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In the area of ICT (Information and Communications Technologies) EURIM is a link between Commerce and Industry, Parliamentarians, Whitehall and Brussels

EUROPEAN INFORMATICS MARKET EURIM

Electronic Commerce and the Law

EURIM Overview

Electronic commerce has been defined as *doing business electronically*. The definition therefore includes communications by telephone, telex, facsimile, e-Mail or EDI; it includes use of private or public networks, including the Internet, and it includes messages which may have originated as data, sound or image. It applies to any electronic trade regardless of size or value and applies equally to messages sent *one to one* and those sent *one to many*. The range of possibilities makes the use of electronic commerce explosive.

However, there are still snags to be overcome. For example, most UK law assumes commerce to be manual. Therefore we need to change UK law where necessary in order to achieve global parity in Statute, as between manual and electronic commerce. Priority in such change should be given to Consumer Protection Law. Electronic trade between businesses is, in general, capable of looking after itself, which reduces the urgency for legal reform. There is, however, one major exception to this: SMEs are often as unsophisticated in electronic commerce as is the individual consumer, yet find themselves subject to law applicable to the more sophisticated larger corporates.

The arrival of new technologies allowing procurement electronically via the Internet, the TV screen and touch kiosk poses new risks for SMEs and consumers. We have to work, however, for a balance between the need to protect them and the need to educate them to apply the caution they routinely use in manual trade. The concept of *caveat emptor* should not get lost.

More work on Statute reform is needed, particularly in trading disciplines associated with the Internet and the protection of citizen interests. Work is also required to ensure satisfactory law in respect of privacy, security, rights and payment across border.

Main Findings

General

- Existing legislation is ill fitted to respond appropriately to electronic commerce.
- Because technology will always outdistance law, relevant law needs routine periodic review.
- New electronic commerce technologies have already led to Regulatory involvement.
- The distinction between a very small company and a consumer is becoming blurred.

In the UK

- Existing UK statutes, not surprisingly, favour manual commerce and need review and revision.
- The UK has started updating the law for trade between businesses. There is much more to do.
- We found no evidence of any UK review of Consumer Protection Law for electronic trade.

In Continental Europe

- There is work on encryption; also Germany and Denmark are working on electronic signatures.
- We were unable to find any review of existing statutes.
- The EU Distance Selling Directive is currently drafted on the assumption that commerce is manual.
- The Commission promises initiatives in: standardisation of electronic commerce (July 97); electronic payments; copyright; protection of conditional access services; and digital signatures.

Globally

- Electronic commerce is growing exponentially. The USA and Far East are moving ahead of Europe.
- Differing laws will reduce the likelihood of consumer redress from global Internet trade.
- Corporations rely heavily on Contract Law to overcome global problems but consumers cannot.

The Principal Problems in the UK

There is no law specific to electronic trade in relation to either documents or transactions. Whilst this has not stopped large corporates from trading, through the use of contract (Interchange Agreements), electronic commerce needs statutes that respond to its existence and current statutes (at the least) need appropriate amendment.

Existing statutes contain many requirements which are expressed in terms which appear to exclude electronic data, e.g. *writing, document, original, signature. O*ther words, such as *lien, assignment, instrument,* leave doubts about whether their definitions stretch to an electronic version.

There is uncertainty about the word *original* since not only is the essence of electronic data one of infinite replication but, more profoundly, storage media may deteriorate with time and data integrity is only made good by periodic replication. Automatic death of an electronic document fits ill with a Court system which assumes that competent document management lasts for ever. One way to overcome this is to use WORM (Write Once - Read Many) media for archiving electronic records.

Communication is inhibited by legal uncertainty both in existing ways (eg. foreign law differs from UK) and due to new ways of communicating (eg. paper to image locally, then to data for long distance carriage and back to paper for local delivery at destination). What extra liabilities, not present in manual carriage and delivery are present for hybrid communication companies?

Under UK common law, hearsay evidence (any statement which is not made during Court proceedings) is inadmissible. To prove content there is a need for primary evidence (e.g. a document) but exceptions have been permitted on certain secondary evidence, such as authenticated copies. Even so, there has been uncertainty about the ability to prove in Court that electronic copies are properly authenticated.

The UK Civil Evidence Act 1995

The 1968 Act on Civil Evidence made limited provision for the admissibility of electronic media. However, proving admissibility was expensive and grew more so as technology changed. Following a 1990 Law Commission consultation document on hearsay, a draft Bill eventually became the 1995 Civil Evidence Act.

This Act abrogated the rule against hearsay as admissible evidence, but two safeguards were introduced against any potential weaknesses in such evidence. First, hearsay evidence can only be given in Court after notice has been given to the other side. Second, the Judge will decide what weight to attach to such evidence.

The Act gives guidance on circumstances to be taken into account in assessing the weight of hearsay evidence. It also states that where copy documents are concerned, the number of removes from the original is irrelevant but that the copy must be "authenticated in such manner as the Court may approve". S.10 allows admission of electronic "business records" as evidence and the definition of *document* and of *copy* in S.13 is broad.

The Act does not exclude the requirements of other statutes as to the admissibility of hearsay. The need to draw up Rules of Court in respect of the presentation of hearsay evidence took time and the Act only came into force on 31st January 1997. It is thus untested in the Courts and, as one legal commentator recently wrote, "the Courts are not universally noted for ready adoption of change".

Key to getting electronic copy documents accepted in Court will be the quality of the audit trail from the original through to the copy submitted to Court. The British Standards Institute (BSI) has published a Code of Practice, *Legal Admissibility of Information Stored on Electronic Document Management Systems.* The code covers data files that are stored on WORM optical storage systems. BSI seeks to define the current interpretation of best practice and to publicise this through training seminars. Whilst there is no guarantee that demonstration of compliance with the code will be accepted by the Courts, it ought to assist materially in achieving admissibility. The BSI/DISC Code of Practice should also become a useful tool to support regulation, dispute resolution and arbitration.

The Working Party of the Society for Computers and Law

This was commissioned by the UK Government to review legal impediments to the wider use of electronic commerce. It was given a remit to canvass business views and to make proposals for reform of the law relating to electronic commerce. It made its first report to Government in January 1997. This reviewed, in minute detail, the implications in UK law from the use in electronic commerce of the following words: *documents, records*, *Instruments*, *writing*, *signature*, *originals* and *conversion of records.*

The following briefly summarises the Working Party's conclusions and recommendations:

Documents: In most cases, a recording of information (irrespective of its form) is a *document.* In a minority of instances, it is quite clear that a document must be hard copy. The

legal concept of *documents* must soon encompass transactions based on underlying digital information where no permanent record has been retained. How this is best achieved is a matter the Working Party can leave to the future. There is no major barrier to electronic commerce today and no reforms are proposed.

Records: The earliest definition of a *record* in a UK statute was in 1982. Only once since then (in a case where records were expressly required to be held in *writing*) has doubt been expressed on the applicability of the definition to digital information. Tax records, however, are expressly permitted to be held digitally. No recommendations are necessary on the creation and retention of records.

Instruments: Effecting a transaction through an instrument is likely to require use of hard copy. Commerce gave no evidence that failure to use electronic instruments caused a barrier. Therefore no reforms are proposed.

Writing In general: The definition of writing does not extend to digital form. In general, it may be assumed that a requirement for writing means hard copy. New definitions are proposed of writing and of physical writing:- Writing is a representation of words, symbols and numbers which is now called "text". This new definition should be inserted into schedule 1 of the Interpretation Act 1978. It should apply only to future legislation. (Note: *text* is said to be manual or digital).

A new definition of *physical writing* should be in schedule 1 of the Interpretation Act and should apply to future legislation only. It should be defined as:- *Any writing on or in a physical medium from which it can be perceived directly by the human senses.* Senses will include sight, sound and touch.

Signature: English law on signature is sufficiently flexible to apply to digital documents. Yet sufficient uncertainty exists for a definition of *signature* to be desirable. A new definition of *signature* should be in schedule 1 of the Interpretation Act 1978. It should apply only to future legislation. It should define a *signature* as follows:

> *"Any process performed on a writing or other thing to be signed by or under the authority of a person (the signatory) which (a) alters or adds to the information content of the writing or other thing to be signed and (b) identifies the signatory and evinces his adoption of the writing or other thing to be signed".*

Signatory and recipient may need to prove the signature but may chose the method used. Following legislative review, the new definition should be applied retrospectively. In future Bills, if a *personal signature* is required, this should be so stated.

Originals: Deeming a document to be a copy goes to its weight as evidence, not its admissibility. Where a document is admissible, it may be proved by producing a copy. This is so, even when the original exists. (Civil Evidence Act 1995). Future use of the phrase *original or true/certified copies* is recommended, but no reforms are proposed.

Conversion of records: Some statutes expressly permit records to be held in digital form. This may not extend to permit hard copy records to be converted to digital form. Amendment is required to include explicit provision of records in digital form.

Terms to be avoided: Future drafting should avoid terms such as *executed, issued, endorsed* and *stamped* unless considered for their effect following the new proposed definitions.

Other Legislative Initiatives

The United Nations Commission on International Trade Law (UNCITRAL) has produced *A Model Law on Electronic Commerce* which, on its own, appears to EURIM to be exemplary. Its problem is that it is *A Model* and would only ensure that electronic commerce was not disadvantaged against manual commerce were all nations to enact it. In fact, the *Computers and Law* report actually disagrees with the Model Law in one particular, arguing that the need for *reliability* [Article 7(1)] in a signature is inappropriate for unstructured electronic commerce.

Other ongoing work, in both UN and EU groupings, includes: conflict resolution (What is the applicable law? Is there an arbitration procedure?); transfer of rights (Are Bills of Lading needed? How can they be electronic? Can there be a paperless Letter of Credit?); defining *offer* and *acceptance* where communication is electronic; and, in general, the consideration of security, privacy, data protection and intellectual property rights in the context of electronic commerce.

A number of initiatives are under way in an effort to support electronic commerce better through global contractual agreements amongst traders. These include: electronic invoicing and self billing (which cause problems to some Customs authorities); the International Chamber of Commerce's *Electronic Commerce Project*; the use of Certification Authorities; and *BOLERO*.

The expected 1998 BOLERO Pilot of maritime trade between five nations, including the UK, could be significant. It seeks to eliminate paper in trade related documents, including

negotiable documents of title. It will use the services of the international banking co-operative, SWIFT, to support a central registry that will enable electronic exchanges to take place between parties agreeing to the BOLERO rules.

The Commission's April 97 Communication, *European Initiative in Electronic Commerce,* recognises that vigorous growth of electronic commerce needs a single wholly interoperable market. It points out that differing laws and customs within EU States create barriers which prevent this from happening and proposes new Directives to achieve it.

EURIM Comments

1. *The Working Party of the Society for Computers and Law - Report to the UK Government* is broadly acceptable in so far as it goes but much more needs to be done. In the context of its Terms of Reference, it suggests that the next stage of its work is a review of retrospective legislation. We suggest that it is more important to review those areas of uncertainty where it has not made proposals, since, otherwise, they will continue to inhibit trade.

2. Greater certainty is required about circumstances where data on an original is lost, perhaps involuntarily through age or deliberately through compression techniques. A definition of *information* is needed. The real purpose of writing is to transfer information across place and time. Such transfer can now be between media other than writing. Future law needs to look at purposes rather than forms of information.

3. The responsibility in UK law of service providers remains unclear. We suggest that, in the same way that the Post Office cannot be held responsible for illegality of content within the sealed envelope which it delivers, so the service provider should not carry responsibility for the unread message that it delivers. Yet, proposals exist to require service providers to monitor traffic for pornography. There is also the possibility that innocent service providers may be joined in actions which allege that the carrier violated intellectual property rights. We suggest that service providers should only incur such responsibilities when they are aware, or ought to be aware, of such transgressions.

4. On the proposed definition of *signature* we suggest that *thing to be authenticated* is more appropriate than *thing to be signed*.

5. We expect electronic commerce to subdivide between off-line services (procurement of tangible goods) where the electronic commerce part is limited to advertising, ordering, invoicing and payment and on-line services (where the actual goods or services being procured are delivered electronically, eg the daily newspaper). On-going legal concerns include the risk of tangible goods delivered but payment reneged, or vice versa, as well as the problems of taxing on-line cross border intangible services.

6. We suggest that an *original* need no longer be *unique*. Electronic watermarking offers many originals which are identical in information content but individual for tracking purposes.

7. New hybrid services (eg. the electronic "postal order") may lead to the need to revisit the report's findings on *documents* and on *records*. The arrival of digital cash has interesting regulatory consequences. Its use falls under both the Financial Services and Banking Acts. Whilst action under the FSA is not expected, the possibility exists of contradictory regulations.

8. The Internet, web pages and browsers offer the consumer a new way to buy goods and services. Clearly UK Consumer Protection Laws such as the Unfair Contracts and Distance Selling Acts should be reviewed to establish whether weaknesses exist in the context of electronic commerce.

9. The National Consumer Council exists "to promote the interests of consumers of goods and services of all kinds". EURIM has suggested that it review whether existing UK law matches the future needs of electronic consumers. Those buying goods or services from outside the UK should be even more cautious about their lack of redress if these turn out to be unsatisfactory.

10. Internet trade depends on security and the current problems in achieving suitable encryption are sufficiently complex to require separate consideration - they are the subject of EURIM Briefing No. 16. There is a need for balance between the interests of Government, of traders and consumers, and of the proposed Trusted Third Parties (or ethical intermediaries). Such trust will be even harder to achieve where encrypted communications cross borders.