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Dear Mr Russell

E-Commerce Directive - Consultation on Implementation

We write with our comments on the draft Regulations published by the Department and with respect to the implementation of the E-Commerce Directive more generally.

Whilst we acknowledge that there are ambiguities in the Directive itself we believe it is important, so that businesses can at least have some certainty in their day to day operations, that the DTI publish its views on some of the key questions, whether by way of guidance or otherwise. It can always be made clear that the ultimate interpretation is for the European Court of Justice, but there are a number of issues where the DTI may at least be aware of the intention or policy where this is not clear from the face of the Directive or the Regulations, and comment by the DTI with regard to its own understanding would be helpful.

1. It appears from all of the material published that the UK considers that the E-Commerce Directive applies (insofar as it imposes obligations) to companies which are incorporated and have their head office outside a member state, if they have a branch in a member state, albeit that such companies are not entitled to the benefit of the "passporting" which facilitates cross border services. This interpretation is difficult to reconcile with the statement in Recital 58 that the Directive does not apply to services supplied by service providers established in a third country. The concept of "established" is given some definition in Recital 19 and, in this regard, footnote 8 to the European Commission Communication on E-Commerce and Financial Services also seems relevant.

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We understand from a conversation with DTI that, despite these references, it is nevertheless the intention of the Directive that it should apply to anyone who has an establishment (including a branch) in a member state. Given the fact that this is not clear from the face of the Directive itself we believe it is important that this be expressly stated by the DTI to be its understanding of the intention. It also seems to us that if the Directive applies to services provided from such branches then the same reasoning presumably means that the branches are entitled to the benefit of the "passport" in respect of the services which they provide.

In addition there are a number of issues on which international companies will need further guidance from the DTI as to the intended effect on them. If an overseas company is headquartered in Switzerland but has a branch in Paris and in Amsterdam, does the presence of these offices alone give rise to the effect that the Directive applies or does one have to examine the activities of the particular office? What services have to be supplied from such a branch in order for the Directive to apply? We do not think it is enough for the DTI to acknowledge that there are difficulties with the application of the Directive in these circumstances - businesses need some semblance of certainty in order to organise themselves and for their directors to have some comfort that they are complying with the law. In addition we expect that the construction to be placed on the E-Commerce Directive may well be determinative or a factor in determining the application of other European based laws. Thus we urge the DTI to give further guidance on the application of the Directive to companies which are established in a third country and also how the Directive operates if such a company has more than one EU branch.

2. Neither the Directive nor the implementing Regulations recognise that any number of situations can give rise to a "layering" of providers of information society services. It appears from the Directive that an information society service could consist only of providing a communication network. The persons who receive that service may themselves then use the communications network in order to provide an information society service to their clients. In such a case it would seem to us that the provisions of Regulations 11, 13 and 15 apply to the person who is prepared to use the service to take orders and not in any way to the provider of the communication means. Again we appreciate that the DTI may not wish to change the drafting of the Regulations insofar as they reflect the exact wording of the Directive, but it could helpfully comment to this effect in its guidance.

Whilst this letter raises general issues of concern to a number of companies you should also be aware that it has the specific support of our clients Bloomberg LP and Bloomberg Tradebook Europe Limited who will be affected by the implementation of the Directive and in particular by the issues raised above.

We would be happy to discuss any of these comments with you and if it would be helpful, please do not hesitate to call Margaret Chamberlain on 020 7295 3233.

Yours sincerely

TRAVERS SMITH BRAITHWAITE