

Amazon.co.uk
Comments on UK Draft Regulations 2002 Electronic Commerce (EC Directive)

Amazon.co.uk is the UK's leading online retailer. With millions of customers worldwide, Amazon.com strives to be the world's most customer-centric company, where customers can find and discover anything they might want to buy online. Amazon.co.uk opened its virtual doors in October 1998 and has over 3.2 million active customers¹.

Amazon.co.uk welcomes the opportunity to comment on the draft Electronic Commerce (EC Directive) Regulations 2002 relating to UK transposition of EC Directive 2000/31/EC on Electronic Commerce.

We remind the UK Government that the purpose of Directive 2000/31/EC is to ensure that electronic commerce benefits from a European Single Market without internal borders by removing the legal uncertainty for operators as to whether services operated from within the Member State of establishment are subject to that state's laws or to the laws of the state in which the services are received (see recitals 3-8). Legal certainty encourages businesses to offer and promote services online and across borders, thereby increasing competition and consumer choice. We trust that the UK transposition of Directive 2000/31/EC will faithfully implement this agreed objective, to the benefit of electronic business and consumers alike - and indeed in line with the aim of the UK Government to establish the UK as the best environment in the world for e-commerce.

We have chosen in our response to focus on three main areas of importance to our business. We are happy however to provide additional comments where helpful. The three areas cover:

- Internal Market: UK Regulations 4 & 7
- Scope of the Directive and associated derogations: EC Directive Annex & UK Regulations Schedule
- Information Requirements: Regulation 8

The European Internal Market: Regulations 4 & 7

Amazon.co.uk calls on the UK Government to transpose explicitly the requirements of article 3.1 of Directive 2000/31/EC in the UK implementing Regulations, so as to give effect to the country of origin principle referred to in Recital 22. Accordingly, the UK Regulations should contain a provision specifying that information society services established in the United Kingdom shall be subject to the laws of the United Kingdom.

We also call for the Government to provide clarification of the "restriction" test to be applied to non-UK operators (Regulations 4.2 and 7.2).

¹ meaning customer accounts from which at least one order was placed within the preceding twelve months.

EC Directive 2000/31/EC on Electronic Commerce is a Single Market directive, within the aims of article 14(2) of the EU Treaties. Not surprisingly therefore the directive confirms and gives force to the dual principles of the Single Market, namely 1) a country of origin (based on “establishment”) approach to applicable law, and 2) mutual recognition of incoming goods and services. These two sides of the same Single Market coin are set down explicitly in articles 3.1 and 3.2 respectively of the Directive.

However, the UK draft regulations fail to transpose properly the principle (set out in recital 22 and article 3.1) that information society services be subject to the law of the Member State in which the service provider is established. Although the DTI’s draft Guide for Business states in paragraph 4.1 that “Regulation 7(1) provides that information society services provided to a person in another Member State by a service provider from an establishment in the UK must comply with any applicable UK law that falls within the coordinated field”, that Regulation does not in fact state this principle. Regulation 7(1) deals solely with the creation of an obligation for enforcement authorities to enforce compliance with certain areas of UK law. Further, the definition of enforcement authority expressly excludes courts and accordingly, the regulation does not necessarily apply to all applicable UK law (for example, it would not apply to a private action in tort brought in a UK court). We strongly oppose the omission of the country of origin principle from the UK implementing Regulations and submit that the Regulations should contain a provision specifying that information society services established in the United Kingdom shall be subject to the laws of the United Kingdom.

Failure to transpose this clear principle of country of origin applicable law principle provided for under article 3.1 as the basis of the Directive from which limited and exhaustive derogations subsequently stem, appears to be completely at odds with the wording as well as the spirit of the Directive. Furthermore, it exposes e-commerce operators established in the UK to significant legal uncertainty - a level of uncertainty to which, it appears, operators established in other Member States would not be subject.

It is still not clear which law would apply for non-UK-established operators providing services to the UK where a UK law were different to that in the country of establishment but is not defined as a “restriction”. Were such a restrictions test to be applied in other Member States, it would similarly impose considerable regulatory burdens on UK e-commerce companies in terms of understanding what might be considered a restriction in each of 14 other EU Member States.

This lack of clarity in laying down the country of origin and mutual recognition principles is all the more surprising given that these were the very principles which the UK Government argued for, and indeed celebrated having achieved, at the time of negotiating the EC Directive.

Scope of the Directive and associated derogations: EC Directive Annex and UK Regulations Schedule

The annex of the EC Directive lays down a narrow and exhaustive list of derogations from the general provisions of the directive. We strongly oppose therefore what would appear to be an intention to unilaterally extend the scope of these derogations to include pre-contractual arrangements. We would suggest that this is unnecessary gold-plating, and further undermines the concept of legal certainty for UK companies operating legitimately in the UK.

The approach of the EC Directive is clear in its interpretation of a country of origin approach to applicable law in general by explicitly listing in the Annex to the Directive those few areas which are not covered by this approach – the derogations.

The EU institutions and Member States could have decided during the decision-making process to include further derogations such as pre-contractual/non-contractual obligations - they explicitly did not. The list of derogations is therefore an exhaustive, not an indicative, list and the Directive should be transposed and implemented accordingly.

We are both surprised and concerned therefore to see that the UK draft Regulations appear to contemplate a further extension of the derogations entirely unwarranted by the Directive itself – that of pre-contractual arrangements – through the interpretation in the Guide for Business (paragraph 4.8) of “contractual obligations concerning consumer contracts” to include “essential information that has a determining influence on the decision to contract”.

In practical terms this introduces an additional layer of legal uncertainty for operators, suggesting, contrary to the Directive itself, that in areas such as unfair competition, a country of destination approach applies in determining the applicable law.

By not transposing the legal certainty of the directive into UK Regulations, this potentially exposes a company such as Amazon.co.uk, whose website can be accessed throughout the EU, to unknown liabilities in 14 other EU member countries, despite its establishment in the UK and compliance with UK domestic law. Not only does this again contradict the very concept of Single Market principles of country of origin and mutual recognition at EU level, but it also exposes UK-established operators to multiple, and often conflicting, interpretations of such obligations across Member States. Furthermore, not only would it be impossible to have legal certainty in general terms in such a situation, but the concept of complying with contradicting laws is clearly an impossible one.

Information Requirements: Regulation 8

Amazon.co.uk calls for the inclusion of language in the Regulations that reflects the recognition accorded in the Guide for Business in respect of information requirements.

We welcome the recognition from Government in paragraph 5.3 of the Guide for Business that the requirement under Regulation 8(1) to provide information in a form and manner which is “easily, directly and permanently accessible” may be met if the information is accessible by other means than the means by which the service provider transacts with recipients of his services. We also welcome the recognition that temporary interruptions to the availability of the information are essential and unavoidable. We call for the inclusion of language in the Regulations that gives effect to this latitude.

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