

STATUTORY INSTRUMENT

S.I. No. 68 of 2003

REGULATIONS

entitled

EUROPEAN COMMUNITIES (DIRECTIVE 2000/31/EC) REGULATIONS 2003

(S.I. No. 68 of 2003)

I, MARY HARNEY, Minister for Enterprise, Trade and Employment, in exercise of the powers conferred on me by section 3 of the European Communities Act, 1972 (No. 27 of 1972), and for the purpose of giving effect to certain provisions of Directive No. 2000/31/EC¹ of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, hereby make the following regulations:

Citation and commencement.

1. (1) These Regulations may be cited as the European Communities (Directive 2000/31/EC) Regulations 2003.

(2) These Regulations shall come into operation on 24 February 2003.

Non-application of Regulations.

2. These Regulations do not apply to the following activities:

(a) the imposition, charging, levying, collection, payment, remission or abatement of any tax, charge or levy by or under any enactment,

(b) any matter relating to relevant services to which –

(i) the Data Protection Act 1988 (No. 25 of 1988) (including that Act as it stands amended for the time being for the purpose of giving effect to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data),

¹ OJL 178, 17.7.2000, P.1

or

(ii) the European Communities (Data Protection and Privacy in Telecommunications) Regulations 2002 (S.I. No. 192 of 2002) ,

applies or apply,

- (c) any issue relating to the validity, lawfulness or enforceability of any agreement or practice by reason of the Competition Act 2002 (No. 14 of 2002), the Treaties establishing the European Communities or any other enactment or rule of law concerning restraints on trade,
- (d) the activities of notaries or commissioners of oaths to the extent that those activities involve a direct and specific connection with the exercise of a public function,
- (e) the representation of a party to legal proceedings and the defence of his or her interest before a court or tribunal,
- (f) activities to which the Betting Act 1931 (No. 27 of 1931), the Gaming and Lotteries Acts 1956 to 1979 or the National Lottery Act 1986 (No. 28 of 1986) applies or apply.

Interpretation.

3. (1) In these Regulations, unless the context otherwise requires -

“at a distance” means, in relation to a service, that the service is provided without the parties being simultaneously present;

“at the individual request of a recipient of a service” means that the service concerned is provided through the transmission of data on individual request;

“authorised officer” means an officer appointed under Regulation 21;

“by electronic means” means, in relation to a service, that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

“commercial communication” means any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession; however, the following do not in themselves constitute commercial communications:

- (a) information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic mail address, or
- (b) communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration;

"Community act" means an act adopted by an institution of the European Communities;

"consumer" means a natural person who is acting for purposes which are outside his or her trade, business or profession;

"coordinated field" means requirements of any enactment which are applicable to relevant service providers or relevant services, regardless of whether those requirements are of a general nature or specifically relate to such service providers or such services and includes -

- (a) requirements with which a service provider has to comply in respect of the taking up of a relevant service, such as qualifications, authorisation or notification,
- (b) requirements concerning the pursuit of the activity of a relevant service, such as requirements regarding the behaviour of the relevant service provider, the quality or content of the service, including those applicable to advertising and contracts or requirements concerning the liability of the relevant service provider,

but does not include requirements applicable to -

- (i) goods as such,
- (ii) the delivery of goods, or
- (iii) services not provided by electronic means;

"designated authority" means, in relation to a regulated profession, an authority of the kind mentioned in paragraph (a) or (b) of the definition of "designated authority" in, as appropriate -

- (a) Regulation 3(1) of the European Communities (General System for the Recognition of Higher Education Diplomas) Regulations, 1991 (S.I. No. 1 of 1991), or the corresponding provision of any regulations amending or replacing those Regulations,

or

- (b) Regulation 2(1) of the European Communities (Second General System for the Recognition of Professional Education and Training) Regulations 1996 (S.I. No. 135 of 1996), or the corresponding provision of any regulations amending or replacing those Regulations;

"Directive" means Directive No. 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market;

"Director" means the Director of Consumer Affairs;

"enactment" includes an instrument made under an enactment;

"legal rights" includes rights relating to copyright or intellectual property, rights to which the law of defamation and malicious falsehood relate and rights under contract;

"Member State" means -

- (a) a Member State of the European Communities, or
- (b) a Member State of the EEA;

"Member State of the EEA" means a state that is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992, as amended for the time being;

"Minister" means the Minister for Enterprise, Trade and Employment;

"recipient of the service" means any natural or legal person who, for professional ends or otherwise, uses the relevant service concerned and, without prejudice to the generality of the foregoing, in particular for the purposes of seeking information or making it accessible;

"regulated profession" means a professional activity or range of activities for which an authority of the kind mentioned in paragraph (a) or (b) of the definition of "designated authority" in -

- (a) Regulation 3(1) of the European Communities (General System for the Recognition of Higher Education Diplomas) Regulations, 1991 (S.I. No. 1 of 1991), or the corresponding provision of any regulations amending or replacing those Regulations,

or

- (b) Regulation 2(1) of the European Communities (Second General System for the Recognition of Professional Education and Training) Regulations 1996 (S.I. No. 135 of 1996), or the corresponding provision of any regulations amending or replacing those Regulations,

has been designated;

"relevant service" means an information society service within the meaning of Article 1.2 of Directive 98/34/EC as amended by Directive 98/48/EC, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of the service, other than a service specified in Schedule 1 to these Regulations;

"relevant service provider" means any natural or legal person providing a relevant service.

(2) In these Regulations references to a relevant service provider being established in the State are references to such a provider who effectively pursues an economic activity using a fixed establishment in the State for a definite or indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider.

(3) In these Regulations -

- (a) a reference to a Regulation is a reference to a Regulation of these Regulations unless it is indicated that reference to another enactment is intended,
- (b) a reference to a paragraph or subparagraph is a reference to the paragraph or subparagraph of the provision in which the

reference occurs unless it is indicated that reference to some other provision is intended.

(4) A word or expression that is used in these Regulations and is also used in the Directive has, unless the contrary intention appears, the same meaning in these Regulations as it has in the Directive.

Freedom to provide relevant services.

4. (1) A relevant service provider, being a relevant service provider established within the State, has, subject to any requirements for the time being in force of the coordinated field and these Regulations, the right to provide relevant services within the State and from the State to another Member State or States; accordingly only those requirements and these Regulations govern the provision of relevant services by such a provider.

(2) The right under the Directive of a relevant service provider, other than a relevant service provider established within the State, to provide relevant services from one or more other Member States to the State shall not –

- (a) be made subject to any requirement of the co-ordinated field, or
- (b) be restricted in any other way save as provided in Regulations 4(4) and 5.

(3) Without prejudice to the generality of paragraphs (1) and (2) -

- (a) the taking up and pursuit of an activity referred to in paragraph (1) shall not be made subject to prior authorisation or any other requirement having equivalent effect,
- (b) the rights referred to in paragraph (1) or (2) extend, subject to Regulation 11, to commercial communications which are part of, or constitute, a relevant service provided by a member of a regulated profession.

(4) Nothing in paragraph (1) or (2) affects the application to a relevant service or relevant service provider of an enactment or rule of law referred to in Schedule 2 to these Regulations.

(5) Nothing in paragraph (3)(a) affects -

- (a) the application of any enactment requiring the provision of a service to be authorised (whether the authorisation takes the form of a consent, approval, licence or any other type of authorisation) if the requirement for authorisation applies to services that are not relevant services as it applies to services that are relevant services, and
- (b) any requirement for authorisation under the European Communities (Telecommunications Licences) Regulations 1998 (S.I. No. 96 of 1998) (as amended by the European Communities (Telecommunications Licences) (Amendment) Regulations 2000 (S.I. No. 70 of 2000)) or the European Communities (Postal Services) Regulations 2000 (S.I. No. 310 of 2000).

Certain restrictions on right referred to in Regulation 4(2).

5. (1) In this Regulation, "power" means a power conferred by any enactment, whether a power to make an instrument or to do any other thing.

(2) Subject to paragraph (3), a power shall not be exercised in a manner that results in a restriction or limitation on the right referred to in Regulation 4(2) taking effect.

(3) Paragraph (2) does not apply if the restriction or limitation resulting from the exercise of the power concerned –

- (a) is warranted on the ground that it is necessary for one or more of the following reasons (each of which is referred to in paragraphs (b) and (c) as an "objective") -
 - (i) public policy, in particular the prevention, investigation, detection and prosecution of offences (including offences relating to protection of minors and relating to incitement to hatred on grounds of race, sex, religion or nationality),
 - (ii) the protection of public health,
 - (iii) the safeguarding of national security and defence, and
 - (iv) the protection of consumers, and investors acting as consumers,
- (b) takes effect only in relation to the particular relevant service which prejudices the objective or objectives concerned referred to in paragraph (a) or which presents a serious and grave risk of prejudice to that objective or those objectives, and
- (c) is proportionate to that objective or those objectives.

Supplemental provisions in relation to Regulation 5.

6. (1) In this Regulation "power" has the same meaning as it has in Regulation 5.

(2) If the power concerned is exercisable by a person (other than the Director) then the person shall consult with the Minister in regard to the matter before the person makes a decision that either –

- (a) a proposed exercise of the power will not result in a restriction or limitation of the kind referred to in Regulation 5 taking effect,

or

- (b) paragraph (3) of that Regulation applies to such an exercise.

(3) If the basis of such a decision by that person is that Regulation 5(3) applies in the circumstances concerned then, if Regulation 5(3) would otherwise have applied to the exercise of the power concerned, it shall not apply unless the consultation mentioned in paragraph (2) has taken place.

(4) In addition to the foregoing requirements and the requirements of Regulation 5, if the exercise of a power would result in a restriction or limitation on the right referred to in Regulation 4(2) taking effect, being a restriction or limitation permitted by Regulation 5(3), then that power shall not be exercised unless and until -

- (a) the Member State or States concerned from which the right is being exercised have been requested to take measures for the purpose of putting in place such a restriction or limitation on that right and have either refused to take such measures or the measures taken are, in the opinion of the Minister, inadequate for the purpose, and
- (b) the Commission and the said Member State or States have been notified by the person proposing to exercise that power of his or her intention to exercise the power.

(5) Nothing in paragraph (4) affects the bringing of any legal proceedings or the investigation of any offence.

(6) If the exercise of a power is necessary as a matter of urgency so that a restriction or limitation permitted by Regulation 5(3) may take effect then paragraph (4) shall not apply to that exercise of the power but, as soon as may be after the decision is made to exercise the power, that decision and the reasons for why it is considered that the exercise of the power is necessary as a matter of urgency shall be notified to the Commission and the Member State or States referred to in paragraph (4).

(7) Where, consequent on an examination by the Commission under Article 3.6 of the Directive of a decision notified to it under paragraph (6), the Commission requests the State to take the action referred to in that Article 3.6, the person who proposes to exercise the power concerned, before he or she, as appropriate -

- (a) exercises the power concerned, or
- (b) decides subsequent to the exercise of the power, having regard to the request of the Commission, whether to continue in effect the restriction or limitation concerned,

shall give the utmost weight to the request of the Commission.

General information to be provided.

7. (1) The following information shall be provided by a relevant service provider in a manner which is easily, directly and permanently accessible to the recipients of the service and to the Director:

- (a) the name of the service provider,
- (b) the geographic address at which the service provider is established,
- (c) the details of the service provider, including his or her electronic mail address, which allows him or her to be contacted rapidly and communicated with in a direct and effective manner,

- (d) details of how natural persons can register their choice regarding unsolicited commercial communications; these should be prominently displayed on the service provider's website and at every point where natural persons are asked to provide information at the service provider's website (for example a registration form);
- (e) where the service provider is registered in a trade or similar public register, the trade or other such register in which the service provider is entered and his or her registration number, or equivalent means of identification in that register,
- (f) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority,
- (g) where the service provider is a member of a regulated profession -
 - (i) any professional body or similar institution with which the service provider is registered,
 - (ii) the professional title of the provider and the Member State where it has been granted, and
 - (iii) a reference to the applicable professional rules in the Member State of establishment and the means to access them,
- (h) where the service provider undertakes an activity that is subject to value-added tax, the registration number assigned to that provider in accordance with section 9 of the Value-Added Tax Act 1972 (No. 22 of 1972),
- (i) in addition to the requirements of the Consumer Information Act 1978 (No. 1 of 1978), any orders for the time being in force under that Act, the European Communities (Misleading Advertising) Regulations 1988 (S.I. No. 134 of 1988) and of any other enactment, where the relevant service refers to prices, those prices are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

(2) A person who fails to comply with paragraph (1) shall be guilty of an offence.

(3) An offence under this Regulation may be prosecuted by the Director.

Commercial communications: information to be provided.

8. (1) A communication that is part of a relevant service shall comply with the following conditions:

- (a) the commercial communication shall be clearly identified as such,
- (b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable,

- (c) details of how natural persons can register their choice regarding unsolicited commercial communications shall be provided; these should be prominently displayed on the relevant service provider's website and at every point where natural persons are asked to provide information at the provider's website (for example a registration form);
- (d) promotional offers, such as discounts, premiums and gifts shall be clearly identifiable as such, shall comply with any enactment for the time being in force relating to such activities and the conditions which must be satisfied in order to qualify for them shall be easily accessible and be presented clearly and unambiguously, and
- (e) promotional competitions or games, where permitted under the law of the State, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

(2) A person who fails to comply with paragraph (1) shall be guilty of an offence.

(3) An offence under this Regulation may be prosecuted by the Director.

Unsolicited commercial communications.

9. (1) An unsolicited commercial communication by a relevant service provider established within the State shall be identified clearly and unambiguously as such as soon as it is received by the recipient by stating that it is an unsolicited commercial communication.

(2) A person who fails to comply with paragraph (1) shall be guilty of an offence.

(3) An offence under this Regulation may be prosecuted by the Data Protection Commissioner.

(4) Where a person is convicted of an offence under this Regulation, the court may order any data material which appears to the court to be connected with the offence to be forfeited or destroyed and any relevant data to be erased.

(5) The court shall not make an order under paragraph (4) in relation to data material or data where it considers that some person other than the person convicted of the offence concerned may be the owner of, or otherwise interested in, the data unless such steps as are reasonably practicable have been taken for notifying that person and giving him or her an opportunity to show cause why the order should not be made.

(6) The following provisions of the Act, namely –

- (a) sections 1, 10, 12, 24 and 25,
- (b) section 26 in so far as it relates to a requirement specified in an enforcement notice or an information notice or a decision

of the Data Protection Commissioner in relation to a complaint under section 10 (1) (a) of the Act,

and

(c) sections 27 to 30,

apply for the purpose of this Regulation with the modifications specified in paragraphs (7) to (10) and any other necessary modifications.

(7) References, in the provisions of the Act mentioned in paragraph (6), to that Act or the provisions of that Act shall, unless the context otherwise requires, be construed as including references to this Regulation or the provisions of this Regulation.

(8) Section 1(1) of the Act applies as if the following definition were inserted:

" 'Regulations of 2003' means the European Communities (Directive 2000/31/EC) Regulations 2003;"

(9) Section 10 of the Act applies as if –

(a) in subsection (1)(a), "in relation to a person either where the person complains" were substituted for "by a data controller or a data processor in relation to an individual either where the individual complains",

(b) in subsection (1)(b), the following subparagraph were substituted for subparagraph (ii):

"(ii) if he or she is unable to arrange, within a reasonable time, for the amicable resolution by the parties concerned of the matter the subject of the complaint, notify in writing the person who made the complaint of his or her decision in relation to it and that the person may, if aggrieved by the decision, appeal against it to the Court under section 26 of this Act within 21 days from the receipt by the person of the notification.",

(c) the following subsection were inserted after subsection (1):

"(1A) The Commissioner may carry out or cause to be carried out such investigations as he or she considers appropriate in order to ensure compliance with Regulation 9 of the Regulations of 2003 and to identify any contravention thereof.",

(d) in subsection (2), there were deleted, "being a data controller or a data processor,",

(e) in subsection (3), there were substituted the following paragraph for paragraph (a):

"(a) to block, rectify, erase or destroy any of the data concerned, or", and

(f) in subsection (7), there were substituted the following for so much of the subsection as follows paragraph (a):

"(b) if such compliance materially modifies the data concerned, any person to whom the data were disclosed during the previous 12 months before the date of the service of the enforcement notice concerned and ending immediately before such compliance unless such notification proves impossible or involves a disproportionate effort, of the blocking, rectification, erasure, destruction or statement concerned."

- (10) Section 24 of the Act applies as if –
- (a) in subsection (2)(a), there were substituted "a person to whom the Regulations of 2003 apply" for "a data controller or a data processor",
 - (b) in subsection (2)(b), there were substituted "being a person to whom the Regulations of 2003 apply or an employee of such a person" for "being a data controller, a data processor or an employee of either of them", and
 - (c) there were deleted subsections (3), (4) and (5).
- (11) In this Regulation –
- "Act" means the Data Protection Act 1988 (No. 25 of 1988);
 - "enforcement notice" means a notice under section 10 of the Act;
 - "information notice" means a notice under section 12 of the Act.

Requirements of Regulations 7 to 9 additional to other Community requirements.

10. The requirements of Regulations 7, 8 and 9 are in addition to any other requirements arising by virtue of any Community act with respect to a matter mentioned in those Regulations.

Regulated professions.

11. (1) This Regulation applies to the right under Regulation 4 to make a commercial communication which is part of, or constitutes, a relevant service provided by a member of a regulated profession.

(2) Without prejudice to any other provision of these Regulations permitting a restriction or limitation, the designated authority for a regulated profession may, in exercise of any powers vested in it with regard to the regulation of the activities of its members, make the exercise of the right to which this Regulation applies by a member of the profession subject to compliance with specified conditions of the kind mentioned in paragraph (3).

(3) The conditions that may be so specified are ones that may reasonably be regarded as appropriate for the purpose of maintaining the standing and integrity of the profession concerned and ensuring adherence by its

members to the requisite standards and, in particular for the purpose of ensuring -

- (a) the independence, dignity and honour of the profession,
- (b) compliance with obligations of professional secrecy and fairness towards clients and other members of the profession.

Report to the Commission regarding contracts that may not be concluded by electronic means.

12. The Minister shall prepare and furnish to the Commission before the end of -

- (a) the period of 5 years from the commencement of these Regulations, and
- (b) each period of 5 years following the period mentioned in paragraph (a),

a report specifying the reasons why the State considers it necessary to maintain, during all or part of the period to which the report relates, the relevant exemptions specified in section 10 of the Electronic Commerce Act 2000 (No. 27 of 2000).

Conclusion of contracts by electronic means: information to be provided.

13. (1) Subject to paragraph (4), in respect of a contract to be concluded by electronic means, the relevant service provider concerned shall clearly, comprehensively and unambiguously and prior to an order being placed by the proposed recipient of the service provide the following information to the recipient -

- (a) the different technical steps that need to be followed to conclude the contract,
- (b) whether or not the concluded contract will be filed by the relevant service provider and whether it will be accessible,
- (c) the technical means for identifying and correcting input errors prior to the placing of the order,
- (d) the language or languages in which the contract may be concluded.

(2) Subject to paragraph (4), in respect of a contract to be concluded by electronic means a provider shall indicate to the recipient of the relevant service, on the placing by the recipient of the order or as soon as practicable thereafter, which relevant codes of conduct, if any, the provider subscribes to and information in relation to how those codes can be consulted electronically.

(3) In relation to contracts to be concluded by electronic means, the terms and general conditions provided by the relevant service provider to the recipient of the service shall be made available in a way that allows the recipient to store and reproduce them.

- (4) Paragraph (1) or (2), or both as appropriate, shall not apply -
 - (a) in a case where the parties to the contract are not consumers, if the parties agree that paragraph (1) or (2), or both as the case may be, shall not apply in respect of the contract, or
 - (b) if the contract is to be concluded exclusively by exchange of electronic mail or by equivalent individual communications.
- (5) A person who fails to comply with paragraph (1), (2) or (3) shall be guilty of an offence.
- (6) An offence under this Regulation may be prosecuted by the Director.

Placing of orders pursuant to contracts concluded by electronic means.

14. (1) Notwithstanding the provisions of the Electronic Commerce Act 2000 (No. 27 of 2000) and subject to paragraph (2), in relation to contracts concluded by electronic means, where the recipient of the relevant service places his or her order through electronic means -

- (a) the relevant service provider shall acknowledge the receipt of the order of the recipient without undue delay and by electronic means,
- (b) the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

(2) In relation to contracts concluded by electronic means, the relevant service provider shall make available to the recipient of the service appropriate, effective and accessible technical means allowing him or her to identify and correct input errors, prior to the placing of the order.

(3) Paragraph (1)(a) or (2), or both as appropriate, shall not apply in a case where the parties to the contract are not consumers if the parties agree that paragraph (1)(a) or (2), or both as the case may be, shall not apply.

(4) Paragraphs (1)(a) and (2) shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

(5) A person who fails to comply with paragraph (1) or (2) shall be guilty of an offence.

(6) An offence under this Regulation may be prosecuted by the Director.

References in Regulations to non-liability of certain providers.

15. A provision of Regulation 16, 17 or 18 providing that a relevant service provider shall not be liable for a particular act shall be construed as a provision to the effect that the provider shall not -

- (a) be liable in damages or, unless otherwise provided, be liable to be the subject of an order providing for any other form of

relief, for infringing, by reason of that act, the legal rights of any natural or legal person or, by reason of that act, for breaching any duty, or

- (b) be liable to be subject to any proceedings (whether civil or criminal) by reason of that act constituting a contravention of any enactment or an infringement of any rule of law.

Liability of intermediary service providers - "mere conduit."

16. (1) An intermediary service provider shall not be liable for information transmitted by him or her in a communication network if -

- (a) the information has been provided to him or her by a recipient of a relevant service provided by him or her (being a service consisting of the transmission in a communication network of that information), or
- (b) a relevant service provided by him or her consists of the provision of access to a communication network,

and, in either case, the following conditions are complied with –

- (i) the intermediary service provider did not initiate the transmission,
- (ii) the intermediary service provider did not select the receiver of the transmission, and
- (iii) the intermediary service provider did not select or modify the information contained in the transmission.

(2) References in paragraph (1) to an act of transmission and of provision of access include references to the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communications network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

(3) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights.

Caching.

17. (1) An intermediary service provider shall not be liable for the automatic, intermediate and temporary storage of information which is performed for the sole purpose of making more efficient that information's onward transmission to other users of the service upon their request, if -

- (a) that storage is done in the context of the provision of a relevant service by the relevant service provider consisting of the transmission in a communication network of information provided by a recipient of that service,

and

- (b) the following conditions are complied with -

- (i) the intermediary service provider does not modify the information,
- (ii) the intermediary service provider complies with conditions relating to access to the information,
- (iii) the intermediary service provider complies with any rules regarding the updating of the information that have been specified in a manner widely recognised and used by industry,
- (iv) the intermediary service provider does not interfere with the lawful use of technology, widely recognised and used by industry to obtain data on the use of the information, and
- (v) the intermediary service provider acts expeditiously to remove or disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

(2) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights.

Hosting.

18. (1) An intermediary service provider who provides a relevant service consisting of the storage of information provided by a recipient of the service shall not be liable for the information stored at the request of that recipient if -

- (a) the intermediary service provider does not have actual knowledge of the unlawful activity concerned and, as regards claims for damages, is not aware of facts or circumstances from which that unlawful activity is apparent, or
- (b) the intermediary service provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

(2) Paragraph (1) shall not apply where the recipient of the service is acting under the authority or the control of the intermediary service provider referred to in that paragraph.

(3) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights.

Contact points for purposes of Article 19 of Directive and their functions.

19. (1) For the purposes of paragraph 2 of Article 19 of the Directive each of the following is a contact point referred to in that paragraph -

- (a) the Minister, and
- (b) the body or bodies, if any, designated by the Minister, with the consent of the body concerned, to be such a contact point or contact points.

(2) The following shall provide the assistance and information referred to in Article 19.3 of the Directive to the Commission and other Member States -

- (a) the Minister, or
- (b) where one or more bodies are designated under paragraph (1)(b), whichever of the following, namely, the Minister or the body so designated, or one or more of the bodies so designated as the Minister determines shall perform, for the time being, functions in respect of specified classes of assistance or information.

(3) For the purposes of paragraph 4 of Article 19 of the Directive each of the following is a contact point referred to in that paragraph -

- (a) the Minister, and
- (b) the body or bodies, if any, designated by the Minister, with the consent of the body concerned, to be such a contact point or contact points.

(4) The relevant contact point shall provide, on request being made by the provider or recipient, to a relevant service provider or a recipient of a relevant service -

- (a) general information (but not legal advice) on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms, and
- (b) details of authorities, associations or organizations from which the provider or recipient may obtain information or practical assistance additional to that provided under subparagraph (a).

(5) For the purposes of paragraph (4) the relevant contact point is -

- (a) the Minister, or
- (b) where one or more bodies are designated under paragraph (3)(b), whichever of the following, namely, the Minister or the body so designated or one or more of the bodies so designated as the Minister determines shall perform, for the time being, functions in respect of specified classes of information.

(6) The Minister and any body designated under this Regulation shall, for the purposes of this Regulation, be capable of being communicated with by electronic means.

(7) The making of each of the following shall be notified by the Minister to the Commission and the other Member States as soon as may be after it is made -

- (a) a designation of a body under this Regulation, and
- (b) a determination under this Regulation that the Minister or one or more of the bodies designated under this Regulation shall perform, for the time being, functions under this Regulation in respect of a specified class of matter.

Developments in State concerning relevant services to be reported to Commission.

20. (1) Where the Minister acquires direct knowledge of any matter mentioned in paragraph (2) or information in respect of it is supplied to the Minister by any other Minister of the Government, the Director, the Data Protection Commissioner or any other person, the Minister shall communicate to the Commission such and so many particulars in relation to the matter as the Minister considers relevant or the Commission, after having been initially informed of the matter, requests the Minister to supply to it.

- (2) The matters referred to in paragraph (1) are -
 - (a) significant judicial decisions made in the State in relation to any cause or matter concerning the provision of relevant services,
 - (b) significant decisions made by any tribunal, the Director or other body in relation to any dispute or complaint concerning the provision of such services, and
 - (c) practices, usages and customs relating to electronic commerce.

Authorised officers.

21. (1) In this Regulation the "relevant provisions" means Regulations 7, 8, 13 and 14.

(2) The Director may appoint one or more officers of his or hers to be an authorised officer or authorised officers for the purpose of this Regulation.

(3) For the purpose of ensuring compliance with the relevant provisions and, in particular, for the purpose of investigating any contravention of a relevant provision he or she suspects has occurred or is occurring, an authorised officer may exercise the powers specified in paragraph (4) if he or she considers it to be reasonably necessary to do so for such a purpose.

- (4) The powers mentioned in paragraph (3) are -
 - (a) at all reasonable times, to enter, if necessary by force, and search premises in which the authorised officer has reasonable grounds for believing that any records, materials or other documents are being kept, being records, materials or documents which relate to an activity the subject of a relevant provision,

- (b) to require -
 - (i) the owner of such premises, any person employed at the premises or any person in charge thereof, or
 - (ii) whether such premises have been entered or not, the person who carries on the activity the subject of a relevant provision,

to give the authorised officer such information in the person's power or control as the officer may reasonably require and to produce to him or her any records (in whatever form kept) or books or documents (including labels and fiches) as the officer may reasonably require,
- (c) at such premises or, in the case of a requirement under subparagraph (b)(ii), within a reasonable time after the requirement is complied with, to inspect and take copies of, or extracts from any books, records or other documents (including, in the case of information in non-legible form, a copy of or extract from such information in permanent legible form), found by or produced to the authorised officer,
- (d) to require any person, by or on whose behalf data equipment is or has been used on such premises in relation to the carrying on of the activity the subject of a relevant provision or any person having charge of, or otherwise concerned with the operation of, the data equipment or any associated apparatus or material, to afford the authorised officer all reasonable assistance in relation to its use thereto.

(5) An authorised officer shall be furnished with a warrant of his or her appointment as an authorised officer and, when exercising any power conferred on an authorised officer by these Regulations shall, if requested by any person affected, produce the warrant or a copy of it to that person.

- (6) A person who -
 - (a) obstructs or interferes with an authorised officer in the exercise of his or her powers under this Regulation or,
 - (b) without reasonable excuse, does not comply with a requirement of an authorised officer under this Regulation or,
 - (c) in purported compliance with such a requirement, gives information to an authorised officer that the person knows to be false or misleading in a material respect,

shall be guilty of an offence.

(7) An authorised officer shall not, other than with the consent of the occupier, enter, in exercise of his or her powers under this Regulation, a private dwelling unless such entry is authorised by a warrant granted by the District Court under Regulation 22.

(8) An authorised officer, where he or she considers it necessary, may require a member of the Garda Síochána to assist him or her when exercising any powers conferred on an authorised officer by this Regulation which involve

the breaking open of any premises or any other action in which the use of force may be necessary and is lawful.

Issue of warrants by District Court.

22. If a judge of the District Court is satisfied on the sworn information of an authorised officer that there are reasonable grounds for believing that records, materials or other documents are being kept on any premises, being records, materials or other documents which relate to an activity the subject of a relevant provision (within the meaning of Regulation 21) and which an authorised officer reasonably considers it necessary to inspect for the purpose mentioned in Regulation 21(3), the judge may issue a warrant authorising an authorised officer, accompanied, if appropriate, by other authorised officers or by a member or members of the Garda Síochána, at any time or times within 1 month from the date of issue of the warrant, on production of the warrant if so requested, to enter that premises, if need be by reasonable force, and exercise all or any of the powers conferred on an authorised officer by Regulation 21.

Interference with books, records or documents.

23. (1) If any person interferes with any equipment, books, records or other documents, whether electronic or paper based, so as to affect, and with the intention of affecting, the outcome of any action taken under Regulation 21 or 22 or a prosecution for an offence under these Regulations, he or she shall be guilty of an offence.

(2) For the purposes of paragraph (1), a person shall be presumed to have intended the natural and probable consequences of his or her conduct; but this presumption may be rebutted.

Offences by bodies corporate.

24. Where an offence under these Regulations has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of a person being a director, manager, secretary or other officer of the body corporate, or a person who was purporting to act in any such capacity, that person as well as the body corporate shall be guilty of an offence and be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.

Penalties.

25. A person guilty of an offence under these Regulations shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 3 months or both.

SCHEDULE 1

Regulation 3(1)

Excluded Services

Services not provided "at a distance"

1. Services provided for in the physical presence of the provider and the recipient, even if they involve the use of electronic devices such as -

- (a) medical examinations or treatments at a doctor's surgery using electronic equipment where the patient is physically present,
- (b) consultation of an electronic catalogue in a shop with the customer on site,
- (c) plane ticket reservation at a travel agency in the physical presence of the customer by means of a network of computers,
- (d) electronic games made available in a video arcade where the customer is physically present.

Services not provided "by electronic means"

2. (1) Services having material content even though provided via electronic devices such as -

- (a) automatic cash or ticket dispensing machines (banknotes, rail tickets),
 - (b) access to road networks, car parks, etc., charging for use even if there are electronic devices at the entrance or exit controlling access or ensuring correct payment is made or both.
- (2) Off-line services such as distribution of CD roms or software on diskettes.
- (3) Services which are not provided for via electronic processing or inventory systems such as -
- (a) voice telephony services,
 - (b) telefax or telex services,
 - (c) services provided for via voice telephony or fax,
 - (d) telephone or telefax consultation of a doctor,
 - (e) telephone or telefax consultation of a lawyer,
 - (f) telephone or telefax direct marketing.

Services not supplied "at individual request of a recipient of services"

3. Services provided for by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission) such as -

- (a) television broadcasting services (including near-video on-demand services), covered by point (a) of Article 1 of Directive 89/552/EEC,
- (b) radio broadcasting services,
- (c) (televised) teletext.

SCHEDULE 2

Regulation 4(4)

Enactments and Rules of Law not affected by Regulation 4.

1. Patents Act 1992 (No. 1 of 1992).
2. Intellectual Property (Miscellaneous Provisions) Act 1998 (No. 28 of 1998).
3. European Communities (Legal Protection of Biotechnological Inventions) Regulations 2000 (S.I. No. 247 of 2000).
4. Copyright and Related Rights Act 2000 (No. 28 of 2000).
5. Trade Marks Act 1996 (No. 6 of 1996).
6. Instruments made under the foregoing enactments.
7. European Communities (Electronic Money) Regulations 2002 (S.I. No. 221 of 2002) or measures adopted in any other Member State to implement Directive 2000/46/EC to the extent that an emission of electronic money is effected by an institution in respect of which -
 - (a) in the case of the foregoing Regulations, a certificate issued under Regulation 19 of those Regulations is for the time being in force,
 - or
 - (b) in the case of such measures adopted by another Member State, the means adopted by that State, pursuant to those measures, to apply one of the derogations provided for in Article 8(1) of that Directive for the time being has effect.
8. Regulation 89 of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 1989 (S.I. No. 78 of 1989).
9. Regulations 8, 23 to 26 and 28 to 37 of the European Communities (Non-Life Insurance) Framework Regulations 1994 (S.I. No. 359 of 1994).
10. Regulations 42 and 46 to 54 of the European Communities (Life Assurance) Framework Regulations 1994 (S.I. No. 360 of 1994).
11. The freedom of the parties to choose the law applicable to their contract.
12. Contractual obligations concerning consumer contracts.
13. Formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated.
14. The permissibility of unsolicited commercial communications by electronic mail.

GIVEN under my Official Seal,
24th day of February 2003.

MARY HARNEY
Minister for Enterprise,
Trade and Employment.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

The purpose of these Regulations is to transpose into Irish law the essential requirements of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Electronic Commerce Directive). A number of provisions of the Directive were transposed in the Electronic Commerce Act 2000 (No. 27 of 2000) or were already on the statute book by virtue of the provisions of the Data Protection Act 1988 (No. 25 of 1988).

The Regulations lay down a framework for the supply of Information Society (IS) services (essentially services provided "on line") between one Member State of the European Economic Area (the EU plus Iceland, Liechtenstein and Norway) and another. The framework lays down that IS services provided by an Irish service provider to a person in another Member State must comply with the applicable Irish law for that service. The applicable law of the importing Member State may not be applied to the IS service in question. Derogations are provided from the framework for the IS services listed in Schedule 2 to the Regulations. In addition, the Regulations provide for the right of a Member State to take measures against incoming IS services on a case-by-case basis and in certain circumstances such as to prevent a crime relating to public policy or to protect consumers, including investors. Certain IS services are excluded from the Regulations.

The Regulations require persons sending unsolicited commercial e-mails to ensure that these are clearly identifiable on receipt.

The Regulations create an exemption from liability for intermediary service providers (persons whose business consists in the connection of persons to the Internet) where certain activities are performed and in certain circumstances.

The Regulations also -

- require persons providing IS services to provide certain information about themselves and the services they provide in the interests of transparency

- permit members of certain professions (referred to in the Regulations as "regulated professions") to engage in IS services provided they respect the rules of their profession in relation to such activities as fairness towards clients and other members of their profession
- provide for co-operation between Ireland and the other Member States in relation to Information Society issues
- provide for information to be given to persons providing and receiving IS services, and
- provide that failure to comply with certain provisions is an offence prosecutable by the Director of Consumer Affairs or (in respect of Regulation 9 only) the Data Protection Commissioner.

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