

**Advisory Workshop on AHRB Centre Anchor Project on
Implementing the E-Commerce Directive – Ways Forward
Edinburgh, December 17th 2003 11am – 3pm**

Present:

Lilian Edwards (Chair) (AHRB Research Centre for Studies in IP & IT Law) (LE)
Hector MacQueen (AHRB Research Centre for Studies in IP & IT Law) (HLM)
Christina Ramberg (Gothenborg University) (CR)
Sjef van Erp (Maastricht University) (SvE)

Nadine Eriksson-Smith (minutes)

The meeting commenced at 11.30am.

1. Progress so far: Edinburgh conference January 2003, e-commerce book in preparation, withdrawal of ERA, budget remaining.

LE welcomed the group, thanked them for their attendance and talked to progress on the project to date. (It was noted that Sjef van Erp was delayed due to travel.) *Implementing the E-Commerce Directive* formed an anchor project funded by the Arts and Humanities Research Board during the five year funding period, April 2002 to March 2007. The project commenced this year with a scoping exercise by way of a domestic conference held in Edinburgh and attracting some seventy delegates. The conference broke-even financially and provided the framework for an edited collection, scheduled to be published in June 2004 by Hart Publishing. To date all except two chapters had been received and were currently being edited. Additional assistance was given by Annette Nordhausen at the University of Sheffield regarding contacts within the EU and extending a network more generally to people with relevant expertise. Scheduled for year 2 of the project (April 2003 – March 2004) was a colloquium to be held jointly with ERA, the Academy of European Law. ERA subsequently decided not to go ahead with the conference, choosing instead to focus on tax legislation. Furthermore, the First Report on the application of Directive 2000/31/EC issued on 21/11/03 by the European Commission –

http://europa.eu.int/eur-lex/pri/en/dpi/rpt/doc/2003/com2003_0702en01.doc

- provided a suitable platform for the focus and future direction of the project now that the conference with ERA would not be going ahead.

LE noted there were at least *four things the AHRB project could do which were not within the remit of the Commission monitoring of the implementation of the EC Directive in terms of Single Market goals:*

- i) consider its effectiveness in promoting e commerce in comparison to the laws of other countries outside EC, eg, USA;
- ii) consider how it fitted into existing Member State domestic/common law;
- iii) consider how it fitted in/conflicted with other EC instruments, eg, telecoms, privacy, competition law;

- iv) consider its impact, positive or negative, on human rights and fundamental freedoms.

Sjef van Erp (Maastricht University) joined the meeting at 11:45am.

2. **What competition/parallel projects are there out there tracking the progress and success of the E-Commerce Directive?**

The report mentioned in Item 1 was referred to with discussion following concerning general points raised in the document. CR spoke to the criticisms of the contracts area by the Commission. General comments were made about problem that the Commission viewed successful implementation of the directive only in terms of member State (MS) statute law, despite the emphasis in Directive also on MS development of soft law. Reference was made to the wishes expressed by ISPs (Internet Service Providers) for hard laws in place rather than codes of practice. The annex within the 'First Report on domestic implementation was useful, but was in various EU languages, as was the primary legislation referred to, which was therefore not easily accessible in English, French or German. **CR suggested that there should be a place where all of the documents were translated into the main EU languages. It needed to be investigated if the EC would supply such** LE talked to the funding available for the project over the five year period and the various options which existed for taking the project forward. In the main these concerned the role of *country rapporteurs*. Comment was also made about the failure to analytically address the difficulties of implementing the e-commerce directive. CR raised the point that analytical research would highlight whether implementation has in fact led to harmonisation, in view of the number of states which have followed legislation to the letter, despite the Directive being a minimum not maximum harmonisation; but would this be helpful harmonisation?

LE noted that there were *four things the EC said the legislation would provide:*

- i) *remove obstacles to e commerce in Europe;*
- ii) *legal certainty;*
- iii) *provide light and flexible framework;*
- iv) *to be drafted in a technology-independent way.*

Last in particular was doubted, especially re spam and cookies

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LE welcomed SvE to the meeting and briefly summarised earlier discussion. She expressed dissatisfaction with the original AHRB centre proposal for *Implementing the E-Commerce Directive* following issue of E Commission First Report, and her views on its future direction following attendance at the Comparative Law conference in Brisbane during August 2002. SvE talked to the methodology of sending out questionnaires to country rapporteurs used at the conference ("the Brisbane approach"), also to the approach of using "problem questions" used in the Common Core projects (the "Trento" approach); and also recommended the creation of a publication which

included all relevant country legislation as well as the report from individual country rapporteurs.

3. **Deciding format of next stage of Edinburgh anchor project: conference, or small working groups, or all on paper, or some other combo?**

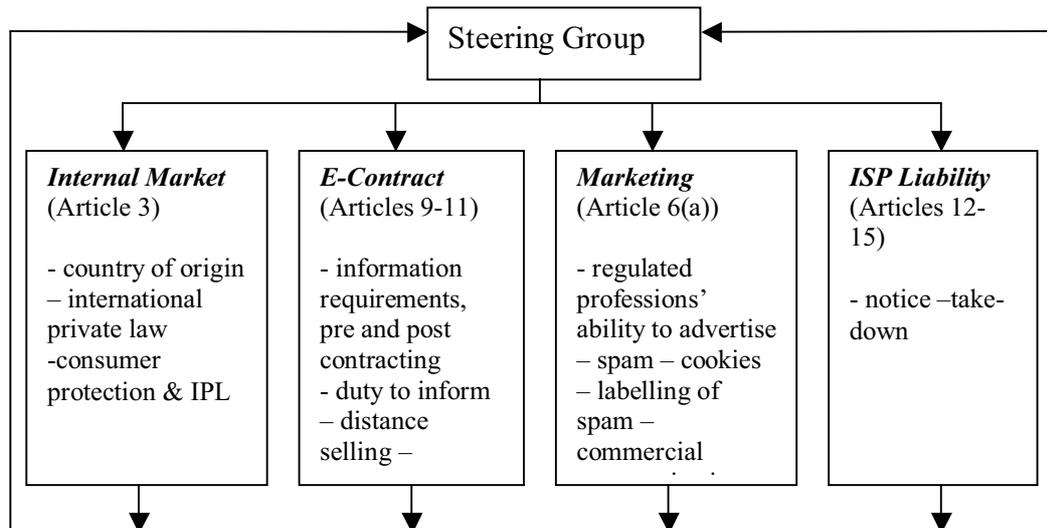
After discussion it was **agreed the Trento methodology should be adopted.**

Country rapporteurs, for each legal domain, would receive the problems and be charged with the responsibility of gathering information from relevant member state sources (legal, academic, practitioner, commercial, civil liberty groups). Their reports would be based on solving key “problem questions” in each domain area, in order to give *more specificity than was to be found in the Commission report.*

Relevant detail would include whether new legislation was brought in or did they depend on legislation already in place; technological neutrality; soft/hard law. See further LE’s paper to ERA, attached to agenda. LE asked whether the reports should be focussed only on the instrument as such (the E Comm Dir) or a particular area of the law (eg e-contracting). It was felt the Trento approach would lead naturally to functional consideration of how particular domains were determined by law (and extra legal factors), and would not be artificially restricted to one Directive only. In general the group was enthusiastic about this approach and decided to utilise it for the project.

SvE commented on the need to give *specific guidance in terms of information required to ensure some consistency in style and content, and the benefits of requesting draft versions in terms of timescale.*

The group **agreed on four groupings of subject domains** based on feedback from the First Report cited earlier in the minutes. CR talked to her experience of how the groups could operate most effectively in terms of a steering group, teams and sub-groups. HLM commented on the methodology of the European Civil Code grouping which would suit the project. He also talked to the benefits of the Centre linking in with the Civil Code project. The group decided on the following format:



SvE commented on a research grouping in Germany, **AQCUIIS**, and mentioned Schulte-Knolke as useful contact. Nolke and Schulte for their knowledge of contacts. **HLM would pass on relevant contact details.** CR talked to the importance of remedies and sanctions. Discussion followed about the relevance of public as well as private law in the exercise. The group **agreed that regulated professions within Article 8 and the ability to use commercial communication online should form part of the Marketing domain.** HLM commented on the Karl Mackie Centre for Dispute Resolution based in Birmingham. Discussion followed about the various industry bodies which provided some dispute resolution eg. Press disputes submitted to the Press Complaints Commission, and the applicability generally of non-court settlements and alternative dispute resolution. **Agreed all reports should also consider how law was applicable to B2B as well to B2C e-commerce.**

4. What funding is necessary? What opportunities exist?

Discussion followed about the funding available from the AHRB for the remaining duration of the project. Existing funding would provide enough for some research assistance, but in view of the potential scope of the project & the time constraints on senior academics involved, further funding would be required. CR/SvE talked to the approach in Sweden/the Netherlands where PhD students were recruited as “team leaders” in major projects. Their research and doctoral thesis topic would then run concurrently, with project deliverables also providing the basis of their thesis. LE talked to the timescale of the project and the necessity of meeting deadlines set which required activities to commence as soon as possible, whereas funding PhD students would require time to get applications together. HLM mentioned the possibility of Framework 6 funding for the project or the ESRC. CASE awards offered the possibility of funding PhD students, but wouldn’t provide sufficient funds for living expenses and travel, nor the independent focus the

project required. LE mentioned that funding already secured from AHRB only would to some extent support fees for PhD students in their first year if necessary.

Agreed that the approach of using PhD candidates as “team leaders” should be adopted as soon as possible, subject to funding for their fees and living expenses at Edinburgh being obtainable, eg from Commission.

5. **Questionnaire approach: draft questions? Just on ECD or on connected/conflicting legislation (eg. Privacy Directive? InfoSoc Directive on ISP liability?)**

The group discussed the **legal elements which would need to be addressed** when developing and solving the problem questions in each of the subject areas illustrated in diagram 1.

- Civil/criminal law
- Hard/soft law
- Public/private law
- Remedies/sanctions
- Procedure that affects the substantive process
- Evidence as far as it affected substantive process.
- Dispute resolution schemes, including ADR, also if relevant to substance.

Agreed, The teams would devise no more than ten problems or “cases”, for each of the four domain areas. Discussion followed about whether *all* groups should be circulated with draft questions in each subject area. Generally felt not necessary.

Agreed that once the team leaders received draft country reports, they should review them and send them back for revision as necessary as some reports would probably diverge from the scheme of response envisaged. This would be built into the timetable to prevent consequent delay.

6. **What countries? All some?**
Agreed that the aspiration should be to include all countries for all four domain areas. However as a minimum, ten national reporters should be recruited across the EU which should include the accession countries. Also at least one report must be obtained from each of Germany, France, and UK, PLUS one of the Mediterranean countries i.e. Italy or Spain, AND one of Poland, Hungary or Czech Republic.

HLM also noted the importance of the Baltic countries, specifically Estonia.

7. **What reporters? Just country rapporteurs, or reports from consumer groups, industry groups, civil liberty groups, Commission itself?**

LE asked whether responses should only be sought from academic community or from a mix of industry sectors and representative groups. CR mentioned the possibility of a ‘hearing’ in order to stimulate debate with invited delegates from representative groups. The relaxed discursive forum would provide a

suitable platform in which to assess people's response to the implementation of the directive without asking them to commit to paper specific views. SvE talked to the success of such a forum on property law with PhD students earlier in the year.

Agreed a mid-point conference should be held, after draft country reports received, at which the doctoral team leaders would speak to their draft analyses, published papers would be kept to minimum, and spontaneous reactions sought from young scholars, industry people and members of European digital civil liberty groups. **This would both provide for dissemination of interim results and allow stakeholders outside academe a chance to get their views into the final analyses.** Commission to be invited to come as observers (discussants?) (other participants?)

8. **Country reports: one *rapporteur* or a team? Could we mix the two approaches? Fund team meetings infra-member-state?**

The key role of the team leaders for each of the four domain areas was discussed in relation to the weighty duties and responsibilities attached. It was **agreed** that

- initially, team leaderships would be kept internally where possible within the AHRB Centre, as it was primarily the Centre's responsibility to carry out the project.
- interim team leaders would be used to kick-start the project without the requirement of producing the final analysis of submitted country reports which was too all consuming a task for a senior academic with other responsibilities.
- interim team leaders could be recruited for one year with responsibilities for assembling small sub teams to draft the problem questions. Senior academics with a sound track record within the subject areas would be identified and approached.
- *during* this time, suitable PhD students could be recruited to act as "doctoral team leaders" after year 1.
- Not all 4 domains had to start off simultaneously

Interim team leaders were identified for the four domains. HLM would be responsible for the e-contracts team; LE responsible for ISP team. LE to approach Paul Torremans for the Internal Market team and Rachel Crawford-Smith (Edinburgh, Europa Inst.) for the Marketing team. Interim team leaders would identify a sub-group of two to five experts and commence drafting questions.

Year 1 would then be used for LE to secure funding for four doctoral candidates to be located at Edinburgh. The appointed PhD students would chase up country reports and complete draft analysis of each domain, in consultation with the former interim team leaders & the Steering Committee.

A sound management structure would be needed for successful funding application, with key names from both the EU and outside eg Latin America, US . Names would be added to the steering committee of LE, HLM, CR and SvE to form an Advisory Body (name?). Key contacts who agreed to a role on this committee would be rewarded with participation in the final conference on completion of the project in 2007, plus some sub group meetings in Edinburgh or elsewhere funded by AHRB funds.

10. **Deadlines and deliverables.**

STAGE A- SETTING THE PROBLEMS

January 2004 – end 2004

Recruit and put in place interim team leaders (ITLs) ; ITLs then identify and approach members of sub-groups; hold initial meetings in person or by email; steering committee (HLM, LE, SvE, CR) to identify or provide contacts to find suitable *country rapporteurs*. Problem questions for each of 4 domains drafted and finalised. LE seeks funding for 4 Doctoral team Leaders (DTLs) to take over from ITLs.

STAGE B- REPORTS AND ANALYSIS

By January 2005

Country rapporteurs in place. Problems sent out to country rapporteurs. May be staggered as to the 4 sub-domains. Deadline gives 9 months for preparation of draft reports leaving 3 months slack for late reports (not advertised.)

August 2005

PhD students recruited as new DTLs, responsible for follow-up of late reports, and analysis of final reports. Two months for orientation before reports begin arriving at end September 2005. Draft analysis begins October 2005.

By January 2006

All draft country reports in. Draft country reports sent back for re writes as necessary by DTLs.

March 2006

All final country reports received.

May 2006

Final analyses by DTL's ready.

STAGE C- DISSEMINATION

??June 2006

“Interim” conference to which industry, digital civil liberties groups and young scholars are invited as well as ITLs, DTLs, Steering Group and Commission. To be held Edinburgh?

August 2006

International Comparative Law Conference in Utrecht; sub group conference on e commerce directive as a platform for interim results.

June 2006- March 2007

Country reports gathered and completed. Analyses amended to take account of response from conferences in June and August.

March 2007

Final conference, Edinburgh. Publication of reports and analyses as appropriate (books, web, etc).