EXPLANATORY MEMORANDUM TO THE:

THE UNSOLICITED GOODS AND SERVICES ACT 1971 (ELECTRONIC COMMERCE) (AMENDMENT) REGULATIONS 2005

2005 No.148

1. This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

2. Description

The regulations amend section 3 of the Unsolicited Goods and Services Act 1971 [the "1971 Act"]. They allow an advertiser to place an entry in a business directory by sending the publisher an order form or other business stationery by electronic means.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None

4. Legislative background

4.1 Section 3 of the 1971 Act prescribes three methods of authorising payment for placing an entry in a business directory. These are:

- The Business Order Form method, which is where a request for a directory entry is sent on the business' own order form or other stationary belonging to the business and bearing in print it's name and address;
- The Business 'Note' method, which is where a 'note' agreeing to the charge is produced by a directory publisher and signed by the business; and
- The Electronic Communications method, which is where an electronic communication agreeing to the charge is sent by the business.

4.2 The 1971 Act, as it stands, provides for Business Order Forms to be sent in paper form only. This constitutes a barrier to electronic contracting, in contravention of Article 9(1) of the E-Commerce Directive[1]. This instrument removes this barrier to electronic contracting.

4.3 The bulk of the E-Commerce Directive was implemented by the Electronic Commerce (EC Directive) Regulations 2000[2]. Article 9(1) is being implemented on an *ad hoc* basis, where legislation is identified which contravenes its requirements. A transposition note has not been prepared for these regulations, as it would provide little benefit to the reader.

4.4 **A** Regulatory Reform Order amending the 1971 Act has also been made – the Regulatory Reform (Unsolicited Goods and Services Act 1971)(Directory Entries and Demands for Payment) Order 2005. The need for these Regulations was identified after the consultation on the RRO had taken place. Rather than re-consult on the RRO and so delay bringing the Order before Parliament, the DTI decided to make the additional amendments to the 1971 Act by way of these regulations.

4.5 These regulations are made under section 2(2) powers of the European Communities Act 1972. Provided they are not annulled, they will commence immediately after the Regulatory Reform Order, namely on 6 April 2005.

5. Extent

[1] Directive 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 (Directive on Electronic Commerce.)
[2] S.I. 2002/2013

This instrument extends to England, Scotland and Wales, but not Northern Ireland.

6. European Convention on Human Rights

The Minister has made the following statement regarding Human Rights:

In my view the provisions of the Unsolicited Goods and Services Act 1971 (Electronic Commerce) (Amendment) Regulations 2005 are compatible with the Convention rights.

7. Policy background

7.1 The Department is introducing this measure to ensure the 1971 Act fully complies with article 9(1) of the E-Commerce Directive. It will facilitate electronic commerce within the UK by introducing equivalence between paper-based methods and electronic methods of placing an entry in a directory. It is doing this by allowing Business Order Forms to be sent electronically where a request for a directory entry is sent on the business' own order form or other stationary belonging to the business. This removes a potential obstacle to e-commerce and ensures compliance with the Directive.

7.2 The policy change being advanced by these regulations is not significant, politically or legally. The Department consulted 58 organisations and received 8 responses. There has been no other public interest in this proposal.

7.3 The consultees informed the Department that the Business Order form method is not widely used in the industry. Where a request for a directory entry originates from an advertiser, the publisher usually confirms it via a Note of Agreement or an electronic communication. However, the DTI see this change as beneficial for advertisers and potentially reducing burdens for those who wish to use a new and simplified means to contract for a directory entry by electronic means.

7.4 Guidance has been prepared to help business. This can be found on the Department's website at: *http://www.dti.gov.uk/ccp/topics1/unsolicited.htm*.

8. Impact

A Regulatory Impact Assessment is attached.

There is no impact on the public sector.

9. Contact

David King at the Department of Trade and Industry (Tel: 020 7215 5374 or e-mail: David.King@dti.gsi.gov.uk) can answer any queries regarding the SI.

REGULATORY IMPACT ASSESSMENT

Title of proposed measure:

1. Electronic "Business Order Forms" for advertisers wishing to place entries in business directories -

    - Amendment to section 3 of the Unsolicited Goods and Services Act 1971 [UGSA] by way of a regulation under section 2(2) of the European Communities Act 1975.

Objective:

2. The Department is introducing this measure to ensure UGSA complies with article 9 of the European E-Commerce Directive. It will facilitate electronic commerce within the UK by introducing equivalence between paper-based methods and electronic methods for contracting an entry in a directory.

3. We are ensuring compliance by creating an electronic equivalent to the Business Order Form method of contracting for a directory entry, which is where a request for a directory entry is sent on the business' own order form or other stationary belonging to the business. The Act does not make provision for an electronic equivalent of this paper based order form, which creates a potential barrier to contracting electronically for directory entries.

4. We are therefore providing for Business Order Forms to be sent electronically, to remove this potential obstacle and ensure compliance with the Directive. We also see this as beneficial to advertisers who may wish to place an entry in directory through a quick and cost-effective electronic means. This can be seen as reducing a burden as advertisers would potentially have a new and simplified means to contract for a directory entry by electronic means.

Extent of the 1971 Act to Devolved Administrations:

5. The 1971 Act does not extend to Northern Ireland. The Act extends to Scotland and Wales; the proposed change does not impact on Assembly functions. The power to legislate in relation to directory entries is a reserved matter in relation to Scotland.

Background:

Article 9 of the European E-Commerce Directive

6. Article 9 of the European E-Commerce Directive requires Member States to ensure that "requirements applicable to the contractual process do not create obstacles for the use of electronic contracts". For this RRO, it means ensuring there is equivalence between paper based and electronic methods for contracting an entry in a directory.

7. UGSA currently prescribes three methods of authorising payment for placing an entry in a business directory. These are:

   - The Business Order Form Method, which is where a request for a directory entry is sent on the business' own order form or other stationary belonging to the business and bearing in print it's name and address; and

   - The Business 'Note' method, which is where a 'note' agreeing to the charge is produced by a directory publisher and signed by the business;

   - The Electronic Communications method, which is where an electronic communication agreeing to the charge is sent by the business.

8. The Regulatory Reform Order (Unsolicited Goods and Services Act 1971)(Directory Entries and Demands for Payment) Order 2004] is inserting a fourth method into the Act. This is a simplified method for repeat entries and renewals under certain conditions. This will come into force at around the same time as this proposal relating to Business Order Forms.

9. This proposal relates to the first method of agreeing a directory entry, the Business Order Form method. At present, Business Order Forms –as defined by UGSA- cannot be sent electronically. Should a directory publisher wish to accept an electronic order for a directory entry, it must use the Electronic Communications method of authorising payment set out above.

10. What this means is that UGSA requires certain specified information to be given to a purchaser [generally a business] before it agrees to a charge by way of an electronic communication. Such information is not required for paper-based Business Order Forms, where an advertiser requests a directory entry, and so potentially puts obstacles in the way of a business who would wish to contract electronically in this way.

11. This RRO amends the 1971 Act to lift burdens on directory publishers and advertisers, and does also bring the UGSA more into line with the European E-Commerce Directive. However, it does not ensure total compliance with article 9 of this directive, and this proposal is also being advanced in parallel with the RRO to ensure there is no doubt about the *vires* of the RRO.

12. The DTI consulted on this proposal from 28 March 2004 to 18 June 2004. 58 organisations were written to and 7 responses were received during this period, and one after closure of the consultation. Five were from Directory publishers, one from the Advertisers Association, and two from the Trading Standards Institute and a partnership of South East Trading Standards Authorities respectively.

Risk assessment

13. The DTI is required to make a change to create an electronic equivalent of Business Order Forms. This is to ensure compliance with Article 9 of the E-commerce Directive. The risk of not proceeding would be an infraction, and could be subject to infraction proceedings.

14. Any risks are from scams, because there may be more difficulty determining the origin and authenticity of electronic communications in comparison to paper ones. However, such a risk is slight for the following reasons

15. The Business Order method of contracting is not widely used, so these changes will affect relatively few transactions anyway [though more businesses may use this method once an electronic Business Order Form is introduced].

16. With modern technology, details on and of paper-based Business Orders can also be altered fraudulently, so that there is an argument of fairness for providing an equivalent electronic Business Order form method.

17. The main risks would arise should any email be considered an electronic Business Order in terms of the Act. This could lead to a scenario where a fraudulent publisher claims an email response to one originating from the "publisher" is a Business Order. The fine print of this email could sign the advertiser up to bogus directory entries. The way to mitigate this risk is to stipulate that only an order form or stationary belonging to the purchaser (whether transmitted electronically or otherwise) will be considered a Business Order. This would mean that a bogus publisher could not required payment in those circumstances where a potential advertiser was responding to an unsolicited email.

18. We consider, for these reasons, that the benefits of this proposal and the need to ensure compliance with the E-Commerce Directive outweigh any small risks arising from an increase in scams.

19. The proposals directly affect directory publishers and those who pay to advertise in directories.

<u>The Directory Publishing industry</u>

20. The Directory publishing market is worth about £1.5B per annum. Business to Consumer directories - dominated by Yell (Yellow Pages) - comprise between £800 and £1B per annum. Business-to-Business directories are about £200 – £300 million per annum. There is also a small number of directories which are do not advertise and service the professional reference market. Many publishing houses also publish directories as a sideline to their other business.

21. The Department's consultation on this proposed change established that few advertisers use the Business Order Form method and that publishers do not generally receive unsolicited entries in this way, either paper-based or electronic.[3] Where such a request is received, those Publishers who responded to the consultation process would generally confirm them either through a Note of Agreement or an Electronic Communication. [4]

[3] The Directory Publishers Association (DPA) estimated that the number of entries placed using this method originating from UK businesses accounted for less than 1% of directory entries.

[4] Respondees from the Directory Publishing Industry were Directory Publishing Association, Yell, Reed, AP Information Services Ltd, Periodical Publishers Association.

22. Some smaller publishers could, however, accept an emailed Order Form and find as a result that their advertising contracts were unenforceable. Under the current situation, there is a risk that they would not be able to require payment for the entry from the advertiser, should they accept an Order emailed in this way. The consultation on the Regulatory Reform Order 2004 above found that there was widespread ignorance of UGSA, particularly among small publishers or those who published directories as a sideline to other publishing.

Current and Potential Advertisers

23. Current and future advertisers in directories [mainly businesses] are also affected by these proposals. As indicated above, advertisers do not generally use the Business Order Form to place entries in directories. The reasons for this are unclear, though the lack of any means [legally] to make a Business Order electronically might be contributing to deterring advertisers from using this method. The removal of this obstacle should be welcomed by an industry as providing a quick and cost-effective means to contract electronically, as intended by the E-Commerce Directive. [5]

Issues of equity and fairness

24. The issue of equity and fairness is whether the benefits of the proposals outweigh any risks for the directory publishers and advertisers in their directories, and whether any key groups would be disproportionately affected by the proposal.

25. There are benefits to the publisher from clearing up any potential lack of clarity in the law, whereby they may accept an emailed request for a directory entry and find as a result that their contract with the advertiser is unenforceable. There are also potential benefits to advertisers from providing a new, quick and cost-effective method for authorising a directory entry. Removing obstacles to electronic contracting is also required under the European E-Commerce Directive.

26. No group will be disproportionately affected by this proposal. It will be a business decision on behalf of directory publishers and their advertisers to take advantage of this new method for approving an entry in a directory.

Options

27. Two options were considered prior to formulation of these proposals for consultation. These were:

Option 1 – Do Nothing

Option 2 - Introduce a new method for contracting a directory entry that is the electronic equivalent of the Business Order Method

28. We propose to remove the information requirements around electronically transmitted Orders in a way that minimises any reduction in the protection that UGSA provides. This means making an electronically transmitted Business Order **equivalent** to one sent on a "business' own order form or other stationary belonging to the business and bearing in print its name and address".

Benefits

Option 1 - Do Nothing

29. The Do Nothing option would not introduce equivalence between paper-based and electronic contracting for directory publishing. The UK would still be required to ensure compliance with this

[5] The Advertising Association also responded to the consultation, though many of its members are publishers as well as those who advertise in directories.

Directive at some later stage. There would also be a question around the *vires* of the Regulatory Reform Order (Unsolicited Goods and Services Act 1971)(Directory Entries and Demands for Payment) Order 2004], which does not itself bring UGSA fully into compliance with the Directive.

30. There are no obvious benefits from doing nothing, apart from saving administrative time in advising business of the change [and this is minimised by introducing the changes at the same time as other changes being advanced by the RRO].

Option 2 – Introduce a new method for contracting a directory entry that is the electronic equivalent of the Business Order Method

31. As indicated above, this option will ensure compliance with the E-Commerce Directive, so the UK will fulfil its obligation under this aspect of European law. It will also remove an area of legal uncertainty and provide an additional, quick and cost-effective means to authorise a directory entry for those advertisers who choose to use it.

Costs

Compliance costs

32. There are no obvious compliance costs arising from this proposal. As discussed in para 42 below, we have not required the Order Forms to incorporate any burdensome features, such as embedded logos.

Option 1 - Do Nothing

33. The Do Nothing option would not cause any implementation or policy costs. It would not, however, allow potential benefits to be realised either. Some costs may arise from situations involving unenforceable contracts. These are likely to be very low, given the very low levels of complaints or prosecutions under this Act.

Option 2 – Introduce a new method for contracting a directory entry that is the electronic equivalent of the Business Order Method Option 1

34. This option would not directly lead to costs for directory publishers, though there is the possibility of costs from amending business procedures to take advantage of a new method for authorising a directory entry. As the Department's consultation indicates, initially at least such costs are likely to be low as few directory transactions use the Business Order Form Method.

35. There is highly unlikely to be an increase in scams through the introduction of an electronic Business Order Form. This is largely through maintaining the legal protection that such a form must "be made by means of an order form or other stationary belonging to the purchaser … and bearing his name and address …".

Costs for a typical business

36. Directory publishers might incur costs initially by taking advantage of this new authorisation method in order to make longer-term savings. These short-term costs are difficult to quantify and are likely in the short-term to be low for the reasons set out above. Most legitimate directory entries are agreed using the **Note of Agreement** method, and the general view of the respondents to the consultation was the proposed change in the short term at least would not lead them to change their business practices.

Small Firms Impact Test

37. The directory publishing industry has a small number of large companies that account for the majority of the turnover in the industry and a larger number of smaller companies. See the 'Directory Publishing Industry" section above for details. It is highly unlikely that this proposal will increase scams of the nature indicated above, which small businesses would have been most susceptible to.

Competition assessment

38. The proposed changes to the 1971 Act are not considered to have any adverse impact on competition. The main markets for this proposal are:

    - British directory publishers
    - The advertising industry

39. The largest player in the British Directory publishing market is Yell, who have turnover in excess of 50% market share. However, this proposal does not give them a greater or unfair advantage over any other player in the market.

40. Feedback from the consultation suggested that most directory publishers and advertisers saw this as a relatively small and insignificant measure, given that the Business Order Method was rarely used. A recurrent theme was that publishers not be put at a disadvantage through burdens such as embedded logos, in comparison to other advertising media or overseas directory publishers.

41. We have taken this on-board, and not required any specific requirements apart from name and address, save that the email must clearly originate from the advertiser. In the longer term this should allow the industry to compete more effectively within the wider advertising industry, where there is not the same obstacle to contracting by electronic means. This proposal will not limit competition within the industry or allow any one firm or type of firm to gain a competitive advantage over rivals.

Enforcement and Sanctions

42. Trading Standards Authorities are enforcers of UGSA throughout Britain and will continue to be so under this proposal. Staff will be made aware of this change at the same time as other changes to UGSA being advanced by the Regulatory Reform Order.

Monitoring and review

43. The DTI will retain responsibility for the 1971 Act. Monitoring scams and potential rogue directory publishers will continue as part of the day-to-day activities of the Department. The Department will continue to consult with directory publishers and advertisers on the impact of the changes brought in by the parallel RRO and by this regulation.

Consultation

44. As indicated above, DTI consulted on this proposal between March and June this year. The list of organisations and groups consulted about this consultation is attached as an Annex. The Consultation Document **Consultation on electronic Business Order Forms - a regulation to amend the Unsolicited Goods and Services Act 1971** is available at http://www.dti.gov.uk/ccp/consultpdf/ebcondoc.pdf

Summary and Recommendation

45. We recommend that Option 2 be implemented.

- Option 1 involves no change, which would mean that the Unsolicited Goods and Services Act 1971 could perpetuate an obstacle to e-commerce, and potentially would not comply with the European E-Commerce Directive.

- Option 2 would ensure compliance with the E-Commerce Directive, remove a potential obstacle to contracting by electronic means in the directory publishing field and provide a quick and cost-effective means for advertisers to contract for a directory entry should they choose to use it.

- Option 2 strikes the right balance of removing obstacles to contracting by electronic means, ensuring compliance with the E-Commerce Directive and ensuring business advertisers do not incur costs due to scams.

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed by the Minister responsible

Gerry Sutcliffe

(Parliamentary Under-Secretary of State for Employment Relations, Postal Services and Consumers)

12th January 2005

Contact: Rosita Hill, CCP2c, Room 610, 1 Victoria Street, London, SW1H 0ET

Tel: 020 7215 6260
Fax: 020 7215 0357