
STATUTORY INSTRUMENTS

2002 No.

ELECTRONIC COMMUNICATIONS

The Electronic Commerce (EC Directive) Regulations 2002

<i>Made</i>	[2002]
<i>Laid before Parliament</i>	[2002]
<i>Coming into force</i>	[2002]

The Secretary of State, being a Minister designated^(a) for the purposes of section 2(2) of the European Communities Act 1972^(b) in relation to information society services, in exercise of the powers conferred on her by that section, hereby makes the following Regulations: -

Citation and commencement

1. These Regulations may be cited as the Electronic Commerce (E.C. Directive) Regulations 2002 and shall come into force on [2002].

Interpretation

2. - (1) In these Regulations –

“commercial communication” means any form of communication designed to promote, directly or indirectly, the goods, services or image of any person pursuing a commercial, industrial or craft activity or exercising a regulated profession, other than a communication –

- (a) referring only to any one or more of the following-
- (i) a geographic address at which the activity or regulated profession is pursued,

^(a) S.I. 2001/2555.
^(b) 1972 c. 68.

- (ii) a name, address or other information which enables electronic communications to be sent to that person, or
- (b) a communication relating to the goods, services or image of that person provided that the communication has been prepared independently, (and for this purpose, a communication prepared without financial consideration shall be taken to have been prepared independently unless the contrary is shown);

“consumer” means any natural person who is acting for purposes which are outside his trade, business or profession;

“coordinated field” means requirements applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them, and covers requirements with which the service provider has to comply in respect of-

- (a) the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification, and
 - (b) the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider,
- but does not cover requirements such as those applicable to goods as such, to the delivery of goods or to services not provided by electronic means;

“the Directive” means 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)(a);

“EEA Agreement” means the Agreement on the European Economic Area signed at Oporto on 2 May 1992 as adjusted by the Protocol signed at Brussels on 17 March 1993(b);

“enactment” includes an enactment [comprised in Northern Ireland legislation and] comprised in, or an instrument made under, an Act of the Scottish Parliament;

“enforcement action”-

(a) O.J. L178, 17.7.2000, p.1.

(b) O.J. L1, 3.1.94, p.3 and p.572.

- (a) in relation to any legal requirement imposed by or under any enactment, means any action taken with a view to or in connection with imposing any sanction (whether criminal or otherwise) for failure to observe or comply with it;
- (b) in relation to a permission or authorisation, means anything done with a view to removing or restricting that permission or authorisation; and
- (c) includes any other form of enforcement action;

“enforcement authority” does not include courts but, subject to that, means any person who is authorised, whether by or under an enactment or otherwise, to take enforcement action;

“established service provider” means a service provider who is a national of a Member State or a company or firm as mentioned in Article 48 of the Treaty and who effectively pursues an economic activity using a fixed establishment for an indefinite period, but the presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider, and references to a service provider being established or to the establishment of a service provider shall be construed accordingly;

“information society services” has the meaning set out in Article 2(a) of the Directive, (which refers to Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations,^(a) as amended by Directive 98/48/EC of 20 July 1998^(b) and is summarised in recital 17 of the Directive as covering any service normally provided for remuneration at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service);

“Member State” includes a State which is a contracting party to the EEA Agreement;

“recipient of the service” means any person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;

“regulated profession” means any profession within the meaning of either Article 1(d) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years’ duration^(c) or of Article 1(f) of Council

^(a) O.J. L204, 21.7.98, p.37.
^(b) O.J. L217, 5.8.98, p.18.
^(c) O.J. L19, 24.1.89, p. 16.

Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC^(a);

“service provider” means any person providing an information society service;

“the Treaty” means the treaty establishing the European Community.

(2) Terms used in the Directive other than those in paragraph (1) above shall have the same meaning as in the Directive.

Exclusions

3.- (1) Nothing in these Regulations shall apply in respect of –

(a) the field of taxation;

(b) questions relating to information society services covered by the Data Protection Directive^(b) and the Telecommunications Data Protection Directive^(c);

(c) questions relating to agreements or practices governed by cartel law; and

(d) the following activities of information society services -

(i) the activities of a public notary or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,

(ii) the representation of a client and defence of his interests before the courts, and

(iii) betting, gaming or lotteries which involve wagering a stake with monetary value.

(2) In this regulation-

“cartel law” means so much of the law relating to agreements between undertakings, decisions by associations of undertakings or concerted practices as relates to agreements to divide the market or fix prices;

“Data Protection Directive” means Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;

^(a) O.J. L209, 24.7.92, p. 25 Directive as last amended by Commission Directive 97/38/EC; O.J. L 184, 12.7.97, p.31.

^(b) O.J. L281, 23.11.95, p.31.

^(c) O.J. L24, 30.1.98, p.1.

“Telecommunications Data Protection Directive” means Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.

Level of protections

4.- (1) These Regulations do not affect any national legislation implementing Community acts where it establishes the level of protection in particular as regards public health and consumer interests.

(2) The national legislation referred to in paragraph (1) above shall be applied insofar as it does not restrict the freedom to provide information society services by a service provider who is established in a Member State other than the United Kingdom.

(3) In this regulation, “national legislation” means, in relation to the law of any part of the United Kingdom, any enactment or other legal requirement implementing Community acts referred to in paragraph (1) above in that part of the United Kingdom.

Private international law

5. These Regulations do not establish additional rules on private international law nor do they deal with the jurisdiction of courts.

Diversity and pluralism

6. These Regulations are without prejudice to measures taken at national level in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.

Internal market

7.- (1) Subject to paragraph (3) below, where the person for whom the services are intended is in another Member State, an enforcement authority with responsibility in relation to any enactment or other legal requirement shall ensure that the information society services provided by a service provider from an establishment in the United Kingdom comply with that enactment or legal requirement which applies to an information society service and falls within the coordinated field irrespective of whether the service in question is provided in the United Kingdom and any power, remedy or procedure for taking enforcement action shall be available to secure compliance with those requirements.

(2) Subject to paragraphs (3) and (4) below, any enactment or other legal requirement which applies to an information society service shall not be applied for reasons which fall within the coordinated field to

an information society service provided by a service provider established in a Member State other than the United Kingdom where its application would restrict the freedom to provide information society services to a person in the United Kingdom from that Member State.

(3) Paragraphs (1) and (2) shall not apply to those fields in the annex to the Directive set out in the Schedule.

(4) Nothing in paragraph (2) shall prevent an enforcement authority from taking proportionate measures, including applying in a proportionate manner any enactment or legal requirement which would otherwise not apply by virtue of that paragraph, in respect of a given information society service where those measures are necessary for reasons of-

- (a) public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,
- (b) the protection of public health,
- (c) public security, including the safeguarding of national security and defence, or
- (d) the protection of consumers, including investors.

(5) Paragraph (4) shall only apply where the information society service prejudices or presents a serious and grave risk of prejudice to an objective at (a) to (d) of that paragraph.

(6) Subject to paragraphs (7) and (8), an enforcement authority shall not take the measures in paragraph (4) above, unless it-

- (a) asks the Member State in which the service provider is established to take measures and the Member State does not take such measures or they are inadequate; and
- (b) notifies the Commission and the Member State in which the service provider is established of its intention to take such measures.

(7) Paragraph (6) shall not apply to court proceedings, including preliminary proceedings and acts carried out in the course of a criminal investigation.

(8) If it appears to the enforcement authority that the matter is one of urgency, it may take the measures under paragraph (4) without first asking the Member State in which the service provider is established to take measures and notifying the Commission and the Member State in derogation from paragraph (6).

(9) In a case where a measure is taken pursuant to paragraph (8) above, the enforcement authority shall notify the measures taken to the Commission and to the Member State concerned in the shortest possible time thereafter and indicate the reasons for urgency.

(10) To the extent that anything in these Regulations creates any new criminal offence, the maximum penalty shall not exceed the penalty allowed under paragraph 1(1)(d) of Schedule 2 of the European Communities Act 1972(a).

General information to be provided by a person providing an information society service

8. - (1) A person providing an information society service shall make available to the recipient of the service and any relevant enforcement authority, in a form and manner which is easily, directly and permanently accessible, the following information:

- (a) the name of the service provider;
- (b) the geographic address at which the service provider is established;
- (c) the details of the service provider, including his electronic mail address, which make it possible to contact him rapidly and communicate with him in a direct and effective manner;
- (d) where the service provider is registered in a trade or similar register available to the public, the register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
- (e) where the provision of the service is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
- (f) where the service provider exercises a regulated profession:-
 - (i) the details of any professional body or similar institution with which the service provider is registered;
 - (ii) his professional title and the Member State where that title has been granted;
 - (iii) a reference to the professional rules applicable to the service provider in the Member State of establishment and the means to access them; and

(a) 1972 c. 68.

- (g) where the service provider undertakes an activity that is subject to value added tax, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment.(a)

(2) Where a person providing an information society service refers to prices, these shall be indicated clearly and unambiguously and, in particular, shall indicate whether they are inclusive of tax and delivery costs.

Commercial communications

9. A service provider shall ensure that a commercial communication sent by him which constitutes or forms part of an information society service shall –

- (a) be clearly identifiable as a commercial communication;
- (b) clearly identify the person on whose behalf the commercial communication is made;
- (c) clearly identify as such any promotional offer (including any discount, premium or gift) and ensure that any conditions which must be met to qualify for it are easily accessible, and presented clearly and unambiguously; and
- (d) clearly identify as such any promotional competition or game and ensure that any conditions for participation are easily accessible and presented clearly and unambiguously.

Unsolicited commercial communications

10. A service provider shall ensure that any unsolicited commercial communication sent by him by electronic mail, where permitted, is clearly and unambiguously identifiable as such as soon as it is received.

(a) O.J. L145, 13.6.77, p. 1. Directive as last amended by Directive 1999/85/EC; O.J. L277, 28.10.99, p.34.

Information to be provided where contracts are concluded by electronic means

11. – (1) Unless parties who are not consumers have agreed otherwise, a service provider shall, prior to an order being placed by the recipient of a service, provide to that recipient in a clear, comprehensible and unambiguous manner the information set out in (a) to (d) below -

- (a) the different technical steps to follow to conclude the contract;
- (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
- (c) the technical means for identifying and correcting input errors prior to the placing of the order; and
- (d) the languages offered for the conclusion of the contract.

(2) Unless parties who are not consumers have agreed otherwise, a service provider shall indicate which relevant codes of conduct he subscribes to and give information on how those codes can be consulted electronically.

(3) Where terms and conditions applicable to the contract are provided to the recipient, they must be made available to him in a way that allows him to store and reproduce them.

(4) The requirements of paragraphs (1) and (2) above shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Other information requirements

12. Regulations 8, 9, 10 and 11(1) have effect in addition to any other information requirements in legislation giving effect to Community law.

Placing of the order

13.-(1) Unless parties who are not consumers have agreed otherwise, where the recipient of the service places his order through technological means, a service provider shall -

- (a) acknowledge receipt of the order to the recipient of the service without undue delay and by electronic means; and
- (b) make available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors prior to the placing of the order.

(2) For the purposes of paragraph (1)(a) above, the order and the acknowledgement of receipt will be deemed to be received when the parties to whom they are addressed are able to access them.

(3) The requirements of paragraph (1) above shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Meaning of the term “order”

14. Except in relation to regulation 11(1)(c) and regulation 13(1)(b), “order” may be but need not be the contractual offer for the purposes of regulations 11 and 13.

Liability of the service provider

15. The duties imposed by regulations 8, 9, 10, 11(1) and 13(1)(a) shall be enforceable, at the suit of any recipient of a service, by an action against the service provider for damages for breach of statutory duty.

Right to cancel contract

16. (1) Where a person-

- (a) has entered, or proposes to enter into a contract to which these Regulations apply, and
- (b) the terms and conditions have not been made available to him in compliance with regulation 11(3) or the service provider has not acknowledged receipt of the order or made available means of allowing him to identify and correct input errors in compliance with regulation 13(1),

the contract shall not be enforceable against him and he may give notice of cancellation of the agreement to the service provider at any time.

(2) It shall be the duty of the service provider to ensure that the person referred to in paragraph (1) is as far as possible put back in the same position he was in prior to the contract.

Mere conduit

17.- (1) Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of a service or the provision of access to a communication network, the service provider (if he otherwise would) shall not be liable in damages as a result of that transmission where the service provider –

- (a) did not initiate the transmission;
- (b) did not select the receiver of the transmission; and
- (c) did not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access referred to in paragraph (1) include the automatic, intermediate and transient storage of the information transmitted where:

- (a) this takes place for the sole purpose of carrying out the transmission in the communication network, and
- (b) the information is not stored for any period longer than is reasonably necessary for the transmission.

Caching

18. Where an information society service is provided which consists of the transmission in a communication network 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 transmission where-

- (a) the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request, and
- (b) the service provider –
 - (i) does not modify the information;
 - (ii) complies with conditions on access to the information;
 - (iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
 - (iv) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

- (v) acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

Hosting

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 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 to 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.

Protection of rights

20. (1) Nothing in regulations 17, 18 and 19 shall –

- (a) prevent a person agreeing different contractual terms; or
- (b) affect the rights of any party to apply to a court for relief to prevent or stop infringement of any rights.

(2) Any power of an administrative authority to prevent or stop infringement of any rights shall continue to apply notwithstanding regulations 17, 18 and 19.

Defence in Criminal Proceedings

21-(1) In proceedings against a service provider for any offence arising out of any transmission, provision of access or storage falling within regulation 17, 18, or 19, it shall be a defence, to show that the service provider complied with regulations 17, 18 or 19 in so far as these provisions are applicable in the relevant circumstances.

(2) Notwithstanding paragraph (1) above, paragraph 19(a)(ii) shall not apply in criminal proceedings.

SCHEDULE

Regulation 7(3)

1. Copyright, neighbouring rights, rights referred to in Directive 87/54/EEC(a) and Directive 96/9/EC(b) and industrial property rights.
2. The freedom of the parties to a contract to choose the applicable law.
3. Contractual obligations concerning consumer contracts.
4. Formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated.
5. The permissibility of unsolicited commercial communications by electronic mail.

(a) Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products; O.J. L24, 27.1.87, p.36.

(b) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases; O.J. L77, 27.3.96, p.20.