diversity and Pluralism. Guidance 3.7.

As already expressed to the DTI, we have concerns that the DTI’s approach may in practice elevate a mere declaratory statement in Article 1(6) of the ECD into a derogation from the directive. We believe that this approach could cause considerable mischief, particularly as the UK text also omits the passage “*in respect of Community law.*”

Recommendation. Article 1(6) has not been transposed by other Member States. It should be withdrawn and not replaced.

Regulation 7: Internal Market Guidance Part IV Sections 4.1—4.7.

(see also the drafting suggestions to Regulation 7 made above in comments on Regulation 2).

Regulation 7, taken in conjunction with Regulation 5, delivers an approach to the (central) internal market provisions of the ECD that appears to us be (completely) at odds with the Hewitt/Pinder Report to the Prime Minister, as well as with other high-level DTI and HMT statements on the implications of ECD. The result is also out of line with the approaches taken by other Member States.

Article 3(2) of the ECD expressly prevents the imposition of restrictions by the country of reception in the path of incoming information services. That is all it does. There is nothing in Article 3(2) to suggest that it additionally determines the applicable law for incoming service providers. This, nevertheless, appears to be the line of argument underpinning the applicable law approach now being taken by the DTI. By contrast, it seems clear to us that Article 3(1) expressly provides guidance on the applicable “*national provisions*”, which must presumably include law. To elevate Article 3(2) from its narrow purpose into the governing article on applicable law is unsustainable.

We appreciate that at the time DTI was drafting its regulations and Guidance, certain other Member States, including Germany, appeared to be approaching transposition of the internal market provisions along broadly similarly cautious lines. However, this is no longer the case. Those early texts have been replaced by new ones that implement Articles 3(1) and (2) of the Directive on a straightforward country of origin basis. We understand that the UK’s approach is now unique among Member States.

Furthermore, it seems relevant to us that the TV Without Frontiers Directive, which contains similar language and structure to the ECD, including provisions limiting restrictions by receiving states, has been applied and interpreted by Member States, including the UK, and by the ECJ, as providing for a straightforward country of origin regime (see above).

The UK's approach to implementation of Article 3 is widely viewed in the UK and Continental Europe as unsustainable. Serious—perhaps fatal—damage will be caused to the UK as the preferred European home for international e-commerce if the anomalies in the DTI's current proposals are allowed to be carried through into law.

Recommendation: Regulation 7 should be redrafted to deliver the Hewitt/Pinder objective, and to achieve conformity with implementation by other Member States. We would particularly commend the (revised) German text as a model.

Regulation 7.3 Internal Market Guidance Part 1V Section 4.8.

Recital 56 does not, in our view, extend the contractual obligations derogation to comprehend pre-contractual information as now argued by the DTI and HMT.

In support of this assertion, I am recording below an excerpt from a paper produced by the Financial Services Policy Group Report, which was endorsed at the Ecofin Council. It was, it seems, accepted by all Member States that pre-contractual information falls within the country of origin rule. We believe that the approach taken by the FSPG Report is correct, and is of general application to e-commerce.

SCENARIO 3: The consumer residing in country A takes out an on-line loan with a bank that is established in country B and offers banking services from its website in country B.

In this scenario, the bank thus has an interactive Internet site enabling internet users in all countries to access the site and to take out an on-line credit contract. This situation is covered by the Directive on electronic commerce.

- Pre-contractual matters: The site need not be designed so as to comply with the legal provisions in countries A, C, Y or Z. Its design need comply only with the rules in force in country B, e.g. regarding advertising, promotional material or provision of information to the public.

If the authorities in country A take the view that their legislation is being infringed by this site, which is, by definition, accessible on their territory, they may act only under Article 3(4) to (6) of the e-commerce Directive (as from 17 January 2002, of course). The measures they could take (injunctions, court proceedings, etc) would have to satisfy the conditions of Article 3(4) (consumer protection, prior notification to the Commission and to country B, and proportionality).

In summary, this Guidance confirms that pre-contractual information requirements are those operating in the service provider's country of establishment. We agree with the FSPG that the correct approach by a Member State is to proceed by way of Articles 3(4)-(6) of the ECD rather than by unnaturally extending the range of the consumer contracts derogation.

We understand that at one stage certain Member States sought to extend the consumer contracts derogation to pre-contractual information, but that such attempts were abandoned. We therefore urge the DTI—and HMT—not to reopen what was a most controversial debate, which everyone believed had been closed. The intention of HMT to include over a page of information requirements within the derogation causes particular tensions. We have already suggested that HMT proceeds instead under the Article 3 mechanisms instead.

Recommendation: In our view, the DTI and HMT should abandon attempts to extend the consumer contracts derogation to include pre-contractual information. Instead, the DTI and HMT should proceed within the framework of the mechanisms provided for in Article 3 in respect of any pre-contractual information that they deem essential.

Regulation 11: Information to be provided where contracts are concluded by electronic means

Because UK law does not regard headings as relevant for interpretation, we would request that in Regulation 11(1) the words “*where the contract is concluded by electronic means*” is added after the words “*recipient of a service.*”

We can envisage many unintended practical difficulties were there to be any attempt to apply this provision more widely than only to contracts concluded electronically.

Regulation 14: Meaning of the Word ‘Order’

The meaning of this Regulation is not clear.

Regulation 16: Right to Cancel

A consumer’s right to cancel is already addressed under the Distance Selling (Consumer Protection) Regulations 2000. Regulation 16 goes considerably beyond, and in places is inconsistent with, these existing Regulations. It would be particularly unreasonable to allow a consumer to annul a contract in all circumstances—even where performance had already commenced, or indeed had been completed—through (perhaps inadvertent) non-compliance with some requirement on the service supplier. The results appear unreasonable and disproportionate, particularly as they do not include safeguards contained in the Distance Selling Regulations. Contracts for financial services are acutely vulnerable and for this reason received careful exemption under the Distance Selling Regulations.

In their present form, the provisions are susceptible to abuse by persons hunting for a premature exit from contracts for reasons quite unconnected with the intentions of Regulation 16.

It is not clear to us whether the provisions are intended to apply to inter-professional business. In our view, they should not. The DTI should not seek to interfere with the freedom of contract principle of B2B contracts.

Recommendation: Regulation 16 should be withdrawn or alternatively made consistent with the Distance Selling Regulations.

Regulation 21: Defence in Criminal Proceedings

We propose deleting Regulation 21(2) and amending Regulation 19(a) (ii) to add at the beginning:
“*(and in the case of civil damages only)*”

While we concede that the DTI’s drafting approach is neater, it has two inadvertent consequences. First, Article 14(1) of the ECD provides that awareness of facts or circumstances is to be ignored, not just for criminal proceedings, but for any claim, other than a claim for damages. It therefore captures not just criminal law but also a civil injunction or other order (where there might not be damages but there could be costs consequences) Second, we believe it will be hard for someone coming to the Regulations in the absence of the Directive to interpret Regulation 19(1) in the light of Regulation 21 (2). The proposed Reuters amendment stays closer to the ECD text.

Leaving the position unchanged would impose a higher threshold of liability under law on UK based suppliers.

We hope that these comments are helpful.