

EURIM Working Party Minutes

Working Party: 03-Network Governance

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Minutes of the Network Governance Working Party meeting held at Ashurst Morris Crisp, London EC2 on Tuesday 25th January 2000

1. Philip Virgo apologised for the absence of the Working Party Chairman and Vice-Chairman. Attendance had been decimated by illness and transport problems and members who had agreed to make reports to the meeting were also amongst the absentees. He opened the meeting with a presentation on the background issues that should be kept in mind during the following discussion on applicable law and alternative dispute resolution.

Presentation

2. The first matter of concern was to be clear on the definition of the Internet. Although this was often taken to mean any-to-any packet switched communications, he preferred a more precise definition of “those networks which could be linked using tcp/ip protocols.” On that basis, the Internet was over 20 years old and the Web 10. It was important to distinguish the public Internet from the many intranets and extranets over which most electronic commerce still took place. Much that was said to be impossible when discussing the Internet was already in common use, but only by those who could afford the cost of secure systems.
3. There were issues of content to consider - who was responsible in areas of electronic crime, electronic fraud and electronic piracy - and those of performance - over the Christmas period billions of dollars had been lost by non-performing websites. Privacy was another major concern, as was consequential loss.
4. The debate on applicable jurisdiction and law was focused on country of origin v. country of destination. The draft electronic commerce directive reflected the view of the telcos and ISPs that it should be country of origin, but financial regulation world wide and similar legislation was based on the concept of “targeted” country - if selling into “our patch” we will go for them. There were serious incompatibilities between legislation. The Financial Services and Markets Bill (FSMB) was in line in this respect with the directive on distance selling of financial services, but in conflict with the electronic commerce directive. The matter was further confused by occasions when the electronic commerce directive might allow consumer protection law to prevail or where credit (Distance Selling of Personal Financial Services) was involved in the payment.
5. He referred to a proposal to hold over the electronic commerce directive for a year while effective alternative dispute resolution measures were put in place, in which case the directive could be made to work. Some players within the financial services area already had ways of handling this between themselves with ombudsmen/regulators from each country in contact with their opposite numbers elsewhere. Although action in the country of origin would be needed to get redress, there was also a clear requirement for the aggrieved party to be able to instigate action in the country of destination.

6. It was important now to examine the areas involving consumers where no alternative dispute resolution procedures existed. As far as the public debate was concerned this involved individuals and small firms using the any-to-any Internet. It must be remembered that this excluded most existing electronic commerce traffic and thus also those with the most resources and expertise with regard to cross border transactions.

Discussion

7. Where liabilities were concerned, the electronic commerce directive was marching in one clear direction but the whole of the financial services industries and their regulators appeared to be going in a completely contrary direction. The FSMB was a clear example of this and it appeared to apply to anyone who was not solely a "mere common carrier". The suggestion was made that we would be better learning to manage the conflict than trying to resolve it. The Internet was conceived as a single global administration but that was still years away. Users should not have to worry about arcane disputes. Reference was made to the paper which BE had presented the previous day and which elaborated on these issues.
8. It was noted that many large retailers and big multinationals were not involved in the debate at present. It was suggested this might be because they liked the current situation and saw no reason for change. The large spend required to meet a raft of regulatory requirements - up to a third of cost of sales in some sectors - was an effective barrier to entry for potential competitors. They worked on an assumption that each country was different and cross country trading was not allowed. This was hampering efforts to resolve the cross border problems now highlighted by the development of consumer electronic commerce.
9. An important factor was to make consumers more aware of the risks involved. However, the prevailing image of anarchy on the public Internet was costing business. Far more tracking and tracing was possible than was actually being implemented. Traders were beginning to compete on security and response time, rather than price. The models were changing and this was likely to affect attitudes to the draft directives. It was noted that the French seemed to be successful in using existing laws to regulate anything happening within their territory.. The view on what constituted targeting varied in different countries. Both the UK and the US tended to regard anything in the English language as targeted at them and there was concern about US lawyers making predatory attacks on some overseas websites. German regulators considered they were targeted unless the site made it clear they were specifically excluded.
10. Internet business models and regulatory concepts ranged from the wild west to a series of walled gardens. Advocates of the latter would want to take draconian action against intruders. A consensus was needed between the political bodies involved - Commission, HMG etc - as to what could realistically be achieved rather than what it would be nice to have happen. There was felt to be deadlock at the moment between the Commission and different commercial interest and consumer groups. Compromises would have to be reached. Even if the Commission did achieve a walled garden it would not afford realistic protection from the rest of the world. Whenever governments felt that weak, vulnerable people were being exploited, then legal constraints were introduced. Until ISPs understood that they had to put their own houses in order and clearly inform their customers as to what risks existed on what services, they would be in danger of having draconian (and probably not well-considered) legislation imposed on them. There was

not, however, any obligation to be a member of a self-regulatory group. Several key players were not members of ISPA.

11. It was agreed that the working party should focus on the politically sensitive areas. These concerned the public Internet. There was a need to be more specific on which small firms the problems applied to - those on the supply chains of large companies were probably using secure systems and covered by contract law. This was very different from the householder to whom the supermarket failed to deliver the groceries he had ordered electronically. Consumer confidence remained a major issue. If something global could be achieved (perhaps akin to the way lost airline luggage was dealt with), that consumers knew about and had confidence in, that would be a major step forward. A starting point was to look at the alternative dispute resolution processes already in place in different industries and wherever possible to build on existing mechanisms.

Working Party actions

12. A few minor changes were agreed to the background paper prepared by SB on hosting, caching and mirroring. This would then be widely distributed as a EURIM paper.

13. A background paper on the differences between debit and credit card liability and how they varied between countries would be helpful and possible authors were suggested.

14. The draft Status Report was considered and some modifications agreed in the light of the discussion at the meeting. MR would be asked to review it in the light of the consolidated version of the electronic commerce directive.

15. MT agreed to prepare a short paper explaining her organisation's preference (unlike most other ISPs) for an opt-in rather than opt-out regime for junk e-mail.

16. An update note would be prepared for the DTI with particular reference to the incompatibilities between the electronic commerce directive and the Financial Services and Markets Bill and noting also the lack of response by ISPs to the HM Treasury consultation on the FSMB secondary legislation, despite its direct relevance to their operations. It was agreed that a direct response by EURIM to the Treasury consultation was not required.