

DRAFT STATUS REPORT

NETWORK GOVERNANCE WORKING PARTY

Draft Electronic Commerce Directive – Common Position

The Working Party reviewed the revised drafts issued in August 1999 and the Common Position adopted by the Internal Market Council in December 1999.. Although there have been a number of changes from the original version, some significant issues raised in the working party's previous Status Report remain outstanding.

Objectives

A key objective remains the creation of a coherent European legal framework for electronic commerce. As indicated in the working party's comments on the original draft, this would inevitably lead to conflicts since commercial law varies so much between states. The working party holds the view that, where possible, the same legal provisions should apply "on-line" as "off-line." In any event conflicts arise between directives due to the large number of ad hoc derogations. The new draft attempts to iron out some of these problems, partly by cross-referencing other directives, but taking the directives together, there is no coherent legal framework. In practice, the pace of technological change inevitably leads to a degree of incoherence and the working party feels that the prime objective must be the removal of barriers to pan-European trade rather than the creation of totally coherent legal structures.

Definitions

The draft includes a new definition, "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession". In the working party's opinion, this definition does not reflect the changing nature of work and employment in the e-commerce era. It is increasingly difficult to define when self-employed persons and 'home-workers' are acting inside or outside their trade, business or profession. The Commission does not appear to be linking its flexi-working, tele-working, etc. studies to measures such as this. Furthermore, the working party considers that, if the Commission is to pay more than lip service to its pronouncements on SMEs, sole traders should be afforded the same level of protection as ordinary consumers. The extent of fraudulent transactions on the Internet is sufficient to provide a serious disincentive for small traders to use electronic commerce.

Commercial Communications

The Commission has introduced a requirement for service providers to respect opt-out registers for individuals who do not wish to receive unsolicited communications. The working party welcome this as an important consumer protection measure, but notes that some significant ISPs would prefer an opt-in arrangement for unsolicited commercial e-mails.

Contract Formation

The working party welcomes the revisions to this section as being a significant improvement on the original. In view of the proposed exclusion for “contracts concluded exclusively by exchange of electronic mail” the directive should include a definition of “electronic mail”.

Liability of Intermediary Service Providers

This is an important section as it is intended to define the liabilities of the service providers who are the indispensable facilitators of e-commerce. The intention is to limit their liabilities where breach of copyright, defamation, child pornography, etc are involved. The overall objective is to protect service providers who are simply providing a communication channel for suppliers and recipients of information society services. Rights owners support the provisions as far as they go, but believe that they should also incorporate some of the safeguards of US legislation, such as provision of information on infringing sites and persistent offenders.

The section, however, is flawed by definitions and clauses based on an inadequate understanding of the technology involved, which has the effect of rendering the measures ‘technology specific’. The tests to determine whether the service provider has any responsibility for content depend on modification or storage of data. The technology involved is complex, but transmission processes in use today usually involve modification of data and its storage for an indefinite (ie not temporary) period of time. Attached at Appendix 1 is a paper describing the various methods of making information available over the Internet.

Implementation

The working party supports the Commission’s encouragement of self-regulation through codes of conduct. However it is important to differentiate between codes of conduct (with sanctions) and codes of practice (advisory). EURIM Briefing No 25, prepared by the working party earlier this year, examines the issues involved in self-regulation.