

THE ELECTRONIC COMMERCE (EC DIRECTIVE) REGULATIONS 2002

1. INTRODUCTION

The Electronic Commerce (EC Directive) Regulations 2002 ('Regulations') implement the EU's E-Commerce Directive 2000 ('Directive'). The Regulations came into force on 21 August 2002 and seek to promote e-business and help build consumer confidence and protection.

2. WHO DO THE REGULATIONS APPLY TO?

The Regulations apply to those who provide and receive "information society services", which are defined as services "normally provided for remuneration at a distance, by means of electronic equipment at the individual request of a recipient of a service". This wide definition covers the Internet but also e-mail and mobile phones, although there are certain exceptions for e-mail. It covers a wide range of economic and commercial activities including on-line selling of goods, newspapers, magazines, entertainment services, direct marketing, advertising services and professional services.

3. ARE THERE ANY EXCEPTIONS TO THE REGULATIONS?

The Regulations do not apply to:

- taxation, particularly VAT;
- services covered by the Data Protection Directive 1995, the Telecoms Data Protection Directive 1997 and the Directive on Privacy and Electronic Communications 2002;
- agreements or practices governed by 'cartel' law (e.g. the Competition Act 1998);
- the activities of a public notary or equivalent profession;
- the representation of a client and defence of his interests before the courts; and
- betting, gaming or lotteries.

The Regulations do, however, apply to promotional competitions or games whose purpose is to encourage the sale of goods or services and where any payments that arise serve only to effect that sale.

4. WHAT ARE THE KEY FEATURES OF THE REGULATIONS?

4.1 Establishment of Service Providers

The Regulations seek to liberalise the provision of online services in two key ways:

- they require UK-established service providers to comply with UK laws even if they are providing their services in another Member State. This means that UK-established service providers will have to comply with UK law even if they are providing their services to, for example, French or German recipients; and

- they prevent the UK authorities (including the courts) from restricting the provision of information society services from another Member State in the EEA to the UK.

These basic rules are subject to a number of qualifications and exclusions. In particular, they do not apply to:

- intellectual property rights (so that service providers will still have to comply with the laws in each Member State);
- the freedom to choose the law applicable to contracts;
- obligations arising from consumer contracts; or
- contracts relating to real estate.

In addition, the Regulations permit UK enforcement authorities (and in certain cases the courts) to take proportionate measures against given services on a case-by-case basis in limited circumstances, if such restrictions are necessary to protect public policy, public health, public security or consumers.

4.2 General Information Requirements

Regulation 6 requires service providers to make available to their customers basic information concerning their activities, including:

- the name of the service provider;
- the geographic address at which the service provider is established;
- the details of the service provider, including his email address, necessary for effective rapid communication;
- where the service provider is registered in a trade or similar public register, the registration number or equivalent means of identification;
- where the activity is subject to an authorisation scheme, particulars of the relevant supervisory authority;
- where the service provider exercises a regulated profession, his professional title and details of the professional body;
- the VAT number (if applicable).

Where the service provider refers to prices, these must be clearly and unambiguously displayed, and it must be stated whether they are inclusive of tax and delivery costs.

4.3 Commercial Communications

Regulation 7 requires commercial communications to be clearly identified as such. The person on whose behalf the commercial communication is made must be clearly identifiable. Any conditions to be included must be easily accessible and presented clearly and unambiguously. “Commercial communication” is defined as any form of

communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. This wide definition will presumably include promotional offers, advertising and promotional competitions.

Regulation 8 requires unsolicited commercial communications sent by e-mail to be clearly and unambiguously identifiable as such as soon as they are received.

4.4 On-Line Contracts

Regulation 9 contains new rules relating to online contracts, which cannot be excluded except as between businesses. Service providers must provide the following information in a clear, comprehensive and unambiguous manner, prior to an order being placed:

- the different technical steps to follow in order to conclude the contract;
- whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
- the technical means for identifying and correcting input errors made by an end user prior to the placing of the order; and
- the languages offered for the conclusion of the contract.

If the service provider subscribes to a code of conduct, it must supply details of it and how end users can access it.

If the service provider supplies customers with terms and conditions applicable to the contract, they must be made available in a way which allows the customer to store and reproduce them. (This should be satisfied if customers are able to save the terms and conditions onto their computer and subsequently print them out).

If a customer places an online order with a service provider, the service provider must acknowledge receipt of the order without undue delay by electronic means, and make available appropriate, effective and accessible technical means to allow the customer to identify and correct input errors, prior to placing the order.

The order and the acknowledgement of receipt are deemed to have been received when the parties to whom they are addressed are able to access them, unless the contract is concluded exclusively by exchange of e-mail or by equivalent individual communications.

4.5 Liability of Internet Service Providers

Regulations 17 to 19 seek to limit the liability of Internet Service Providers in certain circumstances where the provision of information society services might otherwise contravene the civil or criminal law (such as copyright infringement, defamation or obscenity laws).

- **Mere Conduit:** The service provider will not be liable if it plays a passive role in transmitting and storing information, and does not:

- (a) initiate the transmission;
- (b) select the receiver of the transmission; or
- (c) select or modify the information contained in the transmission.

- **Caching:** The service provider will not be liable for system caching, i.e. the automatic, intermediate and temporary storage of information performed for the sole purpose of making more efficient the onward transmission of the information to other recipients of the service, on condition that the service provider:

- (a) does not modify the information;
- (b) complies with conditions on access to the information;
- (c) complies with any rules regarding the updating of the information specified in a manner widely recognised and used by industry;
- (d) does not interfere with the lawful use of technology to obtain data on the use of the information; and
- (e) acts expeditiously to remove or 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 administrative authority has ordered removal or disablement.

- **Hosting:** The service provider will not be liable for providing hosting services, i.e. the storing of information, on condition that the service provider:

- (a) does not have actual knowledge of illegal activity or information; or
- (b) on obtaining such knowledge, acts expeditiously to remove or disable access to the information.

5. HOW ARE THE REGULATIONS ENFORCED?

The authorities responsible for enforcing the Regulations include any body able to impose a sanction for failure to observe or comply with any provision of UK law, such as the Local Authority Trading Standards Departments, the Office of Fair Trading and the Independent Committee of Standards and Telephone Information Services.

If a service provider does not comply with Regulation 6 (basic information requirement), 7 (commercial communications), 8 (unsolicited commercial communications), or 9 or 11 (on-line contracts), the customer will be able to sue for damages. In addition, the customer can seek a court order requiring the service provider to comply with the requirement in question. If the service provider does not allow the customer to identify and correct input errors in an order, the customer will be able to rescind the contract.

As from 23 October 2002, the consumer-protection aspects of the Regulations will also be

subject to the Stop Now Orders (EC Directive) Regulations 2001. This extension will permit the Director General of Fair Trading and Trading Standards Departments to apply to the courts for a Stop Now Order if the service provider's failure to comply with the Regulations "harms the collective interest of consumers". The courts will also have the power to order the service provider to publish corrective statements with a view to eliminating the continuing effect of past infringements.

If the service provider fails to comply with a Stop Now Order it may be held to be in contempt of court and could face a fine and/or imprisonment.

This guideline does not purport to be comprehensive or give specific legal advice. Before any action is taken on matters covered in this guideline, you should obtain professional advice.

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