



**Mobile Broadband Group**  
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**Response of The Mobile Broadband Group to the DTI's consultation on the proposed amendments to the Electronic Commerce (EC Directive) Regulations 2002: the liability of hyperlinkers, location tool services and content aggregators.**

This submission is made by the Mobile Broadband Group ("MBG"), whose members are O2, Orange, T-Mobile, Virgin Mobile, Vodafone and 3.

**Summary**

- The MBG welcomes the review of the UK Electronic Commerce Regulation and supports the proposal to extend the limitations of liabilities of intermediary service providers (under Articles 12 -14 of the Electronic Commerce Directive, UK Regulations 17-19) to hyperlinkers, location tool services and content aggregators ("HLTCAs") and believe this to be an appropriate remedy.
- The MBG believes that, overall, if an extension of limitation of liability is not provided in UK legislation, this risks an undesirable cooling effect in the market and risks putting UK e-commerce at a disadvantage vis-à-vis its competitors in the EU that do receive such limitation of liability under their national law. Clearly it will be undesirable to disadvantage "UK plc's" ability to compete on at least the same foundation as it partners in Europe.
- The mobile sector is increasingly providing new services through innovative handsets and faster network speeds which includes internet, search, content aggregation etc. The UK must ensure it creates the environment to allow UK e-commerce to flourish in Europe and also be seen as a positive worldwide e-commerce model. We believe limiting liability for the activities of HLTCAs will generally be a positive step to support innovation and services in the UK mobile market (amongst other e commerce activities) for customers approaching 60 million in number. UK plc players need to view e commerce opportunities based on a stable legal and regulatory platform with the certainty required to encourage investment.
- The MBG preferred option is that limitation of liability under Articles 12-14 of the Directive/ UK Regulations 17-19 is extended to HLTCAs, in the quickest legislative time frame possible.
- However, should the legal issues in relation to content aggregators require primary legislation and therefore require a longer time period to extend the limitation of liability the MBG suggests a different approach -option 4. Option 4 is a two stage process whereby limitation of liability is firstly applied to

hyperlinkers and location tool services and secondly at a later stage to content aggregators. This allows swift action to limit liability where possible, with limitation on liability for content aggregators progressing as quickly as possible thereafter.

## **Introduction**

The MBG welcomes the review and opportunity to respond to the DTI on this area of extending limitation of liability under the UK Electronic Commerce Regulation. The MBG believes this is a positive step for UK E commerce.

When the UK Electronic Commerce Regulations were implemented the inclusion of limitation of liability for HLTCAs would have caused an unnecessary delay to the UK implementation date. The UK now has an opportunity to move forward and as a consequence of the delay the UK has visibility of the extent to which other member states are limiting liability for HLTCAs and of the positive effects that those member states derive now and will continue to derive in the future. The MBG supports the limitation of liability for these activities to encourage UK activity in these areas and also to provide a supportive framework for new services. This will allow the UK to offer similar services on the same basis (from the UK). Should the DTI not provide limitation of liability for HLTCAs then the outcome for the UK does not seem to be positive. The effect will be that some HLTCAs will provide services to the UK but from outside of the UK; this will mean that "UK plc" risks being disadvantaged in the development of one of the key enablers for e-commerce. In addition, it will have the counter productive effect that the UK will not be able to exercise control over these services (providing they comply with the E commerce Directive and other relevant legislation); it may also mean less choice for consumers; and, ultimately fewer service providers in the UK will take up the opportunities of HLTCAs due to the liability risks currently present in this range of activities.

The UK must seek to provide a positive environment to support all aspects of e-commerce to grow in the UK and to provide benefits to consumers.

## **Main Points**

### EU Commission Conclusions on the First Report of the Directive

The MBG fully supports the view in the EC conclusions in its First Report on the Directive to ". . . create incentives in investment and innovation and to enhance the development of e-commerce by providing additional legal clarity for service providers". The MBG supports the EC view to encourage member states to provide further legal certainty for hyperlinkers and location tool services but the MBG also believe it is necessary that all activities, including content aggregators should be afforded legal certainty in relation to limitation of liability to support e-commerce in general. Extending limitation of liability to these areas of activities will reflect changes in the (e-commerce) market place since the Directive was originally conceived and subsequently implemented. It will also mean that the UK will provide a regulatory framework supporting activities of HLTCAs. This framework should help encourage basic signposting services for consumers.

### Issues for UK competitiveness for hyperlinkers, location tool services and content aggregators and limitation of liability

Currently, intermediary service providers (ISP) have limited liability where they act as mere conduits, caches or host information. The MBG believes that many of the problems faced by HLTCAs are similar to that of ISP's. Some liabilities arising from some (but not all) of the activities of HLTCAs can be limited by contract. However, practicalities dictate that any type of e.g. contractual indemnity will only be as good as the provider of the indemnity's ability to deliver on the indemnity. But indemnities do not remove the potential for associated or secondary liability being aimed at HLTCAs. Indeed what is required for HLTCAs is to remove the threat of potential legal action unless they possess actual knowledge. This will mean that they will be placed in the same position as ISPs in relation to their own services.

Consumer demand for services such as hyperlinking, search and content aggregation is likely to increase as consumers engage in e-commerce. It is evident that had ISPs not had liability limited, it is unlikely that we would see the level of e-commerce activity we have today. This is attributable to a broad range of services e.g. faster consumer broadband speeds, but for consumers to get fuller benefits of broadband and engage in e-commerce it is important that customers have easily and readily available tools at hand to provide signposts from them. This is where HLTCAs can play an increasingly important role in the provision of e-commerce.

MBG favours an approach which seeks to stimulate and encourage the market via expanding the scope of limited liability to the activities of HLTCAs to the same extent as ISPs. This does not mean that where HLTCAs clearly infringe others (legal) rights that no remedy will exist – a range of existing legal provisions may apply. Other and more relevant actions in law exist to protect legitimate rights. However, limitation of liability should have a beneficial impact on HLTCAs by removing them from potential secondary liability. In the UK we already have commonly accepted rules to implement systems of notice and take down for ISP – and this system is successful in supporting e-commerce. Indeed it is a necessary pillar that allows e-commerce markets to grow under a sensible and robust framework that could equally be applied to activities of HLTCAs.

### Implementation and extension of limitation of liability for hyperlinkers, location tool services and content aggregators

We believe that it will be increasingly unsatisfactory that HLTCAs must continue to operate without any limitation of liability under the UK Regulations. Just as ISPs receive protection, it is also appropriate that HLTCAs can have the same range of defences in relation to a (secondary) liability for offences such as defamation or copyright theft.

It is also the case that without limitation of liability criminal liabilities may apply. The MBG believes extension of limitation of liability will help reduce any cooling effect in the market due to concern over attracting erroneous criminal liabilities in relation to contempt of court, aiding and abetting etc. and therefore stimulate and encourage ISPs to include a wider range of relevant information in their service.

The MBG firmly believes that limitation of liability should be extended and applied to the activities of HLTCAs. On this basis we support the combination of options 2/3

and therefore suggest a new option 4. This option 4 essentially means providing limitation of liability to HLTCAs with similar protection given to hosts, caches and conduits. However, should for legal reasons the view be that an extension of limitation of liability for content aggregators need primary legislation we would wish to see the UK implement limitation of liability in the first instance (through secondary legislation) for hyperlinkers and location tool services. This could be closely followed by limiting liability for content aggregators under the UK Regulations through the most practical and efficient legislative process.

## **Conclusion**

The MBG supports the expansion of limitation of liability to the activities of HLTCAs. We have concerns about the manner in which the existing UK Regulations fail to address the scope of liability that may exist in providing these type of services and also are concerned that omitting HLTCAs (whilst dealing with mere conduit, caching and hosting) is illogical and potentially hampers "UK plc's" longer term future in e-commerce. Limiting liability for these activities should provide impetus to UK e-commerce and support consumer benefits of improved and sustained signposting.

Like other member states that have already made partial movements in this direction we believe the reasons to include provisions for limitation of liability for HLTCAs exist now, and are appropriate and compelling.

9<sup>th</sup> September 2005.