



ELECTRONIC COMMERCE (EC DIRECTIVE) REGULATIONS 2002

PUBLIC CONSULTATION—GOVERNMENT RESPONSE

July 31, 2002

Introduction

Between March 7 and May 2, 2002, the Government publicly consulted on draft legislation implementing the majority of the requirements of Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market—the E-Commerce Directive. This document summarises the key changes that the Government has made in finalising the Electronic Commerce (EC Directive) Regulations 2002 in the light of the comments received. Those Regulations were made yesterday and laid before Parliament today. The main body of the Regulations will come into force on August 21, 2002.

The Government has separately published its response to comments received on draft legislation implementing the Directive in respect of matters within the scope of the Financial Services and Markets Act 2000. Those measures will also come into force on August 21, 2002.

Approach

The final text of the Directive, as negotiated between the European Parliament and Member States of the European Community, raises questions of both interpretation and implementation. The Government's approach throughout implementation has therefore been to uphold the principles that underlie the Directive to the extent compatible with giving those who will be affected by it as much legal certainty as possible. For this reason, the Government is extremely grateful to those who commented on the draft Regulations and contributed significantly to improving their wording as a consequence.

The rest of this document does not seek to address every comment received. Instead, it highlights those areas of particular importance where the Government has decided to make changes to the draft Regulations or, indeed, to retain the original wording. The Government again stresses the importance that it attaches to the guidance accompanying the Regulations, not least because the interim text has been not only updated in line with the Regulations themselves but also expanded where further clarification was identified as helpful by respondents to the consultation.

Government response

Interpretation

The Regulations confirm their extension to Northern Ireland as well as to England, Wales and Scotland.

The definition of “established service provider” has been extended, in line with recital 19 to the Directive, to address cases where it is difficult to determine from which of several places of establishment a given information society service is provided.

Private international law

The draft Regulations explicitly provided that they neither established additional rules on private international law (i.e. the part of UK law that deals with cases having a foreign element, such as where a contract is made in a foreign country or one or more of the parties is not resident in the UK) nor dealt with the jurisdiction of courts. The Government stated that the effect of this was that UK courts would continue to follow the requirements of the Private International Law (Miscellaneous Provisions) Act 1995 but that the application of the law dictated by them would be subject to a restrictions test in accordance with the internal—market provisions of the Regulations.

Many comments argued strongly that preserving private international law, albeit in modified form, was inconsistent with the intent of the Directive to establish country-of-origin regulation of information society services and that, as a consequence, the Regulations would fail to provide the legal certainty needed by UK-established service providers to trade and be competitive in Europe. The Government has considered these comments carefully, not least in the interests of justice in relation to recipients of such services. On balance, however, it agrees that country-of-origin regulation should take precedence and has removed the provision on private international law accordingly.

Level of protections; diversity and pluralism

The draft Regulations explicitly provided that they did not affect any national legislation implementing Community acts where it established the level of protection in particular as regards public health and consumer interests. Such legislation would be applied insofar as it did not restrict the freedom to provide information society services by a service provider who was established in a Member State other than the UK. Equally, the draft Regulations were explicitly without prejudice to measures taken at national level in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.

A number of comments argued that these provisions were not necessary in the Regulations since they qualified the scope of the Directive in general. The Government accepts this and has therefore decided to remove them from the Regulations. However, it considers that this could itself introduce unnecessary uncertainty where the protection of public health and consumer interests unaffected by the Directive is concerned. It has therefore chosen to clarify, consistent with the expressed scope of the Directive, that such protections do not fall to be considered as restrictions on the provision of information society services for the purposes of the Regulations.

Internal market

The E-Commerce Directive requires the UK to ensure that information society services provided by service providers established in the UK comply with the national provisions applicable here irrespective of where in the European Economic Area the service is being provided. The draft Regulations made it explicit that UK enforcement authorities would have to apply UK provisions to UK service providers, even when the recipient was elsewhere in the EEA, and left it implicit that this required UK service providers to comply with UK provisions in the first place.

Many comments argued that the requirement for UK service providers to comply with UK provisions should be clearly stated. The Government accepts that this would represent a more transparent implementation of the Directive's requirements and has recast the Regulations accordingly. However, because of the need to extend the scope of recipients for whose benefit UK enforcement authorities must act, the Regulations also retain the existing wording to this effect.

Consumer-contracts derogation

The draft Regulations proposed following the wording of the Directive in excluding from their internal-market provisions "contractual obligations concerning consumer contracts." The interim guidance accompanying that draft interpreted this as applying to the question of which law applies to the substance of a dispute, including contractual obligations/rights; essential information that has a determining influence on the decision to contract, which must be provided in accordance with the requirements of the consumer's Member State; and requirements applicable to such contractual obligations, including requirements to do certain things before entering into a contract (e.g. provide information about cancellation rights under the provisions of timeshare legislation).

Comments argued against this interpretation because of the burdens that business would face if it were adopted generally. The Government recognises this concern, in the light of which it will now interpret the exclusion as applying to the question of which law applies to the substance of a dispute, including contractual obligations/rights, information provided by traders about consumers' rights and other essential information that has a determining influence on the decision to contract. Under this interpretation, the derogation also includes Member States' laws that bear on the terms of the contract (e.g. rules on implied terms, certain cancellation rights and the circumstances in which an agreement is unenforceable).

Role of the courts

The draft Regulations did not include courts among the enforcement authorities that could impose proportionate restrictions on inbound information society services for reasons of public policy, public health, public security or consumer protection. The Government was concerned about the appropriateness and practicality of granting courts this role and therefore chose to await the outcome of consultation to inform its final approach.

A number of comments highlighted that where no enforcement authority exists to act on service recipients' behalf, there would be no mechanism to impose restrictions otherwise considered necessary. The Government recognises this and agrees that, in those

circumstances, it is both desirable and necessary for courts to be able to exercise derogations from the lifting of restrictions.

Unsolicited commercial communications

No comments disagreed with the Government's proposal not to transpose Article 7(2) of the Directive, which requires service providers undertaking unsolicited commercial email to consult regularly and respect the opt-out registers in which natural persons not wishing to receive such communications can register themselves. Existing industry self-regulation and codes of conduct continue to provide recipients of such communications with effective protection.

Since the consultation, agreement has been reached between the European Parliament and Member States on the final terms of the proposed Communications Data Protection and Privacy Directive. This will introduce opt-in (i.e. prior-consent) requirements for unsolicited commercial email sent to natural persons but with an exemption where it is sent in the context of an existing customer relationship, provided that the email addresses concerned are properly obtained in accordance with the framework Data Protection Directive and that addressees are always given the chance to opt out of further communications. The final Directive was adopted on 12 July 2002 (2002/58/EC), and implementation is required by autumn 2003. The Government envisages that appropriate statutory provision will be made through Regulations under section 2(2) of the European Communities Act 1972, as for the Regulations implementing the E-Commerce Directive.

Right to cancel contracts

With the aim of ensuring maximum compatibility with existing consumer-protection legislation, the draft Regulations provided for contracts to be unenforceable where the service provider had failed to comply with three specific requirements that went to the actual substance of those contracts: the availability of the terms and conditions, the acknowledgement of the order and the provision of means allowing input errors to be identified and corrected.

A number of comments argued that, by permitting cancellation of a contract "at any time" in these circumstances, the Regulations would create disproportionate penalties for service providers. Instead, they favoured time-limiting the cancellation right to three months, in line with the Consumer Protection (Distance Selling) Regulations 2000 and placing a duty of care on the customer in respect of any goods subsequently delivered.

The Government agrees that greater alignment with existing legislation is not only possible but also necessary to address concerns expressed about the Human Rights Act implications of an open-ended right to cancel. Given that the Regulations do not supersede such legislation or affect consumers' existing rights, it has therefore decided that no remedy other than the right to seek damages for breach of statutory duty is necessary where a service provider fails to acknowledge receipt of an order. Similarly, where terms and conditions provided cannot be stored and reproduced, the Regulations now provide for the possibility of a court order instead of cancellation of the contract.

The Government remains of the view that failure to provide the means to identify and correct input errors goes sufficiently to the heart of any subsequent contract that a more extensive

remedy is appropriate. The Regulations therefore continue permit a contract to be rescinded in these circumstances. However, they also permit service providers to go to court to argue that this is inappropriate to the facts of the case and for the court to order otherwise.

Liability of intermediary service providers

The E-Commerce Directive limits the liability of intermediary service providers where they act as mere conduits, caches or hosts of information. Whereas the Articles in question address civil and criminal liability simultaneously, the draft Regulations proposed tackling them separately, on the one hand limiting civil liability, on the other hand providing intermediaries with a defence against criminal liability. They did so solely because separating the treatment of civil and criminal liability is standard drafting practice for UK legislation.

Some comments questioned whether this architecture could imply that the meaning of the provisions in question differed from those in the Directive. This was not the Government's intention, and it has therefore decided to bring the Regulations into line with the approach of the relevant Articles. In so doing, it has chosen wording to ensure, again in accordance with those Articles, that the ability of courts to require intermediaries to terminate or prevent an infringement is preserved.

Level of proof

The draft Regulations were silent on what intermediaries would need to do to satisfy the defences created for them in cases of criminal liability.

Some comments questioned whether this should be taken to mean that intermediaries were required to prove their innocence beyond a reasonable doubt. This, too, was not the Government's intention, and it has therefore drawn on language in the Regulation of Investigatory Powers Act to clarify that a court or jury must assume that a defence is satisfied if an intermediary adduces evidence sufficient to raise that defence unless the prosecution proves beyond reasonable doubt that it is not.

Actual knowledge

The limitations on liability for caches and hosts apply if an intermediary does not have actual knowledge of illegal activity or information. In line with the Directive, the draft Regulations did not propose specifying how actual knowledge is obtained.

A number of comments sought further detail on what constitutes actual knowledge and what type of notice would give rise to it. Others recognised the inherent difficulties of providing a definition of actual knowledge but requested that some attention instead be given to what would *not* constitute actual knowledge.

The Government remains of the view that providing a positive definition would risk creating loopholes that could be exploited to avoid liability inappropriately. Being too prescriptive about what does not constitute actual knowledge raises similar concerns. However, it recognises that intermediaries face difficulties in assessing whether they are likely to be deemed to have actual knowledge. Given that the courts will ultimately decide individual cases, the Government believes it appropriate for them to have regard at least to whether a

notice has been sent to the intermediary in question and, if so, whether it contains key information about the sender, where the relevant information is stored and why it is considered unlawful. The Regulations therefore provide for this.

Other categories of intermediary

The draft Regulations did not propose limiting the liability of categories of intermediary—in particular, providers of hyperlinks, location tools and content aggregation—beyond those required by the Directive.

A number of comments made the case for these intermediaries to be addressed in the same fashion as mere conduits, caches and hosts. In particular, they argued that the absence of legislation in this area has created legal uncertainty and stunted e-commerce growth; that SMEs with an online presence would be disproportionately hit as they lack the financial and legal infrastructure to cover operational risks engendered by this lack of legal certainty; and that UK-established service providers would be at a disadvantage compared with competitors in Member States that had extended the categories of limited-liability intermediary.

The Government is sympathetic to these concerns. However, it has not yet seen compelling arguments that UK law creates liability for other categories of intermediary in the first place. Even if they can be made, the issues that are raised are not necessarily as straightforward as for mere conduits, caches and hosts. Finally, any proposed legislation in this area would need to be notified under the terms of the Technical Standards Directive, which imposes a three-month standstill while the European Commission and other Member States consider the possible implications for cross-border trade. The Government sees no merit in delaying the Regulations' entry into force for the benefit of associated but nonetheless additional provisions.

The Government will therefore continue to discuss these issues with stakeholders to establish whether problems in law do exist. If so, the Government is prepared to consider bring forward additional Regulations in this area later in the year, following further consultation and notification under the Technical Standards Directive.

General obligation to monitor

The E-Commerce Directive prohibits the imposition of a general obligation on mere conduits, caches and hosts to monitor the information that they transmit or store or to actively seek facts or circumstances indicating illegal activity. The draft Regulations did not propose transposing this requirement because no such obligations currently exist in UK law and their future introduction would be incompatible with the Directive.

Some comments argued for the prohibition to be included in the Regulations to put the matter beyond doubt and to clarify the legal position of intermediaries. However, the Government is concerned that doing so would not only confer no additional legal certainty on intermediaries but could even introduce uncertainty if the prohibition were interpreted differently from its meaning in the Directive. The Regulations do not, therefore, transpose this provision.

Notice-and-takedown procedures

The draft Regulations did not propose statutory notice-and-takedown procedures, governing the removal or disabling of access to information. The Government believed that industry self-regulation and codes of conduct had not yet been shown to be inadequate to the task and that, even if this were to be the case, sectoral approaches would be more appropriate to the different circumstances that will be relevant in each case than the horizontal provisions that would have to be set out in the Regulations.

Consultees supported this approach. In so doing, they did argue that the Government has a key role to play in facilitating the development of codes acceptable to the many and varied interests in industry. The Government is happy to play its part in actively encouraging interested parties to participate in the generation of such codes but stresses that their content is primarily a matter for industry itself.

As and when codes have been agreed, the Government is prepared to consider the merits of giving them statutory backing. The scope of the European Communities Act prevents it from legally taking powers to do so in the current Regulations, as some comments requested. However, this is not necessary as further Regulations, linked to the implementation of the Directive, could be made at the appropriate time.