Legal and Regulatory Update

The E-Commerce Directive and its impact on pan-European interactive marketing

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On 8 June 2000 the E-Commerce Directive ('the Directive') was adopted by the Council of Ministers. The Directive aims to create the framework for the free movement of e-commerce services throughout the EU. As such it is based on Article 49 of the Treaty of Rome, which provides for the free movement of services. The Directive is significant in that it is only the third piece of legislation to pass through the European Parliament on a second reading without amendments. This was largely due to an alliance of pro-internal market MEPs, including Theresa Villiers. The driving force behind the Directive was the parliamentary raporteur Ana Palacio MEP, who successfully piloted the Directive through the Parliament in the face of strong opposition from more protectionist member states and single-issue consumer protection groups.

However, there is currently a backlash against some of the liberalisation measures in the Directive. This is due to the fact that the significance of some of its provisions was not initially fully understood by all of those involved. Now that the full impact of the Directive has become known, a number of attempts are being made to limit its scope, particularly in relation to direct marketing. (See for example the anti-spamming provisions in the draft Directive on Data Protection and Telecommunications, and the report on spamming by the Article 29 Committee of Data Protection Commissioners.)

The core principles of the Directive

Perhaps the most fundamental provision in the Directive is Article 3, which enshrines the principles of country of origin and mutual recognition. These principles mean that a company which is established in an EU member state and trading in accordance with the laws of that member state is not subject to the laws of the other 14 member states. The result of this is that if an e-commerce business is established in the UK and complies with UK law, on advertising and direct marketing for example, it is not subject to stricter or different laws in France and Germany despite the fact that it may be trading into those countries. Under these principles, France and Germany have to recognise that English law gives an equivalent level of protection to their own laws.

This is an extremely useful concept for UK direct marketers as it means

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that a UK company trading into Germany, for example, by the means of electronic commerce should not, following strict legal interpretation, be subject to the German law on unfair competition which prevents the use of marketing promotions such as 'two for the price of one' discounts. However, in practice, litigation will probably have to be brought in order to force Germany to accept this and comply with its obligations under EU law. It should be noted that there have been a number of complaints to the European Commission about German bans on offline marketing. (See for example the Polygram complaint regarding the ban on the use of loyalty bonuses for marketing through a CD club, and the Lands End complaint regarding the ban on the advertising of an unlimited guarantee.)

Unsolicited e-mails

The Directive also allows direct marketing by unsolicited e-mail provided that those e-mails are expressly marked as a marketing communication and can be deleted by a consumer before they are opened. However, as stated above, this clause is under attack, even before the Directive is implemented, from the anti-spamming provisions of the draft Directive on Telecoms and Data Protection, which seems to require an opt-in model to be used before a consumer can be targeted with unsolicited marketing e-mails. Furthermore, the discussions between the national Data Protection Commissioners of the EU member states in the Article 29 Committee seem to be pointing towards a complete ban on the use of unsolicited e-mails within the EU on the grounds that they infringe a consumer's right to privacy. Obviously this is a very contentious issue which will be hard fought by the industry.

County-of-origin principle

The major flaw in the E-Commerce Directive is that it exempts a number of areas from the country-of-origin principle. Most notably for direct marketers, consumer contracts fall under the law of the country in which the consumer is resident. Therefore, as a rough distinction, it can be said that the country-of-origin principle applies to all pre-contractual issues, including advertising and marketing, and the law of the country in which the consumer is resident applies to all contractual disputes. This distinction is due to the dichotomy created by the so-called Brussels Regulation ('the Regulation') on jurisdiction, formerly the Brussels Convention. This has not yet been implemented.

The Brussels Regulation

The Regulation as currently drafted states that an e-commerce business which directs activities towards one or several member states may be sued by a consumer in the event of a breach of contract in the courts of the state where the consumer is resident. A company is currently deemed to be directing activities to any country from which a consumer can access the company's website, regardless of whether or not the company is specifically targeting that market. This means that online traders will be subject to far more onerous regimes than offline traders. For example, a tourist from France visiting London and buying goods in Oxford Street would not be able to return to France and sue in the French courts. However, if the tourist was to visit London online, for example by typing the words 'luxury goods' into his French-based Web portal and then visiting the Harrods website which came up as part of the search, under

the Regulation as presently drafted he would be able to sue in the French courts, even though it is clear to the French consumer that he is shopping in the UK. (Under the E-Commerce Directive Harrods or any other website is required to state clearly the name of the business and its place of establishment.)

Brussels Regulation

A number of commentators have stated that the Brussels Regulation does not cause a problem as it only deals with jurisdiction, and the applicable law will still be the law where the business is established. The authors would disagree with this view, as under the Brussels Regulation once a court has jurisdiction it can also apply the mandatory requirements of its laws. For example, it is a mandatory requirement of French law that all contracts between businesses and consumers be written in French. This would mean that a contract between a UK company and a British citizen living in the Dordogne could be held to be null and void by a French court simply because it was written in English. The fact that a contract was held to be null and void for being anti-consumer could cause a great deal of brand equity damage for a company. It would also have the effect of making all their standard form contracts null and void in that particular jurisdiction.

It should also be noted that the Consumer Protection Directives contain only minimum requirements. Therefore if a company was trading in England where a Consumer Protection Directive had been implemented to the minimum harmonisation standard, but dealing with a consumer in France where an extra level of consumer protection had been added, the French court would be able to apply the extra level of protection.

Rome I Regulation on Contracts (Applicable Law)

EU Regulation

The next area of potential conflict, after the Brussels Regulation, will be the transposition of the 1980 Rome Convention on Contracts (Applicable Law) into an EU Regulation. Given the difficulty of a court taking jurisdiction but then having to deal with a contract under foreign law, there is a compelling legal and logical argument that the applicable law should be the same law as that of the jurisdiction of the court. Therefore if the Brussels Regulation is adopted in its current form it will be extremely difficult to argue that the applicable law pertaining to a contract should not be the law of the consumer's place of residence.

This will lead to a domino effect, as once jurisdiction falls, applicable law will follow. This can be seen in the proposals for the Rome II Regulation on non-contractual liability, which states that the law relating to non-contractual liability (eg areas such as unfair competition law, defamation and product liability) should be the law of the place where the damage occurs. This would mean, for example, that a UK trader offering a 'two for the price of one' discount, which is perfectly lawful under English law, may fall foul of German unfair competition laws simply because his website can be viewed in Germany.

Océano case

The situation is further confused by the judgment of the European Court of Justice in the *Océano* case. This case concerned a contract between a

consumer and a company selling encyclopaedias in Spain. The contract contained a jurisdiction clause which gave exclusive jurisdiction to the courts of the region where the company was based. This clause was held to be an unfair contract term by the European Court of Justice.

It is quite clear that this was an unfair contract term because it required the consumer to bring a court action in the supplier's jurisdiction. However, this has been interpreted by certain members of the European Parliament to mean that all jurisdiction clauses in consumer contracts are unfair contract terms *per se*. If this is correct, it would apply to both online and offline contracts and create major problems for the system of standard-form contracts throughout Europe. However, it is the authors' view that all the court was saying in *Océano* was that they have the right to look at all circumstances surrounding a contract when deciding whether or not a contractual term is unfair.

The Brussels Regulation, together with the Rome I Regulation on Contracts (Applicable Law), the proposed Rome II Regulation on non-contractual liability and the judgment of the ECJ in the *Océano* case all represent a major threat to the framework for the free movement to e-commerce services as set out in the E-Commerce Directive. These new developments will lead to the break-up of the internal market and a return to 15 different national markets.

This situation clearly shows that within the EU there is no coherent policy on e-commerce — rather there are a number of different policy strands which are leading to contradictory legislation that will have a severe negative effect on the internal market and will hinder the development of online pan-European direct marketing campaigns.

Endnote

As we go to press, word is received that the European Council of Ministers has passed a Regulation enforcing the 'country of destination principle' in disputes over online trading. Traders will thus be obliged to observe the laws of all countries with whose residents they trade.