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Why EU anti-hate broadcasting regulations are necessary

The EU Television Without Frontiers Directive's anti-hate broadcasting provision will be incorporated into OFCOM's new Broadcasting Code in May this year after the provision was successfully tested for the first time last month in France. But could English law's comparatively high hurdle for proving incitement to racial hatred limit the application of the Directive? Greg Bousfield talks to Daniel Doherty, media law solicitor with Lawdit...



Establishing incitement in this context may not be as difficult as might be assumed, says Daniel Doherty media law solicitor with Lawdit. "In the UK, incitement to racial hatred is governed by s 21 of the Public Order Act 1986 (POA) which states that it is an offence for a person to publish or distribute material which is threatening or abusive or insulting if, he intends thereby to stir up racial hatred or, having regard to all the circumstances, racial hatred is likely to be stirred thereby," he says.

For the first part of POA's definition, the key difficulty is establishing mens rea. For example, a successful defence could be to claim that 'hate' material is merely being broadcast for educational purposes. "It could be argued that the first of these criteria is very difficult to prove and thus initially setting a high hurdle for proving incitement," he says. "However, the second of criteria is possibly far easier to establish and thus prove. Surely, if the material was broadcast to a large number of people and that material was potentially controversial, it could be argued that at some level, the material is likely to stir racial hatred." Case law is thin on the ground, he admits.

The relevant section of the Directive (89/552/EEC, amended 97/36/EC) is Article 22a, which requires that "Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality." In March, the Commission announced that the French broadcasting regulator had - for the first time in the EU - successfully invoked Article 22a to require that French-based Eutelsat Company deny the use of its Hot Bird 4 satellite to a broadcaster. The broadcaster, Hezbollah's Al Manar, had used the satellite to globally beam program content which the regulator considered anti-Semitic and capable of inciting hatred.

The Directive is aimed at preventing (EEA) member states from blocking broadcasts from other member states. It also regulates broadcasters only once, the so-called "country of origin" principle. This means that the responsible Member State has to ensure that broadcaster under its jurisdiction respects the rules.

The Commission shrugs off suggestions that using Article 22a for intra-EU broadcasting is likely to be more difficult than the Al Manar case because - unlike pornography - member states agree on the definition of incitement to hatred. However, Germany, France and Austria have a considerably lower hurdle for establishing incitement than the UK or Ireland.

In UK terms, "it is widely considered that the current prohibition of broadcasts which contain incitement to racial hatred is effective," he says. Section 1.8(i) 'Ethnic Minorities' of OFCOM's outgoing Independent Television Commission (ITC) code already requires that: 'No programme should be transmitted which is intended to stir up racial hatred or, taking into account the circumstances..'

"It is clear that the law needs to be amended with regards to religious hatred. Furthermore, as culture in the UK becomes more diverse and freedom of expression readily becomes an excuse for others to depict certain groups in a derogatory way, a new more expansive broadcasting code is definitely required to compliment the law and help maintain high standards."

(07/04/05)


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Legislative annotations in other services:-

Public Order Act 1986 s21

Why indemnity rule change plans will force firms to seek limited liability

The Law Society plans to reword the definition of 'one claim' (the aggregation clause) in clause 2.5 of the minimum terms and conditions of professional indemnity insurance, and to increase the minimum sum insured from £1 million to £2 million. Frank Maher, a partner at Legal Risk, tells Veronica Cowan what knock-on effect this will have on firms...

 The compulsory level of cover provided by the Solicitors Indemnity Fund was £1 million for each and every claim, with 'one claim' defined as 'all claims arising from the same act or omission'. With the switch to the commercial market, the minimum terms and conditions provided that: 'all claims against any one or more insured arising from the same act or omission or from one series of related acts or omissions will be regarded as one claim.' The principal difference was the introduction of the words 'or from a series of related acts', which commercial insurers assumed would allow them to treat as one claim multiple claims arising not only from a series of related acts but also from a series of similar acts. But the House of Lords decision in *Lloyds TSB Insurance Holdings v Lloyds Bank Group Insurance [2003] UK HL 48* established that their assumption was wrong. Insurers were concerned that this case had narrowed the effect of the aggregation clause to an unacceptable extent, and sought an amendment of clause 2.5 to put them back in the position they thought they were in before it.

So what will be the impact? Frank Maher, a partner at Legal Risk, explains: "Insurers providing cover under the compulsory insurance scheme for solicitors will be able to limit cover for any number of negligence claims arising from similar mistakes to a total of £2 million. Until now firms have been covered for £1 million for each claim, and they could link their limit of liability to each client in line with their indemnity cover."

He says the new indemnity rules will increase pressure on law firms to convert to Limited Liability Partnerships (LLPs). "Firms are starting to limit liability to clients contractually, but this will no longer be enough to protect them. They can limit liability to individual clients by agreement but that might not help, as they will not know what their insurance limit is, because they cannot know how the £2 million will be shared among the clients." So if they cannot manage the risk by contractual terms, more firms will limit their liability as a partnership.

He continues: "Insurers say they have woken up and now know what they are insuring. The problem here is that one is not looking just at a claim from one client. It is across the whole client base. For example, if there is a faulty rent review clause on the firm's word processor and it is used on different clients the risk now is that they could all be treated in aggregate as one claim, as insurers are now limiting their risk."

Maher does not believe this is in the consumer interest, and says: "A big international law firm reacted in horror when we pointed this out. Even for large firms with £100 million cover or more, this has knock-on implications, because insurers covering the higher layers are expected to follow suit." As to why this is inevitable, he explains: "Often the higher limits have similar wording to the primary cover. The agenda is to cut down their exposure".

Maher also predicts lots of litigation on what the words mean, and speculates: "I wonder whether insurers have taken the upper hand in the negotiations and come away with more than they should, because the new wording goes beyond the *Lloyds TSB* case. Two separate mistakes on one matter will now be treated as one, which is more than insurers needed

to protect them from that case. You might have a probate matter where money has been paid to the wrong beneficiary, as well as incorrect tax advice or a defective house sale, but insurers will argue that it is all one claim within the £2 million".

The changes, once approved by the Master of the Rolls, will take effect from 1 October 2005. Will he agree them? "There have been instances where Law Society rules have not been approved, but very few, and they have not been on indemnity issues," remarks Maher.

(07/04/05)

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Case annotations in other services:-

Lloyds TSB Insurance Holdings v Lloyds Bank Group Insurance [2003] UK HL 48 [2003] 2 All ER (Comm) 665, [2003] 4 All ER 43, [2003] Lloyd's Rep IR 623, [2003] NLJR 1270, 147 Sol Jo LB 935, [2003] All ER (D) 573 (Jul)

How changes on directors' liability will impact employees

The Government has issued a White Paper (and draft Company Law Reform Bill) in which it proposes a statutory statement of duties to replace existing common law and equitable rules for company directors. Veronica Cowan talks to Simon Graham, head of corporate governance at Wragge & Co LLP, about the potential impact this could have on employees...



Changes to the law on directors' liability were made last year, with the Government also keen for skilled individuals to accept directorships. One of these changes is that from 6 April 2005 companies may indemnify directors against most liabilities to third parties; and pay directors' legal costs, provided the director repays them if s/he is convicted in any criminal proceedings or judgment is given against him or her in any civil proceedings brought by the company or an associated company.

But the other side of the coin is the impact on others - such as employees - of what directors decide. When a company goes to the wall, or there is a take-over or merger, the impact on an employee can be life-changing, in that s/he can lose his or her job. But company law has evolved so that every director owes a duty to the

company and not to individual shareholders or employees, notes Simon Graham, head of corporate governance at Wragge & Co. "There is no common-law duty on a director to consider the interests of the company's employees, although the Companies Act 1985, s 309 puts a statutory duty on directors at least to consider the interests of employees in general", he adds.

The general duties directors owe the company are at present found in centuries of case law, and the Government believes this contributes to company directors not understanding their obligations. The Government has issued a White Paper (and draft Company Law Reform Bill), responses to which must be lodged by 10 June 2005, in which it proposes a statutory statement of duties to replace existing common law and equitable rules. These duties will still be owed to the company, and - as now - only the company will be able to enforce them, although the shareholders may still be able to bring a derivative action, albeit for the company's benefit. Derivative actions are the route by which shareholders, usually minority shareholders, can enforce the company's rights where directors are in breach of duty, making it unlikely the directors themselves would act. The Bill would put derivative actions on a statutory footing.

The duties will reflect modern business needs and wider expectations of responsible conduct, and directors will have to take a balanced view of the implications of their decisions. The Bill will make it clear that, while directors must promote the success of the company for the benefit of its members, this can only be achieved by taking due account of longer term performance and wider interests, such as the interest of its employees and the impact of the company's operations on the community and on the environment. This enshrines a principle which has become known as "enlightened shareholder value", explains Graham, who adds: "This has a large political dimension. When Labour came to power, it orchestrated a review and a long period of consultation ensued - including asking whether company law should move away from the idea that 'the shareholder is king' to a school of thought among pluralists that says we should move away from a purely capitalist approach so that directors would think not just about shareholders' interests, but independently consider those of employees. However, that pluralist line looks to have lost out in the context of this review, and the Government has started to use the phrase 'enlightened shareholder value' with a view to embedding in statute the principle that directors' promotion of the success of the company should include taking into account 'where relevant' and 'so far as is reasonably practicable' the interests of others like employees. However, some say this is just preserving the status quo, since in practice it may not be very different to the current position".

There used to be a lively debate about putting workers on the board - or at least securing their rights to information and consultation, and indeed this whole area of works councils is again being looked at, noted Graham, who adds: "The environment is getting tougher for directors, and the Government is stressing that it is a serious job; it is also saying that directors are not required independently to look after employees' interests. The White Paper is giving directors the latitude to decide what is the best course of action for their company, having fairly balanced the interests of all stakeholders. The position of employees, it is implying, is already covered by employment law, and enforced by employment tribunals and the Health and Safety Executive. This area is corporate, and separate", he explains.

Those distinctions are easier to state in principle than to manage, but Graham points out that if the interests of shareholders and employees cannot be reconciled - in corporate decision-making terms - and they sometimes cannot, the directors have to decide, and ultimately it would be up to the courts. "However, there is relatively little litigation on directors' duties and conflicts of interest. Where there is a conflict between the interests of employees and shareholders, the interests of the latter are likely to prevail, despite changes proposed in the Bill," according to Graham.

The Government wants to remove unnecessary burdens on directors and preserve Britain's reputation as a favoured country in which to incorporate and, in Graham's view, this White Paper continues to promote that goal, . (06/04/05)

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Legislative annotations in other services:-
Companies Act 1985 s309

