

DRAFT PARTIAL REGULATORY IMPACT ASSESSMENT

1. (i) Title of proposed measure

The Electronic Commerce (EC Directive) Regulations 2002¹

2. (i) The issue and objective

Issue: E-commerce provides the UK and the rest of the European Economic Area with an opportunity to stimulate economic growth, industrial competitiveness and employment. To facilitate this, it is desirable to put in place an effective legal framework that would remove the chief obstacles to providing services electronically within the EEA. The Regulations will aim to do this and to meet legislative obligations in respect of the E-Commerce Directive. UK businesses will have to ensure that they are in compliance with the provisions of Regulations.

Objective: The purpose of the Regulations is to create a framework within which UK business (particularly SMEs) and consumers will have the legal certainty needed to take full advantage of the opportunities offered by e-commerce. The main areas addressed are:

- (a) identifying and clarifying rules so that both consumers and business have greater confidence about whose laws apply to an online transaction;
- (b) ensuring transparency and consistency in the information to be provided by sellers to consumers about themselves, their offerings and how to conclude a contract online;
- (c) ensuring consistency in aspects of online commercial communications, such as conditions for unsolicited emails; and
- (d) limiting the liability of intermediaries who transfer information from supplier to consumer but are not aware of its content.

2. (ii) Risk assessment

The risks discussed below correspond to the four areas identified in the previous paragraph.

- (a) A substantial barrier to the more confident and widespread use of e-commerce within the EEA is the imposition of restrictions by any of the 18 different sets of national legislation. As the UK is a nation with a relatively high proportion of foreign trade, UK business is particularly exposed to any restrictions associated with doing online business abroad. Compliance with restrictions prevailing in the Member State in which the recipient of the service is located entails considerable expense for business wishing to provide electronic services across borders, in terms of both ensuring that activities are lawful and keeping abreast of any alterations to the legal framework. Moreover, the absence of a harmonised legal framework may create uncertainty for

¹ [Provisional title of draft Regulations] Transposing Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1). The text (PDF 106 KB) is at europa.eu.int/eur-lex/en/lif/dat/2000/en_300L0031.html.

the recipient of the service. The Regulations will implement a partial harmonisation of single market rules so as to reduce the cost and time burden.

- (b) Without specific information, the consumer will not know where to complain if necessary and it will be difficult to ensure that the service in question is supervised at source. Information about the seller, the relevant authorities in the seller's home country, the products and services and their prices and what to do to order online needs to be clear. In particular, consumer take-up is also likely to be inhibited by a diversification of approaches.
- (c) Similarly, unless the consumer has information about an online advertiser (or the person on whose behalf he is advertising), he will not be able to protect himself effectively against unwanted or unsolicited advertising emails. Without requirements that advertising emails are flagged as such, users may be discouraged from entering into e-commerce by the potential costs and difficulties of managing their electronic inboxes.
- (d) Without some harmonisation of the conditions under which intermediary providers of access and storage services could limit their liability for illegal or harmful information and activities, disparities in treatment by national authorities may grow and competitiveness suffer.

There are also major risks associated with a failure to implement the provisions of the Directive correctly into UK law. This could lead to proceedings being brought by the European Commission in the European Court of Justice. Failure could also lead to the Government being held liable for any losses suffered by those denied their rights under the Directive.

3. (i) Identification of options

Two principal options have been identified:

- option 1—do nothing; and
- option 2—specific implementation of the provisions of the Directive, in general and in detail.

This assessment will be developed to cover the main options involved in each of the different subjects covered in the Regulations in the light of consultation on drafts of those Regulations.

3. (ii) Issues of equity or fairness

The harmonisation resulting from the Regulations should reduce the exposure of the public to certain risks.

The Regulations should improve the confidence of actual and potential consumers to engage in e-commerce and promote a level playing field for SMEs.

The Regulations are intended to impact evenly across all sectors of online service provision.

Though the Regulations will apply to large and small businesses alike, SMEs in general have less administrative capacity to ensure compliance. However, they stand to benefit disproportionately, through easier access to new markets. SMEs trade less abroad than large companies, but even those confined to the UK market stand to benefit from the Regulations as most of the information, advertising and other provisions apply also to domestic transactions.

4. Identification of the benefits

Option 1: This has the benefit that there would be, for the time being at least, no change to the current legal framework. The immediate cost for Government and business should therefore be lower, and consumers would continue to benefit from current levels of protection.

Option 2: This has the benefit of reducing restrictions on providers of online services into the UK in most matters, wherever they do business in the EEA. (Implementation by other Member States will ensure that services can be provided from the UK throughout the EEA in all areas within the scope of the Directive without restrictions, except where a derogation may apply). It also benefits business and consumer confidence by requiring the provision of information about the service provider and providing for limitations on their liability for illegal information that they unwittingly transmit.

4. (ii) Quantifying and valuing the benefits

The Regulations will implement a complex Directive, with implications across several major areas of national and European Community law. Only broad, qualified estimates of its financial impact could be made. The Government believes these could be in the order of one-off benefits of up to £1 billion and yearly savings of up to £350 million.

Whilst this example is only illustrative, it does suggest the order of magnitude of the savings that may accrue to businesses—and ultimately to the consumer—through Regulations implementing option 2. The calculation is also sensitive to the precise scope of implementation in the different Member States. Option 1 would not yield these benefits but would avoid the costs associated with transposition, implementation and enforcement of the Directive.

5. Compliance costs for business, charities and voluntary organisations

5. (i) Business sectors affected

The Regulations will affect everyone providing online services within the internal market, given the definition of “information society services” as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. It follows that the Regulations will affect a large number of businesses, charities and voluntary organisations now, and their numbers should increase as the attractiveness of e-commerce grows.

5. (ii) Compliance costs for a “typical” business

The following costs are for option 2; option 1 imposes no immediate direct additional costs on business.

There will be costs relating to ensuring that the provision of services complies with all the relevant national legislation. In some cases, there may be a cost of changing to compliance with UK legislation instead of that of particular markets in the EEA. If these costs are greater than those that businesses bear at the moment, however, it is likely to be because of compliance with other instruments (covering advertising, licensing etc.) since the present Regulations will merely require compliance with home-state controls in such areas.

There will be some additional expense involved in ensuring that certain information is provided on a website or other means of promoting the service. However, the type of information required is not expensive to procure, the majority of responsible businesses would aim to provide such information anyway and the costs and effort concerned would probably be integrated with the burden of meeting the interrelated information requirements of the Consumer Protection (Distance Selling) Regulations 2000.

There may also be some costs for certain businesses (e.g. those standing to benefit from the sending of unsolicited commercial communications) from the requirement for information provision, though much of this is already undertaken by advertisers in accordance with industry standard practice.

The Regulations may result in some one-off expenses for affected organisations. These would result from any necessary alterations to the systems in place and would vary according to the organisation. They are very hard to estimate with any degree of accuracy. None of the 100 respondents was able to give an estimate of any of these costs in DTI’s consultation exercise on the draft Directive in 1999, and only one respondent felt able to suggest the areas in which costs would be reduced or increased, despite a specific question about this. Similarly, only of the almost 100 respondents to DTI’s consultation in 2001 on its approach to implementation provided an estimate of compliance costs, and this was predicated on assumptions that are not reflected in the Regulations.

5. (iii) Total compliance costs

The costs of compliance with these Regulations will depend on the size of the organisation, its current level of involvement in e-commerce, the extent of the changes required to comply with the Directive, the level of systems change required and the extent to which alterations resulting from this Directive are made as part of the process of updating and upgrading required to provide an effective online service.

6. Consultation with small business: “the litmus test”

Small businesses have not yet provided figures for compliance costs. In principle, costs for small businesses would in themselves be lower (but greater in proportion to revenues), and benefits higher, than for larger businesses. During the remainder of the consultation process, DTI will have discussions with organisations representing small-business interests to obtain first-hand views on the costs and benefits of the options. The Small Business Service will continue to offer advice on the development of this assessment.

7. Identification of any other costs

Option 1: The absence of specific implementation of the Directive is likely to cause uncertainty that will inhibit the growth of e-commerce and therefore potentially impose costs on the UK (e.g. resulting from reduced competitiveness, lower employment and less economic growth).

Option 2: Implementation of the Directive by legislative and non-legislative means and enforcement of the Regulations will entail additional costs for Government and other organisations as set out below.

There will be enforcement costs for UK enforcement authorities (e.g. the Director General of Fair Trading, Trading Standards Departments etc.) acting on behalf of consumers in other Member States and encouraging other Member States' authorities to act on behalf of UK consumers.

Additional administrative functions also flow from Articles 16, 17, 19 and 21 of the Directive, which are not directly implemented by the Regulations. Activities that will need to be resourced include:

- implementing and monitoring the Regulations and other obligations under the Directive;
- encouraging the development of codes of conduct and means of alternative dispute resolution;
- establishing and acting as contact points for the provision of advice and assistance to business and consumers;
- forwarding information to the Commission on developments in the UK, attending discussions on the implementation of the Directive and participating in the review of the Directive in 2003 and every two years thereafter;
- providing information and assistance when sought by other Member States and cooperating with their requests for regulatory enforcement action and the search for acceptable solutions to cross-border problems before Community legal action is invoked; and
- the operation of the procedures associated with the exercise of derogations from the requirement not to restrict the cross-border provision of information society services, whether invoked by the UK or by other Member States in respect of services originating in the UK.

8. Results of consultation

DTI consulted generally on the draft Directive in 1999 and on its approach to implementation in 2001. It received some 100 contributions from businesses, consumers, their representative organisations and others on each occasion. In the course of general discussions with interested parties, a number of other unquantified points about the costs and benefits of the

Directive have emerged. These are additional to points dealt with above and might be summarised as follows:

- Regulations that genuinely facilitate the use of e-commerce are likely to reduce business costs by encouraging the use of cost-effective delivery mechanisms that are able to reach the maximum number of consumers; and
- SMEs and micro-enterprises will be particularly handicapped by inconsistent implementation of the Directive since they are less likely to be able to afford sound legal advice and will therefore be discouraged from exploiting the opportunities afforded by the internal market and investing in the European development of their businesses.

This draft partial RIA is available on DTI's website with the draft Regulations and interim guide for business currently the subject of public consultation. The finalised RIA will be published alongside the definitive texts of those documents. DTI hopes to be able to improve its accuracy in the light of comments received.

9. Summary and recommendation

Option 1 is not attractive since it foregoes substantial likely net benefits and would be in breach of the UK's Community obligations.

Option 2 will bring some costs in the form of business-systems changes required to ensure compliance with the Directive. However, these should, on the whole, be relatively small and may not apply to those entering the electronic market in the future (although, clearly, they will need to comply from day one). It will also bring costs with regard to transposition and enforcement. Offsetting these are commensurate benefits to consumer and business confidence and the fact that business opportunities will be increased considerably through the removal of restrictions on the cross-border provision of information society services. DTI's assessment is that the benefits of the Regulations are likely to outweigh the costs and justify option 2.

10. Enforcement, sanctions, monitoring and review

See section 7, above.

Department of Trade and Industry
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