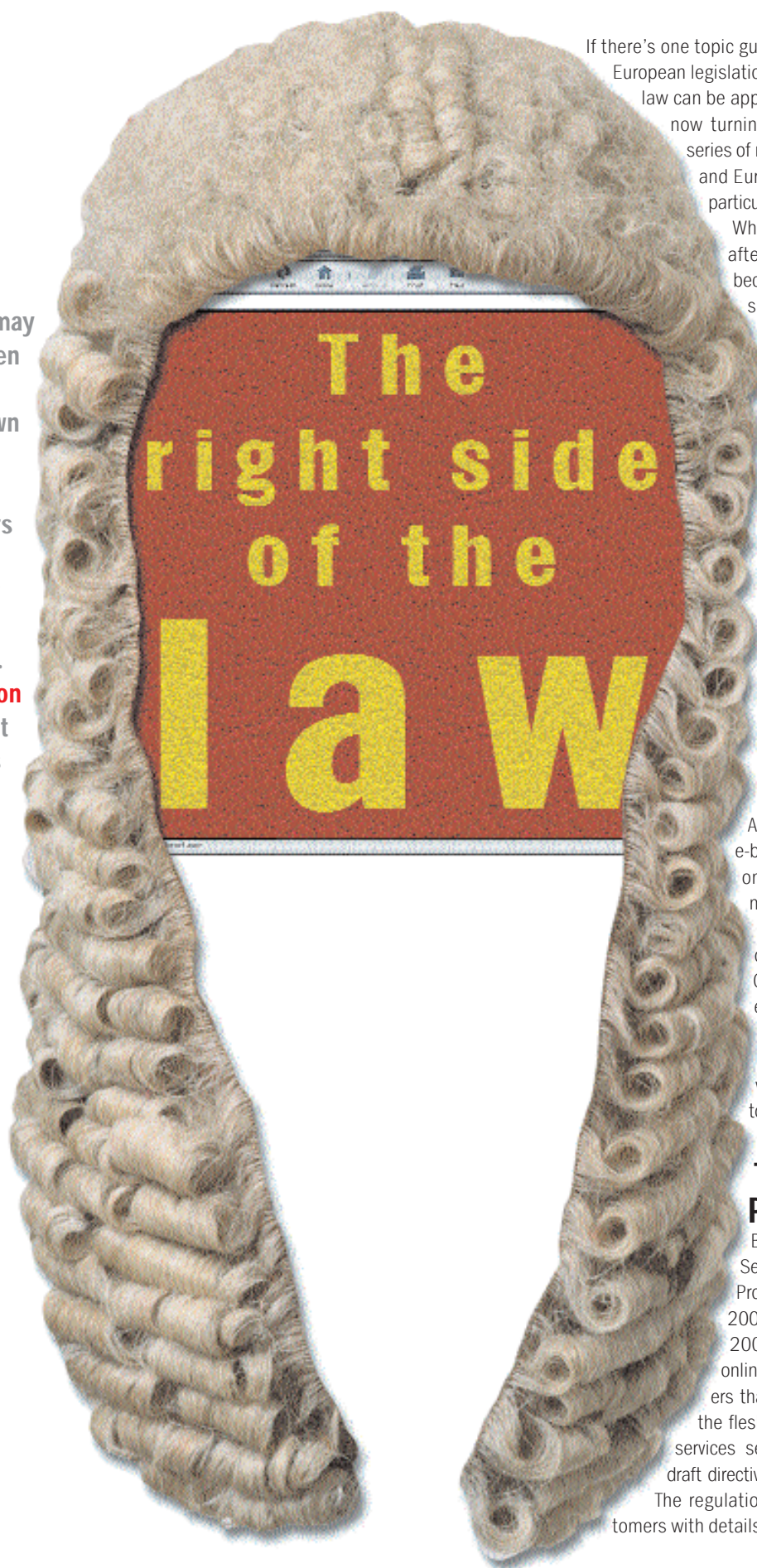


The internet may once have been allowed to develop its own rules, but in recent years the lawmakers have been paying closer attention to digital media.

Dan Williamson finds out what e-businesses need to know to stay legal



If there's one topic guaranteed to generate controversy, it's European legislation. Although a great deal of existing UK law can be applied to e-business, the legislators are now turning their attention to specifics, and a series of recently introduced and forthcoming UK and European laws and directives will have a particular impact on online marketing this year.

While the law may almost have been an afterthought during the dotcom boom because of the sheer pace of change, firms should begin to review how their sites will be affected by the new regulations.

The first stage in the creation of a law comes when the European Commission drafts a directive, then debates and amends it as required. It is then finalised as law by European Parliament. All the 15 current member states within the European Union (EU) then integrate each directive into their own legal system, usually within three years. The following is a guide to how some of these new rules will affect online businesses.

The Electronic Communications Act

The Electronic Communications Act is UK law. It came into force in May 2000. Although the Act seems to refer to all e-business, its provisions will affect few online firms. Its main purpose is to remove any legal obstacles to the use of 'e-signatures' – the online equivalent of a written signature. The Act gives Government ministers the power to ensure legislation under their department's control embraces e-signatures. The framework will become more relevant in time, particularly in the health sector, social security and justice systems.

The Consumer Protection Regulations

Born five years ago as the Distance Selling Directive in Europe, the Consumer Protection (Distance Selling) Regulations 2000 were introduced in the UK in October 2000. Aimed at protecting customers online, the regulations affect all UK suppliers that trade without meeting customers in the flesh, apart from firms within the financial services sector, which is to receive a separate draft directive on distance marketing.

The regulations ensure that e-tailers provide customers with details such as a postal address, full delivery

costs and dates and terms of contract via a 'durable medium'. The Department of Trade and Industry (DTI) has since made it clear that email notifications would be classed as durable.

Designed to protect customers from sales firms that have no fixed address for returned goods or letters of complaint, the regulations could eventually help remove any residual concerns over shopping with businesses that trade solely online.

As customers have the right to cancel an order up to seven days after the delivery of goods, e-tailers dealing in low-value goods could be severely affected, as consumers have the right to hold the goods until a full refund has been made.

If an e-tailer fails to alert customers of their rights under the regulations, this period can be extended up to three months and one week. As the cost of chasing the goods or the consumer may outweigh the costs of the goods themselves, e-tailers should be aware of the rules, which apply to both goods and content.

"If you have an information site where a user paid £10 to become a member and then a month later decided the site didn't tell them the full implications of joining, the user could then give written notice that they want their money back," explains Ian Jeffery, IP/IT partner at law firm Lewis Silkin.

Non-compliance with the regulations could attract attention from the Fair Trading or Trading Standards Departments, which can seek an injunction against a business to prevent further breaches of the regulations. A site could move towards compliance by ensuring users are fully aware of the terms of the contract at every stage of the sales process.

The rise of wireless transactions could hinder the adoption of the regulations, as mobile phones' standard 160-character screen may well be unable to hold all the necessary information. At the moment, the regulations relate to communications made via post, fax, telephone, TV and e-mail.

A summary of the regulations can be found on the DTI's site at www.dti.gov.uk/CACP/ca/work9.htm, while a guide on compliance can be found elsewhere on the same site. The complete regulations can be found on the Stationary Office's web site (www.hms.o.gov.uk).

Data Protection Act

As internet marketers target users with increasing accuracy, the need to observe rules governing the flow and control of personal data grows ever more important. Information

and records are relevant to almost all types of business, sectors and industries, and data protection is playing a greater role in shaping EU directives.

Rules governing data specifically within the EU stem from the Data Protection Directive of October 1995 and the Telecommunications Data Protection Directive of December 1997.

Created to protect individuals' data across the European Community, the directives specify how personal information must be collated, distributed, stored and even destroyed. The UK equivalent, the Data Protection Act 1998 (DPA), provides UK businesses with guidance on proper management of data.

The Act stipulates that any firm processing data must comply with eight core principles. These say that data must be securely processed and not kept for longer than necessary, records must be accurate, relevant, not excessive, processed in accordance with the individual's rights and not transferred between countries without adequate protection. Companies that handle such data are obliged to notify the information commissioner, the enforcer of the DPA, with details of the information kept. Notifications are mandatory and must be made every year at a cost of £35. It is an offence not to do so.

The urgency for compliance among UK web businesses has now stepped up a gear, following news that the University of Manchester Institute of Science and Technology is to audit sites for a study on behalf of the information commissioner.

Although phone and physical interviews will be used to conduct the study, the information commissioner's site (www.data.protection.gov.uk) states that the university will use a variety of techniques. The study, which aims to identify areas for improvement, generate awareness of the rules and create a basis for future enforcement, is due to be published in May 2002.

Although non-compliant sites will not be reported, the penalties for blatant non-compliance with the DPA in general are clear. The information commissioner can issue an enforcement notice to businesses, enter premises and begin criminal proceedings. Individuals who suffer from distress or losses as a result of a business' breach of the Act also have the right to sue that business directly.



If a user decided a month later that a site didn't tell them the full implications of joining, they could ask for their money back

**Ian Jeffery
Lewis Silkin**

The screenshot shows the DTI Consumer Affairs Directorate website. The header includes the DTI logo and the text 'Consumer Affairs Directorate Strengthening Consumers and Business'. A navigation bar contains links for 'What's New', 'Text Version', 'Browse Enhanced', 'Search', 'Guide', and 'Contact'. The main content area is titled 'Work Of Consumer Affairs Directorate' and 'Distance Selling and E-Commerce'. It includes a sub-header 'DISTANCE SELLING' and a list of bullet points detailing consumer rights under the Distance Selling Regulations, such as the right to receive clear information, confirmation in writing, a cooling-off period, and protection from credit card fraud. A link at the bottom states 'A summary of the Regulations can be read by Clicking Here'.

Distance selling: e-tailers must provide contact information

Brussels Regulation

Building on the 1968 Brussels Convention, which deals with contractual disputes, the new Brussels Regulation came into effect on 1 March this year. The regulation is of special interest to the online community, as it deals with e-tailer's exposure to law suits brought by consumers in other EU member states.

First proposed in September 1999, the regulation gives customers greater powers in launching legal action against a foreign company situated in any EU member country (except Denmark, which has opted out).

For example, if a UK customer felt a French e-tailer had failed to deliver a full service or goods, they could legally pursue the French company in a UK court. The regulation means that whatever decision the UK court came to, a French court could then enforce the ruling against the French company.

The regulation could apply to e-businesses if a site is seen to be 'directing' its services to another EU country by offering details of delivery times, prices or product descriptions in relevant languages. But if a UK site, for example, only gives its >



prices in sterling and delivery times for UK addresses, it may be exempt from the regulation, according to the DTI (www.dti.gov.uk/CACP/ca/consultation/jurisdiction.htm).

Olswang e-commerce partner Clive Gringras says the regulation can also be used by e-tailers against consumers. "If I'm a site owner, this affects how I would sue a consumer outside my state. It tells us where we direct our case litigation."

EU directive on VAT

Agreed in February by the European Council of Economic and Finance Ministers after two years of discussions between member states, a new EU directive on VAT and e-commerce is set to come into force on 1 July next year.

The objective of the directive is to create a fairer trading environment for e-commerce in the EU. The directive will have a major effect on non-EU companies that supply web hosting, distance maintenance of programmes and equipment, and the supply and updating of software, images, film, text, music and games. Online distance learning services are also included.

Under existing rules, non-EU businesses can provide online services without adding VAT, a rule which UK companies claim gives an unfair advantage to non-EU businesses.

allowing them to charge other EU customers the VAT rates of a state with low rates. If this state was Madeira, which has a VAT rate of about 12 per cent, for example, costs could be cut.

For UK companies, the directive will see the end of VAT on digital services served to non-EU customers, which again aims to stimulate the 'export' of digital services. Guidelines on the current VAT regulations for digitised products is available at the HM Customs & Excise web site (www.hmce.gov.uk).

The E-Commerce Directive

The E-commerce Directive is now in its final form, after heated debate since its creation more than three years ago. Rubber-stamped by the European Commission and the European Parliament in June 2000, the UK was supposed to have integrated the directive as law by 16 January 2001. However, the directive is unlikely to be translated into UK law until this summer.

The directive aims to inspire consumer confidence in addition to giving online service providers a legal framework. The types of business affected by the directive include ISPs, online newspapers, online databases, online professionals such as lawyers and estate agents, online entertainment services and online direct marketing and advertising agencies.

Although wide-reaching, one of the directive's main provisions will have a particular impact on ISPs; it aims to set out rules on whether a service provider is responsible or liable for a user's actions. Under the directive, damages, claims or criminal proceedings cannot be made against a company if it is not aware that its service is being used criminally. However, the directive leaves room for injunctions.

The directive also sets out rules on the level of information a supplier must send to customers. When sending out commercial communications, companies must provide, among other information, clear contact details, trade and public registration details, along with full tax or delivery costs. The directive states that these commercial communications must be immediately identifiable as such. This element, which refers to email marketing and 'spam', is given its own section (see below).

The directive demands that all EU states must ensure that their legal systems and regulations allow for contracts to be concluded online. As e-tailers must also do all they can to ensure web technology spots mistakes in the ordering process, firms will need to review their site's compliance immediately.

The directive also deals with the legality of site content abroad, and actually makes the regulations much simpler to follow for companies. "If it's legal at home, then it's legal abroad, which means you will no longer need to check with 12 different lawyers to see whether your site is safe or legal," says Olswang's Gringras. This rule, for example, limits the liability of a bank's UK-focused, but globally accessible, site in countries such as Mongolia, whose laws state that a bank cannot advertise in its country without having a physical base there.

To begin the process of introducing the directive into UK law, the DTI launched a public consultation in August last year, which summarised the options surrounding the directive and invited firms and representative organisations to submit comments by 2 November 2001. It is now too late to lobby the DTI, but the EU aims to re-examine the impact of the directive every two years to account for changes in technology.

The screenshot shows the HM Customs and Excise website. At the top, there's a navigation bar with links: About us, Business & trade, Public & travel, Protecting society, and Forms & publications. Below this is a search bar and a row of links: site help, useful links, recent updates, news centre, contact us, and Cymraeg. The main content area is divided into several sections: 'Protecting society' with links like Customs Confidential, 24-hour hotline, and Our fight against smuggling; 'Business & trade' with links like VAT, Importing, exporting and EC trade, and Rates of exchange; 'Public & travel' with links like Your customs allowances, Banned & restricted goods, and VAT refunds for visitors; and 'Forms & publications' with a link to A full library of our notices, forms and information sheets. There are also 'Quick links' and 'About us' sections. The website is branded with the UK online logo at the bottom right.

VAT regulations: when a new directive comes into force in July 2003, UK web firms will work on a level VAT playing field with non-EU competitors

One such company is internet service provider Freeserve, which has long complained about rival AOL and its VAT exemption. AOL does not pay VAT at present as it claims it is not a telecommunications service, and so is exempt from a 1996 EU directive making all telecoms providers to the UK pay VAT.

But as of next year, non-EU firms supplying digital services to private customers will have to register for tax in an EU country and charge VAT at the rate applicable to a customer's own country. Although the directive is a year away, non-EU firms would do well to begin assessing how their front-end and back-office web systems would have to change to account for the current 15 different rates of VAT in member states.

The costs of this change could see non-EU companies favour setting up a stand-alone subsidiary in an EU member country,

As parts of the directive, particularly those regarding email marketing and spam, have caused controversy, selected sections of the directive could be introduced into UK law while remaining sections are left out pending further debate in Europe.

Companies should nevertheless review the directive to minimise potential legal exposure, as individuals can use EU directives to launch damages claims.

For full details on the DTI's consultation process, responses to the consultation and what will happen before introducing the regulations, visit www.dti.gov.uk/cii/e-commerce/europeanpolicy/e-commerce_directive.shtml.



If it's legal at home, then it's legal abroad, which means that you will no longer need to check with 12 different lawyers to see whether your site is safe or legal

**Clive Gringras
Olswang**

Email marketing and spam

Although the debate about the legality of sending unsolicited emails, or spam, in the UK rages on, EU regulations look set to lead the way in setting clear ground rules for email marketers.

The E-commerce Directive caused controversy after an initial draft favoured an opt-in policy – whereby customers must ask to be sent information – for email marketing for all EU states. After lobbying from various marketing groups, Europe now favours a self-regulatory stance within each country. The UK, which so far favours an opt-out rule, acknowledges that opt-in would do little to combat spam from non-EU countries.

Article 5 of the directive requires direct marketers to give their name, geographic address, email contact details and details of supervisory authorities so users can take steps to stop further communications. Potentially workable with e-mail communications, Article 5 does not clearly account for SMS marketing. The DTI has indicated the eventual UK law will take account of this and be technology-neutral, but wireless marketers may have to wait until the summer to see the provisions made.

Article 7 states that all unsolicited communications should be identifiable as such as soon as they are received, so the user can delete the email without opening it or filter it out. But as Jeffery asks: "Do you then use subject headers such as 'Unsolicited communication – want a new car?' on all emails?"

The directive also requires that countries ensure senders of unsolicited emails regularly check with email opt-out registers such as those run by the Direct Marketing Association (www.dma.org.uk).

"Most companies using traditional paper-based direct mail consult the Mailing Preference Service," says Jeffery. "The E-commerce Directive bolsters obligations to consult the electronic version or 'E-MPS', which is likely to become compulsory once the E-Commerce Directive comes in."

The information commissioner could also become more involved in online marketing. If a UK marketer continues to send unsolicited email to an individual who has requested the cessation of such communications, the commissioner can issue an enforcement notice. A breach of this could render company directors liable to prosecution, with fines of up to £5,000 per breach. Continued abuse could see an operation shut down.

The draft Telecommunications Data Protection Directive could also create controversy within online marketing. Not yet European law, this directive aims to unify all existing provisions on spam and electronic communications under one set directive, but past attempts to apply the broad provisions across the technologies have so far been met with deadlock.

The draft Electronic Communications Directive

Small pieces of profiling software that sit in PCs called cookies allow site owners to track users' web browsing activity and build a detailed user profile. Last November, the European Parliament approved a draft of the Electronic Communications Directive, which stated that a web site owner would have to gain prior consent from a user if it wanted to install or read cookie information on their PC.

Groups such as the Interactive Advertising Bureau UK (www.iabuk.net) immediately protested and suggested that the disruption would cause UK site owners to lose an estimated £200 million in revenue.

As the draft directive would force users to re-register with a site or face a message box every time a cookie was presented, the European Council decided banning them outright would not be justifiable.

The EC now says cookies can be used as long as users are informed of their existence. Although the draft directive is likely to be implemented into European law within the next few months, it is thought to be unlikely that a UK equivalent will come into force until 2003.

UK firms looking to comply with the directive would do well to observe rules set out in the DPA, as the information commissioner suggests cookies are covered by the Act.

The commissioner's guidance notes can be found at www.data-protection.gov.uk/dpr/dpdnc.nsf. □

Contributors

Clive Gringras, e-commerce partner and **Marc Dautlich**, solicitor, Data Protection Team, Olswang.

Ian Jeffery, IP/IT partner, Lewis Silkin.

Chris Reed, Professor of Electronic Commerce Law, Queen Mary, University of London.

Peter Stevens, partner, and **Loma Tai**, associate, Media and Information Technology, Manches Solicitors.

Elizabeth Crossick and **Michael Rosenthal**, telecommunications, media and technology group, Freshfields Bruckhaus Deringer.

Simon Roe, associate, E-commerce Group, Theodore Goddard.

Tamzin Matthew, senior solicitor, Morgan Cole.

Graham Smith, partner, Bird & Bird. **Berwin Leighton Paisner**.

