

A GUIDE FOR BUSINESS
TO
THE ELECTRONIC COMMERCE (EC DIRECTIVE) REGULATIONS 2002
(SI 2002/2013)



Department of Trade and Industry

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FOREWORD

Do the Regulations apply to me?

The Electronic Commerce (EC Directive) Regulations may apply to you if you:

- ❑ sell goods or services to businesses or consumers on the Internet or by email;**
- ❑ advertise on the Internet or by email; or**
- ❑ convey or store electronic content for your customers or provide access to a communication network.**

Key features of the Regulations

- ❑ Online selling and advertising is subject to the laws of the UK if the trader is established here. Online services provided from other Member States may not be restricted. There are exceptions, particularly for contracts with consumers and the freedom of parties to choose the applicable law.**
- ❑ Recipients of online services must be given clear information about the trader, the nature of commercial communications and how to complete an online transaction.**
- ❑ Online service providers are exempt from liability for the content that they convey or store in specified circumstances.**
- ❑ Changes to the powers of enforcement authorities such as Trading Standards Departments and the Office of Fair Trading.**

Status of this guide

The guide is intended to be a fairly detailed summary and explanation of the text of the Regulations. More general guidance for readers who need to know only about the broad impact of the Regulations is also available. Neither document in any way replaces the Regulations.

The guide has no legal force but is intended to help businesses, consumers and enforcement authorities to understand the main features of the legislation and the circumstances in which it applies.

PART 1
INTRODUCTION

- 1.1 The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) will transpose into UK law the majority of the provisions of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (“the E-Commerce Directive”). The Directive is published in the Official Journal of the European Communities (OJ L 178, 17.7.2000, p. 1) and online at europa.eu.int/eur-lex/en/lif/dat/2000/en_300L0031.html.
- 1.2 The Regulations are published by the Stationery Office and are available from www.legislation.hmso.gov.uk/si/si2002/20022013.htm. They can also be obtained from normal suppliers.
- 1.3 The Regulations do not apply to online activities that are not of a commercial nature. They do apply to online trade and advertising (e.g. on the Internet, by email or by mobile phone), whether or not the goods or services in question are themselves delivered electronically. The Regulations do not apply to the goods themselves or the delivery of goods or services not provided online; the offline elements (e.g. the conclusion of a hardcopy contract) of any transaction that commences online (e.g. in response to an advertisement on a website) are therefore not within their scope.
- 1.4 Businesses may already satisfy some or all of these Regulations (e.g. where they are closely related to existing obligations under the Consumer Protection (Distance Selling) Regulations 2001), but all need to check that they do comply.
- 1.5 This document aims to provide guidance on the questions most frequently asked about the Regulations. The guide has no legal force; only the Regulations, as interpreted by the courts, have force of law.

Summary of the Regulations

- 1.6 The purpose of the E-Commerce Directive is to ensure the free movement of “information society services” across the European Community. It deals with the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.
- 1.7 Regulation 1 cites the name of the Regulations and the dates that they come into force. Regulation 2 defines common terms used throughout the Regulations.
- 1.8 Regulation 3 provides for certain exclusions from the Regulations. Regulation 4 requires online-service providers established in the UK to comply with UK law and disapplies restrictions in UK law on the provision of online services from elsewhere

in the European Economic Area (i.e. Iceland, Liechtenstein and Norway as well as the Community, comprising Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden. Gibraltar is, for these purposes, part of the Community, but the Isle of Man and the Channel Islands are not). Regulation 5 provides for those restrictions to be reapplied under certain defined circumstances.

- 1.9 Regulations 6 to 9 establish information obligations for online-service providers, particularly those sending commercial communications and those taking orders online. Regulation 10 establishes that all of these information obligations are additional to existing legal requirements. Regulation 11 places obligations on service providers when online orders are placed. Regulation 12 clarifies the relationship between orders and contractual offers.
- 1.10 Regulations 13 to 16 provide remedies for breach of Regulations 6 to 9 and 11.
- 1.11 Regulations 17 to 22 limit the liability of online-service providers for the information that they carry or store under certain circumstances.

PART 2
KEY DEFINITIONS

- 2.1 Explanations of some of the key terms defined in Regulation 2 and used throughout the Regulations are given here.

Commercial communication

- 2.2 A commercial communication is defined as “a communication, in any form, 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) consisting only of information allowing direct access to the activity of that person including a geographic address, a domain name or an electronic mail address; or
 - (b) relating to the goods, services or image of that person provided that the communication has been prepared independently of the person making it (and for this purpose, a communication prepared without financial consideration is to be taken to have been prepared independently unless the contrary is shown).”
- 2.3 This definition covers a wide range of online forms of communication, including websites and emails, which may be free of charge to the recipient and where their essential purpose is advertising. It does not cover independent audits, statutory reports and reports compiled by an independent regulator. Certain specific types of communication—such as mobile text “welcome” messages (routinely sent by mobile operators to roaming customers to introduce them to the local network and set out useful contact numbers) or electronic greeting cards—may be considered not to be “designed” to promote the service provider, even though he is identified, and therefore not to fall within the definition of “commercial communication.” However, such matters of interpretation will need to be addressed on a case-by-case basis by the enforcement authorities.
- 2.4 Whether a company, organisation or person is “pursuing a commercial, industrial or craft activity” will also be a matter for the enforcement authorities. They are likely to take a broadly inclusive view, the responsibility being on the sender of the commercial communication to demonstrate, if required, that his activities do not fall within the definition.

Consumer

- 2.5 A consumer is defined as “any natural person who is acting for purposes other than those of his trade, business or profession.”
- 2.6 All consumers are, by definition, a “recipient of the service” (see below).

Coordinated field

- 2.7 The internal-market provisions of the Regulations (see part 4) apply within the “coordinated field,” which is defined as 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. It covers requirements with which the service provider has to comply in order to provide information society services (e.g. for qualifications, authorisation or notification), requirements regarding his behaviour, requirements regarding the quality or content of the service (including those applicable to advertising and contracts) and requirements affecting his liability.
- 2.8 The definition does *not* include requirements applying to goods as such, to the delivery of goods or to services not provided by electronic means. It also does *not* cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art.

Enforcement authority

- 2.9 An enforcement authority is defined as “any person who is authorised, whether by or under an enactment or otherwise, to take enforcement action,” excluding courts.
- 2.10 This definition includes any body able to impose any sanction (whether criminal or otherwise) for failure to observe or comply with any provision of UK law, to remove or restrict any permission or authorisation or able to take any other form of enforcement action. It includes parastatal organisations, such as the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS), that fall within it.

Established service provider

- 2.11 An established service provider is defined as “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 in a Member State for an indefinite period, but the presence and use of the technical means and technologies required to provide the information society service do not, in themselves, constitute an establishment of the provider; in cases where it cannot be determined from which of a number of places of establishment a given service is provided, that service is to be regarded as provided from the place of establishment where the provider has the centre of his activities relating to that service.” References in the Regulations to a service provider being established or to the establishment of a service provider should be construed accordingly.

- 2.12 The concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period. It is also fulfilled where a company is constituted for a given period. The place of establishment of a company providing services via a website is not the place where the technology supporting the website (e.g. a server) is located or where the website is accessed but rather where it pursues its economic activity. Consequently, a service provider can have several places of establishment across its range of activities, although there will only be one for each service concerned. Where it is difficult to determine from which of several places of establishment a given service is provided, it is the place where the service provider has the centre of its activities relating to that particular service.

Information society services

- 2.13 “Information society services” has the meaning set out in Article 2(a) of the E-Commerce Directive (which refers to Article 1(2) of the Technical Standards Directive 98/34/EC, as amended by Directive 98/48/EC, and is summarised in recital 17 to the E-Commerce 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”).
- 2.14 This covers a wide range of economic activities that take place online, including selling goods and services online, as well as video on demand and services consisting of the transmission of information via a communication network, providing access to a communication network, hosting information provided by a recipient of the service or providing commercial communications by email.
- 2.15 However, the use of email or equivalent electronic communications (e.g. by persons acting outside their trade, business or profession, including their use for the conclusion of contracts between such persons) is *not* an information society service. These can include communications between recipients of a service and a service provider via interactive digital television, including where the service is initiated by a recipient providing his unique membership number and PIN. Also excluded from the definition of “information society services” are the contractual relationship between an employee and his employer and the statutory auditing of company accounts.
- 2.16 The requirement for an information society service to be “normally provided for remuneration” does not restrict its scope to services giving rise to buying and selling online. It also covers services (insofar as they represent an economic activity) that are not directly remunerated by those who receive them, such as those offering online information or commercial communications (e.g. adverts) or providing tools allowing for search, access and retrieval of data.
- 2.17 Services excluded from the definition because they are not provided “at a distance” include those provided in the physical presence of the provider and the recipient, even if they involve the use of electronic devices. Examples include:
- medical examinations or treatment at a doctor’s surgery using electronic equipment where the patient is physically present;

- consultation of an electronic catalogue in a shop with a customer on site;
- plane-ticket reservation at a travel agency in the physical presence of the customer by means of a computer network; and
- electronic games made available in a video arcade where the customer is physically present.

2.18 Services excluded from the definition because they are not provided “by electronic means” include:

- those having material content even though provided via electronic devices, such as:
 - automatic cash- or ticket-dispensing machines (e.g. for banknotes or rail tickets); and
 - access to road networks and car parks, charging for use (even if there are electronic devices at the entrance and/or exit controlling access) and ensuring correct payment is made;
- those provided offline, such as the distribution of CD-ROMs or software on discs; and
- those not provided via electronic processing or inventory systems, such as:
 - voice-telephony services;
 - fax and telex services;
 - services provided via voice telephony or fax;
 - consultation of a doctor or lawyer by phone or fax; and
 - direct marketing by phone or fax.

2.19 Services excluded from the definition because they are not provided “at the individual request of a recipient of a service” include those provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (i.e. point-to-multipoint transmission), such as:

- television-broadcasting services, including near-video on demand, covered by the Television Without Frontiers Directive 89/552/EEC, as amended by Directive 97/36/EC;
- radio-broadcasting services; and
- (televised) teletext.

Recipient of the service

- 2.20 A recipient of the service is defined as “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.”
- 2.21 The definition includes all types of usage of information society services, by those who provide information on open networks such as the Internet and by those who seek information on the Internet for private or professional reasons. It includes both natural persons and legal persons. Natural persons are individuals, including sole traders and, in England, Wales and Northern Ireland, partnerships. (Sole traders are individuals trading under their own name or a business name and whose businesses do not have legal personality distinct from that of the individual concerned. Partnerships in England, Wales and Northern Ireland are groups of individuals that do not have legal personality distinct from those of the individual partners.) In contrast, legal persons have corporate identity separate from an individual and include Companies Act companies and partnerships in Scotland.
- 2.22 The definition encompasses all persons who fall within the definition of “consumer.”

Regulated profession

- 2.23 A regulated profession is defined as any profession within the meaning of either Article 1(d) of the First Diploma Directive 89/48/EEC or Article 1(f) of the Second Diploma Directive 92/51/EEC, as amended by Directives 97/38/EC, 2000/5/EC and 2001/19/EC.
- 2.24 Comprehensive information about which professions and designated competent authorities in the UK are encompassed by this definition is available from the Department for Education and Skills at www.dfes.gov.uk/europeopen/index.shtml.
- 2.25 Other professions do not fall within this definition. In particular, doctors/general practitioners, nurses, midwives, dental practitioners, pharmacists, veterinary surgeons and architects do not fall within this definition because they are subject to other Community legislation.

Service provider

- 2.26 A service provider is defined as “any person providing an information society service.”
- 2.27 Again, this definition encompasses both natural persons and legal persons.

PART 3

SCOPE

3.1 The Regulations encompass the EEA and not just the Community. Within the United Kingdom, they apply to Scotland and Northern Ireland as well as to England and Wales.

Exclusions

3.2 Regulation 3(1) provides that nothing in the Regulations applies in respect of:

- (a) the field of taxation, particularly VAT imposed on a large number of the services covered by the Regulations;
- (b) questions relating to information society services covered by the Data Protection Directive 95/46/EC, the Telecoms Data Protection Directive 97/66/EC, and Directive 2002/58/EC on the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications);
- (c) questions relating to agreements or practices governed by cartel law (i.e. agreements between undertakings, decisions by associations of undertakings or concerted practices as relates to agreements to divide the market or fix prices); 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. They 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. The limitations on intermediary service providers' liability described in part 6 also apply to information about these activities.

3.3 Regulation 3(2) provides that the Regulations apply only to legislation already on the statute book at the time that they were made. Future legislation will, of course, also have to comply with the requirements of the Directive.

PART 4

THE INTERNAL MARKET

Outbound services

- 4.1 Regulation 4(1) provides that information society services provided to a person in the UK or in another Member State by a service provider from an establishment in the UK must comply with any UK legal requirement that falls within the coordinated field. Regulation 4(2) provides that the enforcement authorities are responsible for ensuring compliance.
- 4.2 The effect of this is to shift the responsibility for enforcement. UK enforcement authorities will regulate information society services provided from the UK, wherever in the EEA they are delivered. Similarly, information society services provided from elsewhere in the EEA will be regulated by the enforcement authorities in those Member States.
- 4.3 This will not affect UK consumers of information society services provided by UK-established service providers. However, it does mean that UK-established service providers will need to comply with UK law when they are providing information society services to consumers elsewhere in the EEA. Regulation 4(6) provides that, where the effect of this is to create a new criminal offence by extending the scope of application of an existing law (e.g. to UK service providers' sales to other Member States), the maximum penalty may not exceed that allowed under paragraph 1(1)(d) of Schedule 2 of the European Communities Act 1972. This is imprisonment for two years or, on summary conviction, imprisonment for three months or a fine of level five on the standard scale or £100 per day.
- 4.4 In accordance with Article 18 of the Directive, UK law does not hamper the use of out-of-court schemes for dispute settlement, and the Government is working with the Commission and other Member States to encourage bodies responsible for such schemes to operate in a way that provides adequate procedural guarantees for the parties concerned, particularly consumers.

Inbound services

- 4.5 Regulation 4(3) provides that any UK requirement may not be applied to an information society service provided by a service provider established elsewhere in the EEA for reasons that fall within the coordinated field if this would restrict the freedom to provide that service into the UK.
- 4.6 The effect of this is that the application of UK law to inbound information society services is subject to a restrictions test. "Restriction" should be interpreted consistently with the Treaty establishing the Community and particularly Chapter 3

on the prohibition of restrictions on the freedom to provide services within the Community. Consistent with the expressed scope of the Directive, Regulation 4(5) provides that “restriction” does not include any requirement maintaining the level of protection for public health and consumer interests established by Community acts.

- 4.7 The Regulations do not address whether any specific provision in UK law constitutes a restriction in the context of a specific inbound information society service. Where there is doubt, the relevant enforcement authorities will continue to be able to exercise that provision unless it is held to be a restriction by a court.
- 4.8 Although Article 1 addresses the scope of the Directive, the Directive as a whole does not make clear whether the role of private international law is retained or superseded. (Private international law is the part of UK law which determines the law to be applied to 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). The Government has therefore looked to the purpose of the Directive in informing its approach. This is expressed in Article 1(1) as “ensuring the free movement of information society services between the Member States” and qualified by the statement in recital 22 that “such information society services should in principle be subject to the law of the Member State in which the service provider is established”. Taken together, Regulations 4(1) to 4(3) will, if replicated by other Member States, provide for what might be termed country-of-origin regulation. The existing relationship between the legal systems of England and Wales, Scotland, Northern Ireland and Gibraltar (which is not a Member State) remains unaffected.

Exclusions

- 4.9 Regulation 4(4) provides that Regulations 4(1) to 4(3) do not apply to the areas specified in the Annex to the Directive set out in the Schedule to the Regulations. These are:
- copyright, neighbouring rights, rights referred to in the Semiconductor Topographies Directive 87/54/EEC and the Databases Directive 96/9/EC and industrial property rights;
 - the freedom of the parties to a contract to choose the applicable law;
 - contractual obligations concerning consumer contracts. The exclusion applies 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 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);

- 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; and
- the permissibility of unsolicited commercial communications by email.

Derogations from Regulation 4

- 4.10 Regulations 5(1) to 5(4) provide that, as an exception from Regulation 4(3), enforcement authorities may take measures—and courts may apply UK law—that restrict the provision of a given information society service into the UK from elsewhere in the EEA on a case-by-case basis and under certain circumstances.
- 4.11 First, the restriction must be proportionate (i.e. it must go no further than is necessary to achieve the desired result).
- 4.12 Second, the restriction must be necessary for one of the following reasons:
- (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;
- 4.13 Third, the information society service in question must prejudice or present a serious and grave risk of prejudice to at least one of the objectives given above.
- 4.14 Fourth, where an enforcement authority is acting, it must have:
- (a) asked the Member State in which the service provider is established to take measures and the Member State did not do so or the measures taken were inadequate; and
 - (b) notified the Commission and the Member State in which the service provider is established of its intentions.
- 4.15 Regulation 5(5) provides that the requirement to contact the Member State concerned and the Commission does not apply to court proceedings, including preliminary proceedings and acts carried out in the course of a criminal investigation.
- 4.16 Regulation 5(6) provides that an enforcement authority may also bypass these requirements if it appears that the matter is one of urgency. However, in this case, Regulation 5(7) provides that the enforcement authority must notify the measures

taken to the Commission and to the Member State concerned in the shortest possible time and indicate the reasons for urgency.

PART 5

INFORMATION REQUIREMENTS AND TREATMENT OF CONTRACTS

No prior authorisation

5.1 To encourage online business, Article 4(1) of the E-Commerce Directive provides that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or to any other requirement having equivalent effect. The Regulations do not implement this prohibition as no such requirements exist in UK law, with the exception of those permitted by Article 4(2) of the Directive because:

- they are not specifically and exclusively targeted at information society services (i.e. they apply to the same services provided offline as well as online); or
- they are covered by the Licensing Directive 97/13/EC. From July 25, 2003, this Directive will be repealed and its requirements removed when a new regulatory framework for electronic-communications networks and services enters into force in the Community.

General information to be provided

5.2 In order to enhance transparency, and hence the confidence of those buying online, Regulation 6(1) provides that a person providing an information society service must make available to the recipient of the service, and to any relevant enforcement authority, in a form and manner that 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. This is not necessarily his principal or registered office, nor the usual address that he cites for the purpose of sending communications. Rather, it is the address that derives from the definition of “established service provider” and so indicates the Member State whose laws will, in general, apply to the provision of the service in question;
- (c) the details of the service provider, including his email 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, details of the register in which the service provider is entered

and his registration number, or equivalent means of identification in that register. The Government envisages that the registers in question are those relevant to the service in question, not to the service provider's business in general;

- (e) where the provision of the service is subject to an authorisation scheme, the particulars of the relevant supervisory authority. The schemes in question are those relevant to the information society service in question, not to any subsequent offline transaction;
- (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; and
 - (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
- (g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth VAT Directive 77/388/EEC, as last amended by Directive 1999/85/EC.

5.3 The Regulations do not prescribe how the requirement to make information “easily, directly and permanently accessible” should be met. The Government recognises that technological constraints (e.g. the 160-character limit on mobile text messages) mean that the information may not readily be accessible by the same means by which the service provider transacts with recipients of his services. The Government envisages, however, that these criteria should be capable of being met if the information is accessible by other means (e.g. inclusion on a website). The Government also envisages that temporary interruptions to the availability of the information that are essential (e.g. to maintain a website or the integrity of a network) or unavoidable (e.g. in the event of *force majeure*) will not count against its being permanently accessible. However, the onus is on the service provider to make the information accessible for as long as it may be necessary to do so. It may therefore be advisable to retain evidence of the information that recipients had available at the time of their transaction and whenever a change is made.

5.4 The Regulations also do not prescribe what is meant by details which make it possible to contact the service provider “rapidly” as this may vary according to circumstances. The enforcement authorities are expected to treat this as a question of common sense appropriate to the particular service provided but also to place the onus on the service provider to demonstrate that he has complied with this requirement.

5.5 Finally, the Regulations do not prescribe the nature of the professional rules applicable to service providers exercising a regulated profession. Where there is doubt as to whether particular rules fall within this requirement, service providers

should take into consideration whether recipients of their services would consider them relevant to the transaction.

- 5.6 Regulation 6(2) provides that where a person providing an information society service refers to prices, these must be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs. Again, the Regulations do not prescribe how the requirement for prices to be indicated “clearly and unambiguously” should be met, but the Government envisages that a general statement, as opposed to an individual statement applying to each and every price in question, should be capable of sufficing. The accuracy of prices (as opposed to their presentation) continues to be subject to the provisions of Part III of the Consumer Protection Act 1987.

Commercial communications

- 5.7 In order to enhance transparency, and hence the confidence of those buying online, Regulation 7 provides that a service provider must ensure that a commercial communication provided by him and which constitutes or forms part of an information society service (e.g. an advertising email) must:

- (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 that must be met to qualify for it must be 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.

- 5.8 The Regulations do not prescribe how to meet the requirement for information about commercial communications to be “clearly identifiable”. This could be either through a header, before the communication is opened, or in the body of the communication itself. However, it will not necessarily be sufficient for a commercial communication coming from a business to have no other form of identification.

- 5.9 The Regulations also do not prescribe how to meet the requirement for information about promotions to be “easily accessible and presented clearly and unambiguously.” Again, the Government envisages that this should be capable of being met if the information is accessible by means other than the one which the service provider transacts with recipients of his services.

Unsolicited commercial communications

- 5.10 Regulation 8 provides that a service provider must ensure that any unsolicited commercial communication sent by him by email is clearly and unambiguously identifiable (i.e. capable of being identified) as such as soon as it is received. The

purpose of this is that users or their Internet service providers can delete such communications (or use filtering software to block or delete them) without having to read them.

- 5.11 The Regulations do not define what is meant by email, but mobile text messages are not considered to be within its scope. The Information Commissioner already treats these as calls for the purposes of the provisions on unsolicited direct marketing in the Telecommunications (Data Protection and Privacy) Regulations 1999.
- 5.12 Again, the Regulations do not prescribe how the requirement for unsolicited commercial communications sent by email to be “clearly and unambiguously identifiable” should be met.
- 5.13 The Government believes that existing industry self-regulation and codes of conduct already provide recipients of unsolicited commercial communications by email with effective protection. The Regulations do not, therefore, transpose Article 7(2) of the E-Commerce Directive, which requires service providers undertaking such communications to consult regularly and respect the opt-out registers in which natural persons not wishing to receive such communications can register themselves. Unsolicited commercial communications by email will be subject to new rules under the Communications Data Protection Directive 2002/58/EC, which was adopted on 12 July 2002 and requires implementation by autumn 2003.

Regulated professions

- 5.14 The Regulations do not transpose Article 8 of the E-Commerce Directive, which requires Member States to ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted, subject to compliance with professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession. The Government understands that no such restrictions exist and reminds regulated professions that their introduction would be incompatible with the requirements of the Directive.

Treatment of contracts

- 5.15 The Regulations do not transpose Article 9(1) of the E-Commerce Directive, which requires Member States to ensure that their law allows contracts to be concluded by electronic means. The Government believes that the great majority of relevant statutory references (e.g. to requirements for writing or signature) are already capable of being fulfilled by electronic communications where the context in which they appear does not indicate to the contrary.
- 5.16 Where existing legal requirements applicable to the contractual process do create obstacles for the use of the electronic contracts or result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means, the Government will propose necessary amendments on a case-by-case basis. It will do so through appropriate proposals for primary or subordinate legislation – for example, Orders made under Section 8 of the Electronic

Communications Act 2000 or Section 1 of the Electronic Communications (Northern Ireland) Act 2001 (which permit statutory provisions to be amended in order to authorise or facilitate electronic communications) or Regulations made under Section 2(2) of the European Communities Act.

5.17 The Government has indicated to the Commission that it does not envisage immediately removing hardcopy requirements relating to contracts in the following categories:

- in England and Wales and in Scotland—all contracts that create or transfer rights in real estate, except for rental rights; and
- in the United Kingdom—all contracts relating to the imposition and operation of export controls of goods and technology insofar as the items controlled are not outside the scope of the Treaty by virtue of Article 296 and the specific controls are not required by or giving effect to Community law.

Information to be provided where contracts are concluded by electronic means

5.18 Regulation 9(1) provides that, where a contract is to be concluded by electronic means and unless parties who are not consumers have agreed otherwise, a service provider must, prior to an order being placed by the recipient of a service, provide to that recipient in a clear, comprehensible and unambiguous manner the following information:

- (a) the different technical steps to follow to conclude the contract, so that recipients are made aware of what the process will involve and the point at which they will commit themselves;
- (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible. “Filing” is a legal concept in other Member States that would apply in the UK only where contracts are made with service providers established in those Member States;
- (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.

5.19 These requirements do not apply where, for example, initial contact is made via a website but, for reasons relating to the complexity of the contract, it is actually concluded offline.

5.20 The Regulations do not prescribe how the requirement for information about the placement of an order to be provided “in a clear, comprehensible and unambiguous manner” should be met. Again, the Government envisages that this latter requirement should be capable of being met if the information is accessible by means other than the one which the service provider transacts with recipients of his services.

- 5.21 Regulation 9(2) provides that, unless parties who are not consumers have agreed otherwise, a service provider must also indicate which relevant codes of conduct he subscribes to and give information on how those codes can be consulted electronically. The Government believes that the codes in question are those relevant to the order, not to the service provider's business in general.
- 5.22 The Regulations do not prescribe how parties who are not consumers must agree that the requirements of Regulations 9(1) and/or 9(2) do not apply. In some circumstances, the agreement may be express; in others, implied. It may be appropriate for the parties to reach agreement in relation to each contract or equally to reach one agreement as part of an ongoing business relationship.
- 5.23 Regulation 9(3) provides that where the service provider provides terms and conditions applicable to the contract to the recipient, the service provider must make them available to him in a way that allows him to store and reproduce them. Again, the Government envisages that this requirement should be capable of being met if the terms and conditions are provided in a form other than was the case during the original transaction (e.g. via a printed receipt sent with goods rather than downloaded or copied from a website). Regulation 14 provides that where on request a service provider has failed to comply with this requirement, the recipient may seek an order from any court having jurisdiction in relation to the contract requiring that service provider to comply.
- 5.24 Regulation 9(4) provides that the requirements in Regulations 9(1) and 9(2) do not apply to contracts concluded exclusively by exchange of email or by equivalent individual communications.

Other information requirements

- 5.25 Regulation 10 provides that Regulations 6, 7, 8 and 9(1) have effect in addition to any other information requirements in legislation giving effect to Community law (e.g. the Consumer Protection (Distance Selling) Regulations 2000).

Placing of the order

- 5.26 Regulation 11(1) provides that, unless parties who are not consumers have agreed otherwise, where the recipient of the service places his order through technological means, a service provider must:
- (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.
- 5.27 The Regulations do not specify what is meant by "without undue delay" as this may vary according to circumstances. For the same reason, they do not specify what constitutes "appropriate, effective and accessible technical means." The enforcement

authorities are expected to place the onus on the service provider to demonstrate that he has complied with these requirements.

- 5.28 The Regulations do not require receipt of the order to be acknowledged by the same electronic means as that by which the order was placed. The Government envisages that this requirement may also be satisfied by a confirmation that appears at the end of the ordering process (e.g. on a screen) but is not necessarily “sent” to the recipient by email or an equivalent communication.
- 5.29 Regulation 11(2) provides that, for the purposes of Regulation 11(1)(a):
- (a) 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 (i.e. they are capable of being accessed). The Regulations do not specify what is meant by “access” as this may vary according to circumstances; and
 - (b) the acknowledgement of receipt may take the form of the provision of the service paid for where that service is an information society service.
- 5.30 Regulation 11(3) provides that the requirements in Regulation 11(1) do not apply to contracts concluded exclusively by exchange of email or by equivalent individual communications.

Meaning of the term “order”

- 5.31 The Regulations do not deal with contract formation itself. This remains subject to common law, existing statutory provisions or the law of another relevant Member State. Consequently, Regulation 12 provides that, except in relation to Regulations 9(1)(c) and 11(1)(b) where “order” is the contractual offer, “order” may be but need not be the contractual offer for the purposes of Regulations 9 and 11.

Liability of the service provider

- 5.32 Regulation 13 provides that the duties imposed by Regulations 6, 7, 8, 9(1) and 11(1)(a) may 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 rescind contract

- 5.33 Regulation 15 provides that where a person has entered into a contract to which the Regulations apply and the service provider has not made available means of allowing him to identify and correct input errors in compliance with Regulation 11(1)(b), he is entitled to rescind the contract unless any court having jurisdiction in relation to the contract in question orders otherwise on the application of the service provider.

Stop Now Orders (EC Directive) Regulations 2001

- 5.34 Regulation 16 extends the Stop Now Orders (EC Directive) Regulations 2001 to cover these Regulations and the E-Commerce Directive. This will permit the Director General of Fair Trading and other named consumer-protection bodies to apply to the

courts for Stop Now Orders where the infringement of these Regulations by a service provider harms the collective interests of consumers. The courts will also be able to order service providers traders to publish corrective statements with a view to eliminating the continuing effects of past infringements. Failure to comply with a Stop Now Order is treated as contempt of court, punishable by fines or imprisonment. This provision takes force from 23 October 2002.

PART 6

LIABILITY OF INTERMEDIARY SERVICE PROVIDERS

Mere conduit

- 6.1 Regulation 17(1) provides that where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service (i.e. the service provider plays a passive role as a conduit of information for content providers) or the provision of access to a communication network, the service provider (if he otherwise would) is not liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission provided that the service provider:
- (a) did not initiate the transmission (i.e. he did not make the decision to carry out the transmission). The fact that a service provider automatically initiated a transmission at the request of a recipient of the service does not mean that he initiated the transmission in this sense;
 - (b) did not select the receiver of the transmission. This does not imply that service providers cannot benefit from the limitation of liability if they select receivers as an automatic response to a request from the person initiating the transmission (e.g. a user's request to have an email forwarded to a mailing-list broker); and
 - (c) did not select or modify the information contained in the transmission. Manipulations of a technical nature that take place in the course of the transmission (e.g. the automatic adding of headers) and the automated removal of viruses from emails do not fail this test if they do not alter the integrity of the information contained in the transmission.
- 6.2 Regulation 17(2) provides that the acts of transmission and of provision of access referred to in Regulation 17(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.
- 6.3 The requirement for the storage to be "automatic" will be met if it occurs through the ordinary operation of the technology, for it to be "intermediate" if it is made in the course of the transmission.

Caching

- 6.4 Regulation 18 provides that where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service, the service provider (if he otherwise would) is not liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission provided that:
- (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 (i.e. he does not alter its integrity, as for Regulation 17(1)(c));
 - (ii) complies with conditions on access to the information (i.e. if access is dependent on payment of a fee or provision of a password or other information, the service provider must also meet those conditions and permit access by other recipients only in accordance with those conditions);
 - (iii) complies with 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, access to it has been disabled or a court or an administrative authority has ordered such removal or disablement.
- 6.5 The Regulations do not specify what is meant by “expeditiously” as this may vary according to circumstances. The enforcement authorities are expected to place the onus on the service provider to demonstrate that he has complied with this requirement.
- 6.6 The Regulations also do not specify how “actual knowledge” is obtained by a service provider. However, in this instance, it is expected that the onus will be on the enforcement authorities to demonstrate that a service provider had actual knowledge but did not act appropriately upon obtaining it.

Hosting

- 6.7 Regulation 19 provides that where an information society service is provided which consists of the storage of information provided by a recipient of the service (e.g. the

provision of server space for a website or newsgroup), the service provider (if he otherwise would) is not liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage provided that:

- (a) the service provider—
 - (i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, 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
 - (ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information; and
- (b) the recipient of the service was not acting under the authority or the control of the service provider.

6.8 Again, the Regulations do not specify how “actual knowledge” or “awareness” is obtained by a service provider. It is expected that the onus will be on the party alleging that liability has arisen to demonstrate that a service provider had actual knowledge or awareness but did not act upon it appropriately.

Protection of rights

6.9 Regulation 20(1) provides that nothing in Regulations 17, 18 or 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.

6.10 Regulation 20(2) provides that 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: burden of proof

6.11 Regulation 21 applies where a service provider charged with an offence in criminal proceedings arising out of any transmission, provision of access or storage falling within Regulation 17, 18 or 19 relies on a defence under any of those Regulations. It provides that where evidence is adduced which is sufficient to raise an issue with respect to that defence, the court or jury must assume that the defence is satisfied unless the prosecution provides beyond reasonable doubt that it is not.

Notice for the purposes of actual knowledge

6.12 The Regulations do not establish statutory procedures governing the removal or disabling of access to information (so-called “notice and takedown” procedures). The Government believes that industry self-regulation and codes of conduct have 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.

- 6.13 Instead, Regulation 22 provides that in determining whether a service provider has actual knowledge for the purposes of Regulations 18(b)(v) and 19(a)(i), a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall have regard to:
- (a) whether a service provider has received a notice through a means of contact made available in accordance with Regulation 6(1)(c); and
 - (b) the extent to which any notice includes—
 - (i) the full name and address of the sender of the notice;
 - (ii) details of the location of the information in question; and
 - (iii) details of the unlawful nature of the activity or information in question.

Other categories of intermediary service provider

- 6.14 In line with the provisions of the E-Commerce Directive, the Regulations do not explicitly address the liability of other categories of intermediary, including those providing hyperlinks, location tools and content-aggregation services. Some of these activities may already fall within the provisions relating to mere conduits, caching and hosting; where that is the case, they will benefit from the limitations on liability accordingly. The Directive itself provides that the liability of providers of hyperlinks and location tools will be addressed in the review of its application that the Commission must undertake before July 17, 2003.

No general obligation to monitor

- 6.15 The Regulations do not address the imposition of a general obligation on service providers, when providing the services referred to in Regulations 17 to 19, to monitor the information that they transmit or store or to actively seek facts or circumstances indicating illegal activity. No such obligations exist in UK law, and their introduction would be incompatible with the requirements of the E-Commerce Directive. Moreover, including an explicit prohibition in the Regulations could introduce legal uncertainty if it were interpreted differently from its meaning in the Directive. However, this does not affect the imposition of monitoring obligations in *specific* cases (e.g. in compliance with a warrant issued under Section 5(1)(a) of the Regulation of Investigatory Powers Act 2000 to secure the interception of a communication in the course of its transmission by means of a telecommunication system).
- 6.16 The Regulations also do not establish statutory obligations for service providers to promptly inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their services or obligations to communicate to the competent authorities, at their request, information enabling the

identification of recipients of their service with whom they have storage arrangements. Existing statutory obligations continue to apply equally online as well as offline.

PART 7

SOURCES OF FURTHER INFORMATION

7.1 This is a summary of the Regulations, and you should not rely on it for an authoritative statement of your legal position. The official text of the Regulations is available in hardcopy from normal suppliers and on the HMSO website at www.legislation.hmso.gov.uk/si/si2002/20022013.htm.

7.2 You can contact the DTI at:

Department of Trade and Industry
International Communications Unit
Bay 206
151 Buckingham Palace Road
London SW1W 9SS

☎ (020) 7215 1806 · 📠 (020) 7215 4161 · ✉ ecom@dti.gsi.gov.uk

7.3 You will find the address and telephone number of your local Trading Standards Department for England, Scotland or Wales in the telephone book under “Local Authority” or on the Internet by visiting www.tradingstandards.gov.uk and entering your postcode.

7.4 The address for Northern Ireland is:

Trading Standards Service
Department of Enterprise, Trade and Investment
176 Newtownbreda Road
Belfast BT8 6QS

☎ (028) 9025 3900 · 📠 (028) 9025 3953 · ✉ tss@detini.gov.uk

7.5 You can contact the Office of Fair Trading through its website, www.offt.gov.uk, or at:

Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

☎ (020) 7211 8000 · 📠 (020) 7211 8800 · ✉ enquiries@oft.gov.uk