

# e-Commerce Directive

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## ARNOLD & PORTER

The UK government has now published the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) which were brought into force in the UK on August 21st, 2002 to implement the European Union's ("EU") E-Commerce Directive (2000/31/EC) ("e-Commerce Directive").

### Introduction

Any US company with an affiliate established in the EU and all companies or entities with an establishment in Europe should understand their obligations under the e-Commerce Directive and ensure that their electronic activities comply with the legislation.

By way of background the e-Commerce Directive was adopted by the EU as part of its "e-Europe" Initiative. The e-Europe Initiative is central to the EU's strategic goal to become the most competitive and dynamic knowledge-based economy in the world. The purpose of the e-Commerce Directive is to secure a favourable legal framework for the provision of information society services on-line and via certain network services. Significantly, the Directive applies free market principles to electronic business, and rationalises the approach EU countries take to electronic business.

The e-Commerce Directive is just one of a number of new initiatives in Europe which affect areas such as regulation of contracts concluded at a distance, copyright, privacy, electronic signatures and jurisdictional issues. **This Advisory looks at who will be affected by the e-Commerce Directive, and how.**

### To What Activities Does The Directive Apply?

The e-Commerce Directive applies to **"Information Society Services"**.<sup>1</sup> It applies only to activities of a commercial nature, including business to business ("B2B") transactions and business to consumer

("B2C") transactions. It is not limited to buying and selling on-line, as the definition is couched in sufficiently wide terms to cover electronic business whereby other technologies are used to receive data and content by means of electronic equipment, including WAP and other mobile technologies.

The e-Commerce Directive will therefore regulate a wide range of economic activities taking place on-line or delivered via a communications network, including:

- ▲ sale of goods/services;
- ▲ dissemination of information (such as on-line newspapers and databases);
- ▲ services provided for free, but which generate revenue for the service provider, by (for example) advertising or sponsorship revenue;
- ▲ on-line financial services;
- ▲ on-line professional services (such as services provided by lawyers, doctors, accountants);
- ▲ on-line entertainment services (including video on demand);
- ▲ on-line direct marketing and advertisements;
- ▲ businesses providing access to on-line networks;
- ▲ interactive tv.

1. Summarised in Recital 17 of 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.

Those providing Information Society Services are “**Service Providers**” for the purposes of the e-Commerce Directive.

The e-Commerce Directive does not regulate on-line activities which are not of a commercial nature. Nor does it seek to regulate the goods themselves, thus quality issues, safety standards, labelling obligations, product liability, and other such issues remain regulated by other legislation (European and national).

## To Whom Will The Directive Apply?

Any person or entity which is an “**Established Service Provider**” will need to comply with the e-Commerce Directive. Broadly speaking, any person who provides an “Information Society Service” and who effectively pursues an economic activity using a fixed establishment for an indefinite period in a Member State will be an Established Service Provider for the purposes of the e-Commerce Directive.

Questions will inevitably arise as to what is meant by a “fixed establishment”, but it is clear that the place where the technology supporting the web site is located (e.g. the server) will not be the test – rather, the test seems to be where the entity is pursuing its economic activity.

## Country Of Origin Principle

One of the main issues constituting a barrier to global electronic trade is the uncertainty as to which laws apply to the services provided. For those trading in Europe, the question was, particularly, whether a company needed to comply with the laws of its own Member State, or the laws of all the 15 Member States? The e-Commerce Directive addresses this by the so-called “country of origin” principle. Essentially, Service Providers in the EU must comply with the national laws applicable in the Member State in which they are established.

There are some significant derogations from this principle (including in respect of contractual obligations concerning consumer contracts and the freedom

of the parties to choose the law applicable to their contract). Broadly speaking however, the most significant uncertainty and barrier to trade regarding the provision of information society services in the B2B market in the EU has been removed by the e-Commerce Directive.

## Information Requirements

Service Providers must now provide certain information to those accessing their Information Society Services and this information must be easily, directly and permanently accessible to the recipients of the services and to competent authorities. A Service Provider must provide:

- ▲ its name, geographic and e-mail address;
- ▲ details of any trade or other public register on which it is entered;
- ▲ particulars of the supervisory authority of any authorisation scheme of which it is a member;
- ▲ its VAT registration number;
- ▲ information to ensure that commercial communications constituting an Information Society Service:
  - are clearly identifiable as such;
  - clearly identify the natural or legal person on whose behalf the communication is made;
  - clearly identify as such promotional offers (e.g. discounts, premiums, gifts) and ensure any conditions which are to be met to qualify for them are easily accessible and clearly and unambiguously presented.

These requirements are to ensure transparency in all transactions (the purpose being to gain the confidence of those using Information Society Services and thereby to stimulate trade). They supplement those enshrined in the Distance Selling Directive 97/7/EC (“Distance Selling Directive”) on the protection of consumers in respect of distance contracts (i.e. contracts concluded when the consumer is not present). This legislation only applies to B2C contracts and requires that certain additional information be provided in respect of distance contracts before making a purchase.<sup>2</sup>

2. (a) the supplier’s name, and if payment is required in advance, his address; (b) a description of the main characteristics of the goods or services; (c) price (including taxes and delivery costs) and how long the price offer remains valid; (d) arrangements for payment and for delivery of goods or performance of services (if no date is specified, delivery or performance must be within 30 days of the order); (e) the right to a 7-day cooling off period during which time the customer may cancel for any reason (subject to exceptions); (f) the cost of using the means of distance communications, where it is calculated other than at basic rate, such as if a premium rate telephone rate is charged; (g) the minimum duration of any contract to supply goods or services continuously; (h) where the supplier wants to reserve the right to offer substitute goods or services.

## Unsolicited Commercial Communications

The e-Commerce Directive also sets out new requirements in respect of unsolicited commercial e-mail ("spam"). In particular, "spam" must be clearly and unambiguously identifiable as such as soon as they are received. Member States must also take measures to ensure that Service Providers undertaking spamming regularly consult certain registers of users who do not wish to receive spam.

Note that these provisions are supplemented by another new directive, namely the Directive for Protection of Personal Data for e-Communications recently approved by the EU, which also seeks to regulate direct marketing by spam, Short Message Service (SMS) and Multi-Media Message Service (MMS) messages. Under these laws, a customer must have given specific consent (by opt-in) to direct marketing via these methods but with an exemption where it is sent in the context of an existing customer relationship, provided the email addresses concerned are properly obtained (within the meaning of the EU privacy legislation) and that the customers are always given the opportunity to opt out of further communication.

Direct marketing by telephone and fax is already regulated by previous EU legislation, namely Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the communications sector.

## Information To Be Provided Where Contracts Are Concluded By Electronic Means

The e-Commerce Directive seeks to ensure transparency for those transacting business with an Information Society Services Provider. It provides that, in B2B contracts (unless the parties agree otherwise) and in all B2C contracts, the Service Provider must, prior to an order being made by the recipient of a service, provide certain information clearly, comprehensively and unambiguously, namely:

- ▲ the different technical steps to be followed to conclude the contract (so that recipients are aware of what the process will involve and the point at which they commit themselves);
- ▲ whether or not the concluded contract will be filed by the Service Provider and whether it will be accessible;
- ▲ the languages offered for the conclusion of the contract;
- ▲ the technical means to identify and correct input errors prior to placing an order;
- ▲ the relevant codes of conduct the service provider subscribes to, together with information on how the codes can be consulted electronically.

Additional information requirements also apply in respect of the placing of an order itself. The Service Provider must acknowledge receipt of the order without undue delay and by electronic means and must make available to the recipient of the service appropriate, effective and accessible technical means allowing him to correct input errors, prior to placing of the order.

Note that the e-Commerce Directive does not therefore harmonise Member States laws in respect of contract formation itself, nor does it go so far as to harmonise the moment of conclusion of an electronic contract. Rather, the Service Provider is required to set out all the necessary steps, so that the recipient of the service can be in no doubt as to the point at which they are committed to the contract.

## Liability Of Intermediary Service Providers

The Directive provides that where service providers are a mere conduit, or simply caching or hosting, they will not be liable for the information accessed or transmitted, subject to various provisos and safeguards. These provisions will also be supplemented by additional legislation enshrined in Directive 2001/29/EC on the Harmonisation of Aspects of Copyright in the Information Society.

The e-Commerce Directive also specifically states that Member States may not impose a general obligation on Service Providers to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

The e-Commerce Directive goes on to encourage codes of conduct to be drawn up to contribute to the proper implementation of much of the e-Commerce Directive. It also encourages out-of-court dispute settlement.

## The Future

The efficacy of the Directive is up for regular review. The first re-appraisal is to be before 17 July 2003 and thereafter every 2 years in order to ensure that it continues to adapt to the legal, technical and economic developments in the world.

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