

Response to the European Commission's Questionnaire on the E-Commerce Directive

November 2010

ABOUT THE ADVERTISING ASSOCIATION

1. The Advertising Association is the only organisation that represents all sides of the advertising and promotion industry in the UK - advertisers, agencies and the media. The list of our members is included at the bottom of this response.
2. In the UK, the advertising industry employs nearly 250,000 people. In 2009, advertising expenditure was £14.5bn.
3. We promote and protect advertising. We communicate its commercial and consumer benefits and we seek the optimal regulatory environment for our industry.
4. Our goal is that advertising should enjoy responsibility from its practitioners, moderation from its regulators, and trust from its consumers.

SUMMARY

The E-commerce Directive - Overview

5. The Advertising Association (AA) believes that the UK advertising industry benefits from a regulatory regime that allows businesses to trade throughout the European Union regardless of national borders. The Electronic Commerce (E-Commerce) Directive is, therefore, of vital importance to the advertising community as it has allowed firms to more easily promote and advertise their goods and services across borders.
6. We do not believe that there is a need to review this Directive. Indeed, we suggest that a review of the existing, and effective, rules set out in the E-commerce Directive could in fact be detrimental to the e-commerce market. Should the Commission be minded to undertake a review of the Directive, then we would strongly advocate a focussed review with targeted interventions to alleviate specific barriers to e-commerce, while not undermining the core themes set out in the Directive. Whichever next steps the Commission choose to take with regard to this Directive, we would welcome involvement in future stakeholder discussions.
7. Since the Directive was first transposed into UK law there has been a significant increase in e-commerce in the UK, with a parallel growth in online advertising. Policymakers in both the UK and Brussels will be aware of the important role that online advertising has played in driving the growth of e-commerce. Furthermore, the AA believes that technological innovations that have emerged, and that continue to emerge, creating new modes of online advertising, can assist with the development of e-commerce.
8. The AA and its members have extensive experience with regard to online advertising and we agree with the Commission's assertion that new technologies are opening up global markets more than ever. We support the Commission's EU digital agenda objective of a single, harmonised EU open market which we believe presents exciting opportunities for consumers, advertisers and traders alike.

9. The "country of origin" principle set out in the E-commerce Directive has helped to boost cross-border activity in relation to online advertising. The AA considers it to be absolutely essential for the Directive's provisions on the "country of origin" principle to be maintained.

E-commerce in the UK - Overview

10. The Commission's paper references some concern about the limited take-up of e-commerce since the Directive was first adopted. This is certainly not a cause of concern in the UK where the e-commerce sector has grown, and is still growing, enormously. Indeed figures from the Interactive Media in Retail Group (IMRG) suggest that, since the year 2000, there has been at least a 7000% growth in the sector in the UK. In 2009 e-commerce was worth £50bn to the UK economy and continues to grow (IMRG). Online advertising has been a key driver in the growth and take-up of e-commerce in the UK: total internet advertising spend in the UK in 2000 was £153.1 million, in 2009 it was £3540.8 million (according to data compiled by the World Advertising Research Centre (WARC)), a growth of over 2000%. The most recent figures from the bi-annual online advertising expenditure study from the Internet Advertising Bureau (IAB), the trade body for digital marketing, collated in partnership with PwC and WARC, revealed that online marketing now has a UK market share of 24.3%, the largest of any major global economy. These figures help to show that the UK e-commerce market is a success story. Given such a level of growth, it is clear that the UK is in a good position to provide information to other Member States to help them to develop their e-commerce markets.

Drivers of e-commerce

11. There are numerous reasons for the UK having such a developed e-commerce market, but our high level of IT literacy is clearly of fundamental importance. Indeed, Ofcom research found that the UK is the most 'digitally advanced' nation. The Race Online Project reported in July 2010 that 30 million people in the UK use the internet every day, that half of all leisure travel is now booked online and that seven million job adverts were placed online last year. These figures clearly reveal that the UK has a highly IT literate population; however, the Government continues to undertake a variety of projects over the last ten years to further develop IT skills among the population. Indeed, the Government has recently appointed a Digital Champion who will work with some of the poorest people in society who are currently digitally excluded to teach them IT skills to further increase the level of IT literacy in the country. The Commission should work with the UK Government so as to learn about these programmes which could be developed in other Member States to improve IT literacy and, in doing so, increase e-commerce activity.
12. While IT literacy has been a key driver for the growth in e-commerce in the UK, consumers have also benefited from a good infrastructure base that has enabled greater access to online markets. However, the UK Government is working to further improve access to the internet, as well as faster broadband speeds. The Government has confirmed that a full policy aimed at making broadband internet speeds of at least 2Mb available to everybody in the country by 2015 will be outlined before the end of this year. Similar policies in other Member States will be beneficial to the European e-commerce sector.

Barriers to e-commerce

13. While the e-commerce market has boomed in the last ten years, aided in regulatory terms by the internal market principles set out in the E-commerce

Directive, there remain to be significant barriers to e-commerce growth, and particularly cross-border e-commerce. The European consumer law regime, in its currently un-harmonised state, does impede on cross-border retail, and the fact that the Consumer Rights Directive is not likely to be a full harmonisation directive, emphasises the importance of the E-commerce Directive in enabling cross-border retail. The Advertising Association remains supportive of a full-harmonisation of the Consumer Rights Directive which would undoubtedly lead to increased cross-border commerce both online and off-line.

14. There are a range of other barriers to e-commerce that the Advertising Association believe act as a hindrance to cross-border e-commerce. One example – of many – is the transposition of the WEEE Directive into Irish law which makes it very difficult to sell electronic goods into the Irish market from other member states. Addressing this problem, and others similar to this, should be a priority of the Commission's approach to increasing cross-border e-commerce.
15. Further to the current barriers to e-commerce, there are also a number of threats to the burgeoning e-commerce market. One potential threat is the revised E-privacy Directive which introduces 'consent' for cookies and, if interpreted in a strict way, could place EU businesses at a significant competitive disadvantage. An overly strict interpretation of the revised E-privacy Directive could severely disrupt a range of online business models including the publishing, e-commerce and advertising sectors, as well as disrupt the consumer's overall online experience. Self-regulation can better address changes of technology and commercial practices. While this issue should not be considered directly in context with this questionnaire, it is imperative that the Commission note the damage that enforcing an automatic prior consent for cookies would have on the e-commerce sector.
16. Another concern which could potentially lead to an undermining of the e-commerce sector relates to the upcoming review of the Data Protection Directive. We believe that the principles in the Data Protection Directive should remain technology-neutral and continue to be valid and applicable to current technologies. Whilst we welcome the need to harmonise EU data protection law, we do not believe that there needs to be substantial legislative amendments to update the Directive for the online environment, as the Directive's current principles already provide a high level of consumer protection. Changes in technology can be addressed via industry self-regulation – rather than regulation – to meet the balance of safeguarding privacy and delivering a more customised online environment, delivered by innovative data-driven advertising models. While it is clearly not necessary to address this issue in context with the E-commerce Directive, we have raised it to emphasise that the E-commerce Directive has been integral in helping to grow the UK e-commerce market, and that the impediments to e-commerce can be found elsewhere.

RESPONSE TO KEY ISSUES IN THE E-COMMERCE DIRECTIVE

The "Country of Origin" provisions

17. The "country of origin" principle is of vital importance to the advertising community. It ensures that UK information society services can derive legal security through compliance with only UK law while enabling UK companies to operate across Europe. Without this principle, maintained in its purest form, we believe that cross-border online activity would decrease significantly.

18. Furthermore, while the Directive is essential to all businesses operating online, it is particularly important for those small and medium-sized enterprises (SMEs) that do not have the means to be legally or operationally present in every EU Member State. Given that online advertisers vary in size, the Directive allows UK providers of online services to comply with only one national legislation - that of the UK - in most matters, wherever they do business in the EU.
19. Advertisers are extremely concerned about Article 20 of the Services Directive and the possible impact that this could have on cross-border sales. The viability of online advertising would be severely threatened should paragraph 2 of the Services Directive be interpreted in such a way that the "country of origin" principle is undermined.
20. The "country of origin" principle must not be weakened should the Directive be reappraised, but instead these principles must be made clearer and stronger. This can be done through setting out powerful guidance that will ensure that there is no uncertainty in this regard.
21. While we do not support reviewing the Directive as we believe that the e-commerce sector would benefit from regulatory intervention elsewhere, should the Directive be reviewed the AA would support any moves to increase the number of areas falling under the "country of origin" principle. This will be the most effective mechanism to achieve a true internal market, which is a fundamental aim of our industry and which will benefit business and consumers alike.

Liability of intermediary service providers

22. Articles 14 and 15 state that information society services 'shall not be liable in damages' i.e. civil liability. We again support the Commission's assertion that harmonisation on limited liability has reduced intermediary service provider's risks and costs of conducting business.

However, the provisions of the Directive were drafted with the content delivery model of the late 1990s in mind. The Directive must fully consider, and support, the new models of advertising that are emerging and helping to drive the growth in ecommerce.

Concluding online contracts

23. Harmonised provisions allowing for concluding contracts to be concluded electronically have reduced costs for advertisers. Measures such as these should be encouraged, particularly with business requiring a reduction in costs in the current economic situation.

Codes of conduct

24. The Directive stipulates that commercial communications of regulated professions should be permitted, subject to compliance with professional rules. The AA encourages the use of self-regulatory alternatives for both the handling of disputes and the drawing up of codes of conduct. Self regulation, in the UK administered through the Advertising Standard Authority, can deliver the flexible solution through legislative backing as provided for in the E-Commerce Directive.

CONCLUSION

25. The country of origin provisions, as set out within the E-commerce Directive, is completely essential to a growing cross-border e-commerce market: consistent

application of "country of origin" control can ensure that the internal market functions effectively. Restrictions to the freedom to provide goods and services in e-commerce can be removed by rigorously implementing the "country of origin" principle.

26. The AA is keen to work with the European Commission to increase the take-up of e-commerce. As an industry, we have benefited from the free market principles set out within the Directive which have increased the take-up of cross-border e-commerce, in parallel increasing cross-border online advertising. We do not believe that a review of this Directive is the solution to low take-up.
27. The AA supports the Commission's endeavours to identify any further ways to encourage the advertising and sale of goods through e-commerce across borders for the benefit of both European consumers and businesses.

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