[GB] ISPs Lose Challenge to Digital Economy Act in the Court of Appeal

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BT and TalkTalk, internet service providers, were unsuccessful in their appeal against the decision of the High Court last year that provisions in the Digital Economy Act 2010 were not in breach of EU law (see IRIS 2011-6/20).

The provisions impose obligations on Internet Service Providers (ISPs) to notify subscribers if their internet protocol addresses are reported by copyright owners as being used to infringe copyright, and they must keep track of the number of reports about each subscriber and must compile on an anonymous basis a list of those reported on. After obtaining a court order to obtain personal details, copyright owners will be able to take action against those on the list. These obligations would only come into effect once an 'initial obligations code' made by Ofcom, the communications regulator, and approved by Parliament, has been brought into force. The ISPs argued that these requirements should have been notified to the European Commission under the Technical Standards Directive; that they were incompatible with provisions of the Electronic Commerce Directive; that they were in breach of the Data Protection Directive and the Privacy and Electronic Communications Directive; and that they were incompatible with the Authorisation Directive.

The Court of Appeal held that the provisions of the Act do not require notification as they do not have legal effect in themselves, being conditional on implementation through the code. They do not breach the Electronic Commerce Directive as they do not impose any liabilities on ISPs, and being concerned with copyright, are outside the 'coordinated field' under the Directive where restrictions on freedom to provide information society services are prohibited. The statutory provisions are not in conflict with the Data Protection Directive as the processing of data relates to legal claims, nor with the Privacy and Electronic Communications Directive as the limits to the confidentiality of data are to protect intellectual property rights. Finally, the Authorisation Directive does not require that all sector-specific rules be contained in a general authorisation rather than separate legislation. The Court also held that the exclusion of small ISPs and mobile network operators from the scheme was not disproportionate.

The ISPs had also challenged the draft costs order allocating the costs of running the system. The High Court had decided that requiring ISPs to pay part of the cost of establishing the system would breach the Authorisation Directive, and this

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point was not appealed. The Court of Appeal held that ‘case fees’ covering the costs of appeals were also incompatible with the Directive.

R (on the application of British Telecommunications and TalkTalk Telecom Group) v. Secretary of State for Culture, Media, Olympics and Sport [2012] EWCA Civ 232, 6 March 2012

http://www.bailii.org/ew/cases/EWCA/Civ/2012/232.html

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