To: Matthew Conway
CII
Department of Trade and Industry
151 Buckingham Palace Road
London
SW1

5th April 2002

Response to Consultation on UK implementation of EU Directive 2000/31/EC (the "e-Commerce Directive"); draft implementing Regulations and interim guidance for business

Dear Matthew,

Yahoo! UK Ltd is encouraged that DTI is making progress to implement Directive 2000/31/EC, after a slow start. However, we have some strong reservations concerning the manner in which the Directive's provisions are being interpreted. We believe that, if left unaddressed, the Regulations will lead to a significant *decrease* in the competitiveness of the UK e-economy (and the companies therein) vis-à-vis its EU neighbours, and will also make the UK a less attractive location for businesses (in particular for those coming from the USA, but also elsewhere) seeking a single base for their European operations.

Yahoo! UK Ltd is one of eight national properties which together comprise Yahoo! Europe. Yahoo! Europe chose the UK as its HQ base for its European operations in part on the sensible regulatory environment HMG had developed for incoming e-businesses. We would also note that, with eight local properties across Europe, we are in a position to be able to compare and assess national regulatory regimes.

For service providers like Yahoo! UK, the Directive's key provisions are those covered by the following Articles:
Article 1 (DTI Regulations 4, 5, 6)
Article 3 (DTI (Regulation 7)
Articles 12-14 (DTI Regulations 17-19)
Article 15 (omitted from DTI Regulations)

We will accordingly restrict our responses to those Articles. We will also refer to provisions in the interim Guidance for Business focusing on the same Articles, where we believe the Guidance to be incorrect or confusing.

Article 1
Regulations 4, 5 and 6 erroneously transpose clarifying statements into law. The intention of Articles 1.3, 1.4 and 1.6 in the Directive is for them to act as declaratory statements. They are not meant to have legal weight in the sense that they should be transposed into national Regulations. Indeed, we believe the opposite is the case. If Regulations 4, 5 and 6 are left in the Regulations, the scope of the Directive is (incorrectly) reduced. Member States that have already implemented the Directive have not felt the need to transpose Articles 1.3, 1.4 and 1.6 and we fail to see why HMG alone would see fit to. For these reasons, we urge the deletion of the Articles.

Article 3
Article 3.1 of the Directive ensures that a service provider is subject to the national laws and regulations of the Member State in which he is based, and with no others (save for the derogations mentioned in 3.3 and 3.4). Article 3.2 reinforces this provision.

Regarding the DTI's interpretation of 3.1 and 3.2, the wording, as it currently stands, does not correctly transpose the provisions. Regulation 7.1 is unnecessarily complex, but when read in conjunction with the Guidance for Business (Part 4) also appears to misinterpret the meaning of Directive Article 3.1. The effect is to make UK service providers subject to *enforcement* of applicable law by UK authorities, but not necessarily subject only to UK law. This leaves service providers with all sorts of uncertainties regarding the applicability of foreign law by UK authorities; precisely the uncertainty the Directive seeks to remove by making the applicable law the country of origin of the information society services provider.

The three Member States, which have already implemented the Directive (Luxemburg, Germany and Austria), have transposed 3.1 clearly and correctly – to the advantage of businesses based in those countries. We urge DTI to re-visit the meaning of 3.1, look at other Member States' successful transpositions and then redraft Regulation 7.1 accordingly.

The above is rendered more serious by the inclusion in the Regulations (via Regulation 5) of Directive Article 1.4 (as mentioned above), dealing with private international law. It is our understanding, as we state above, that Article 1.4 is merely a declaration of fact. It is not meant to be transposed – to do so is to ascribe it more significance than it deserves. Given that the purpose of private international law is to deal with conflicts of applicable law, it would appear that, within the coordinated field of the Directive, private international law is rendered redundant, as the applicable law is clearly prescribed (the country of origin, in this case UK law) with the exception only of the given derogations.

Article 3 derogations
The Annex to the Directive gives specific derogations from the principles established via the provisions of Article 3. No other derogations are allowed, except on a case-by-case basis and using the procedure laid out in Article 3.4.

The Regulations correctly transpose verbatim the derogations contained in the Directive's Annex. However, the Guidance for Business incorrectly (and, we imagine, inadvertently) goes a stage further regarding the derogation for "Contractual obligations concerning consumer contracts", by ascribing pre-contractual information to the derogated object. If pre-contractual information were to be subject to the derogation, it would have been explicitly mentioned in the Annex of derogations.

The confusion appears to arise from a partially incorrect interpretation of the Directive's Recital 56, which states, *"As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract".*

The Guidance for Business splits the above in two and then manipulates the wording with the effect of broadening the derogation's scope. This is contrary to the European Court of Justice's guidance, which states that derogations to provisions must be applied in a narrow and restrictive manner. While we believe it unnecessary to include any reference to Recital 56 in the Guidance for Business, if the Government does see fit to do so, then we urge it copy out the Recital verbatim.

<u>Articles 12-14</u>

The Directive's Articles 12-14 deal with liability of intermediaries. The Regulations (17, 18 and 19) applying the provisions do so correctly and follow the Directive almost word-for-word, with two important exceptions; the inclusion of additional wording *"in damages"* in the first sentence of each of the Regulations 17, 18 and 19, and the creation of a separate Regulation for *"Defence in criminal proceedings"* (Regulation 21).

Compare the Directive (here from Article 14), *"Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; …"*

with the draft Regulations (here corresponding Regulation 19), *"Where an information society service is provided which consists of the storage of information provided by a recipient of a service, the service provider (if he otherwise would) shall not be liable in damages as a result of that storage …"*

Clearly, there is a huge area of liability not covered by the Regulation, which *is* covered by the Directive. In order to address this, Regulation 21 provides for a defence in criminal proceedings, should a service provider have complied with the provisions of Regulations 17-19. However, there remains the oddity of excluding para 19(a)(ii) from the scope of Regulation 21. This has the effect of imposing upon the service provider a lower threshold of knowledge to incur liability. In effect, in criminal proceedings, the

exclusion of 19(a)(ii) makes the threshold one of constructive knowledge, rather than one of actual knowledge (i.e. not that a service provider actually knows of facts or circumstances that show a certain activity/item of information to be unlawful, but rather that a service provider should have known of those facts and circumstances).

This is a dangerous precedent to set and is clearly contrary to the provisions of the Directive. The Directive does not provide for any exceptions in criminal cases, but rather (in 14.1(a)) applies a blanket "actual knowledge" test and adds an extra condition in cases where damages are claimed. It does not remove a condition where criminal liability has occurred (as Regulation 21 attempts to do).

To bring the Regulations back into line with the Directive, we therefore urge the deletion of *"in damages"* from Regulations 17-19 and the deletion of Regulation 21 in toto (and consequent amendments to relevant paragraphs in the Guidance for Business).

Lack of Provision for Limiting Liability of Providers of Hyperlinks and Location Tool Services

As a leading provider of Internet search tool services, we are concerned by the manner in which the draft Regulations fail to address the scope of liability that may flow from providing hyperlinks to Web sites and aggregating them. It is the case that this area has been plagued with conflicting case law across Europe, on a scale unimagined when the Directive was drafted back in 1999/2000, which has created confusion and legal uncertainty for providers of such services.

In a strict sense, the Guidance for Business (6.13) is correct when it states that the e-Commerce Directive does not explicitly address the liability of providers of hyperlinks, location tools and content-aggregation services. However, it is not the case (nor the intention of the Commission or Council) that the area should not be addressed at this time by Member States. Member States are in no way prevented from dealing with the issue of hyperlinks (or, indeed, location tools) provision liability. Already, Austria has included such a provision in its final transposition, Spain and Portugal have such provisions in their draft transpositions and others are considering following suit. We believe such Member States understand the importance to their domestic e-business communities of closing this legal loophole. Like those far sighted Member States, we too believe the reasons for including a provision now to cover hyperlinks, location tool services (search engines) and aggregation services are both appropriate and compelling, and are too important to leave unaddressed until the late 2003 review of the Directive (the results of which will probably not be implemented until 2004 or 2005).

As an increasing number of court decisions in Europe show, the provision of hyperlinks can lead to liability claims against the link provider based on general civil liability, copyright and database law, trademark law, unfair competition law or even criminal law.

Multiple disputes, with contradictory outcomes, regarding the liability for hyperlinks have already arisen across Europe, particularly in Germany, but also in France, Austria, the Netherlands, Belgium and Sweden, and their numbers are only likely to increase. The

absence of legislation on the issue and the inconsistent approaches that have been taken by the courts in these cases have created significant legal uncertainty, to the detriment of European e-commerce growth.

We would urge a simple solution along the lines of Articles 12-14 of the Directive (for "mere conduit", "caching", and "hosting" respectively) with the aim of achieving a similar result. The implementation of the Directive provides a unique opportunity to address the problem directly and rapidly. As already mentioned, several Member States, significantly less Internet savvy than the UK, have already suggested such a provision in their national implementations, and we ask that the UK government considers doing the same. In this regard, a model provision based on Articles 12-14 (and the wording of Regulations 17-19) could look like this:

Where an information society service is provided which consists of the creation and provision of hyperlink, location tool (automated or human-compiled) or content aggregation services, the service provider (if he otherwise would) shall not be liable as a result of provision of that service where-

a. *the service provider-*
    i. *does not have actual knowledge that an activity or information was in breach of any law; and*
    ii. *is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or*
b. *upon obtaining such knowledge or awareness the service provider acts expeditiously to remove or disable access to the information, and*
c. *the recipient of the service was not acting under the authority or the control of the service provider.*

If DTI has concerns regarding adding such wording via secondary legislation (under the European Communities Act 1972), a simpler, though less thorough, alternative would be either to insert a small addition to the wording of Article 14, providing a definition of what constitutes "hosting" and what is "hosted" (and including the hosting of hyperlinks and location tools in the definition), or to include such a definition in the Guidance to Business document.

The hosting definition as it currently stands in the Regulation and in the Guidance for Business (and, indeed, the Directive) does not take into account the fact that third party content is not necessarily actively "provided" by a recipient of the service. It is equally usual for hosted material to be sourced by the service provider itself for inclusion in (for example) an online directory, without any actual knowledge of the legality or otherwise of the hosted material. Such directories provide an essential route map to the Web. While not as desirable as a stand-alone provision, a clarification in Regulation 19 and in the Guidance for Business of what constitutes "hosting" would be better than nothing.

We feel strongly that omitting one area of liability (linking and location tools), while dealing with the others (mere conduit, caching, hosting) is illogical and potentially damaging for UK businesses. In particular, SMEs (not just service providers, but all those with a Web presence) would be hit, as they lack the financial and legal infrastructure to cover operational risks engendered by the lack of legal certainty. Navigating the world-wide web from the UK will become increasingly difficult if no clarification is forthcoming; valuable local input could conceivably diminish, making directories and search engines' offerings less useful (and compelling) to consumers. Thus, UK industry and UK consumers both stand to lose as a result of this unnecessary legal uncertainty. We would suggest that a clarification in the Regulations is an essential component of a successful implementation of the Directive. Without such a provision, there is little doubt that UK-based businesses and consumers will be at a disadvantage compared with peers in more pro-active Member States.

Article 15

Article 15 ("no general obligation to monitor") of the Directive provides service providers with a welcome clarification of their monitoring obligations vis-à-vis third party material carried/stored on their networks/services. The provision is based on the logical reasoning that it would not be possible – practically or economically – to force service providers to monitor content which is stored or passes over their networks.

We understand from informal conversations with DTI officials that the Government endorses this point of view. It is regrettable, therefore, that no provision is made for the transposition of Article 15 into UK law. The Guidance for Business (6.14) justifies the omission thus, *"No such obligations exist in UK law, and their introduction would be incompatible with the requirements of the E-Commerce Directive"*.

The statement is correct as far as it goes – i.e. as no obligation appears to exist at present, there is no need to add to current legislation. But, service providers require (and, under the auspices of the Directive, are entitled to) legal clarity on this point and we urge the Government to add Article 15 to its Regulations verbatim in order to avoid having to re-visit this question every time third party liability and a general monitoring requirement is raised in future.

Notice and Takedown (N&T) procedures

The Directive is clear in its recommendation for Member States to develop a workable N&T procedure; *"…this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed in the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures; …"* (Recital 40)

Yahoo! UK concurs with the Directive. It is incumbent upon the Government to provide a framework and procedure for notice and takedown which is workable and fair to all stakeholders. Whether this framework is self-regulatory or has statutory backing is less important. In this regard, we re-state our position from our first submission (of 2 November 2001):

Clear N&T procedures can be a useful mechanism which benefits intermediaries, content providers and other stakeholders alike and which protects the freedom of speech, gives legal security for users and ISPs, while simultaneously providing effective tools for removal of illegal content. As one of the leading information technology nations in Europe, with a consistently forward-looking approach to e-legislation, the UK has an opportunity to pioneer in the European Union and in Brussels with regard to developing a workable N&T regime domestically and, indeed, EU wide. How such a regime might work in practice is, however, less certain. Thus, we merely offer some observations to feed into the ongoing N&T debate in the UK. The present ad hoc system of N&T is unsatisfactory from the viewpoint of the intermediary for several reasons:

1. an intermediary can be considered "on Notice" having been informed of the existence on its site of supposedly illegal material by anyone, by any means. This creates difficulties as non-customer facing members of staff might receive notices from a complainant. It is a difficult task to ensure all members of staff understand a company's N&T procedure. We suggest that complainants be required to address their complaints in a standardised format to a designated individual or department within the company, whose contact details should be readily available on the service provider's website, who will be able to deal with the complaint quickly and accurately.
2. The means by which a Notice is served is equally problematic. Case law shows that a Notice can be issued by any means of communication, including verbally in the street. We suggest that HM Government states which means of communication are acceptable (at least some form of written complaint, sent to the appropriate contact point).
3. At present, the intermediary has to play "judge and jury" when it receives a Notice. It is expected to be sufficiently expert in intellectual property rights infringement, defamation, abusive content, and so on, and to make correct decisions time after time. It is unrealistic to expect (especially smaller) intermediaries to maintain such expertise in-house – and it is too expensive for them to out-source. It might be considered that the only sufficient Notice would be a Court Order; though whether this would be practical is questionable.
4. A much discussed alternative would be to create one or more "clearing houses", preferably with some form of statutory backing, which would be the sole point for reception of complaints/Notices. It would be incumbent upon the clearing house to make a judgment as to whether the Notice was valid. The intermediary would merely act on the instruction of the clearing house, thus absolving itself of making value judgments on content which it hosts but nothing more. In order for the clearing house to perform this task, complainants would have to indemnify the clearing house in case of a challenge to its ruling (probably through the courts).

> The clearing houses could perhaps operate without statutory backing. While this might be possible in fairly clear-cut areas of illegality, such as child pornography, it would be much more problematic in other areas, such as defamation.

Yahoo! UK is looking for clarity in the area of N&T, but we are also realistic. It is unlikely that a fully workable process will be developed in time for the implementation of the Directive in the UK. Perhaps the best that can be achieved during the current implementation would be the fulfilment of points 1 and 2 above. The European Commission is looking into the issue of N&T regimes EU wide and this will form part of its review of the Directive in 2003. A hurriedly created and ill thought out N&T regime for the UK will solve few problems and create many more.

Yahoo! UK appreciates the opportunity to participate in this consultation and we are happy to answer any queries you may have pertaining to the above comments, or to discuss any other ideas you may have. My contact details are email: scollins@uk.yahoo-inc.com, tel 020 7808 4252.

I look forward to hearing from you soon.

Kind regards.

Yours sincerely,

Stephen Collins
Yahoo! Europe (for Yahoo! UK Ltd)

About Yahoo! UK

Yahoo! UK Ltd is a subsidiary of Yahoo! Inc., a global Internet communications, commerce and media company that offers a comprehensive branded network of services to more than 219 million individuals each month worldwide (including over 5 million unique users based in the UK). The company created the first online navigational guide to the Web and also produces a wide variety of offerings that number close to 90, including Yahoo! Sports, Yahoo! News, Yahoo! Maps, Yahoo! Finance, Yahoo! Music, chat rooms and clubs, e-mail and instant messaging.

Yahoo! also provides online business and enterprise services designed to enhance the productivity and Web presence of Yahoo!'s clients. These services include customized enterprise portal solutions; audio and video streaming; store hosting and management; and Web site tools and services.

The company's global Web network includes 24 World properties. Yahoo! has offices across Europe, the Asia Pacific, Latin America, Canada and the United States. Yahoo!'s Global HQ is in California, USA, and its European HQ is in London.