

EXPLANATORY MEMORANDUM TO
THE ELECTRONIC COMMERCE (AMENDMENT ETC.) (EU EXIT)
REGULATIONS 2019

2019 No. 87

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Department for Digital, Media, Culture and Sport (DCMS) and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is being made under the European Union (Withdrawal) Act 2018 in order to address deficiencies arising in the Electronic Commerce (EC Directive) Regulations 2002 (“the eCommerce Regulations 2002”) and the Electronic Commerce Directive (Miscellaneous Provisions) Regulations 2018 (“the eCommerce Regulations 2018”) as a result of the withdrawal of the United Kingdom from the European Union in the event of ‘no deal’ EU exit. These regulations, for which DCMS has responsibility, implement aspects of the eCommerce Directive (eCD) into UK law.

Explanations

What did any relevant EU law do before exit day?

- 2.2 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) (“the Directive”) seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services (“ISS”) between EEA states and approximating EEA states’ laws concerning the regulation and provision of ‘information society services’. An information society service refers to any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of the service. The Directive has been incorporated into the Agreement on the European Economic Area.

Article 3 of the Directive sets out ‘country of origin’ rules in relation to the regulation of information society services. Generally, these rules provide that, within the “coordinated field” (as defined in the Directive), information society services must be regulated by the law of the EEA state in which the provider of the services is established, rather than the law of the EEA state in which the services are received. This means that, on the one hand, where the UK regulates information society services within the co-ordinated field, such regulation must extend to information society services provided by persons established in the UK, even where such services are provided elsewhere in the EEA (Article 3(1)). On the other hand, the UK must not, for services falling within the “coordinated field”, restrict the freedom of a person established in another EEA state to provide information society services in the UK (Article 3(2)). It is, however, possible to derogate from Article 3(2) if certain conditions are met (Article 3(4)).

Other articles implemented by these Regulations include Articles 5-7, which set out the information that information society services must provide to recipients of their service and the means of this communication. They also include articles 12-14 of the Directive, which require the UK to limit, in specified circumstances, the liability of intermediary service providers who carry out certain activities essential for the operation of the internet, namely those who act as “mere conduits” and those who “cache” or “host” information.

The Directive was originally implemented by the e-Commerce Regulations 2002. However, the e-Commerce Regulations 2002 only apply in relation to Acts passed before the date on which the e-Commerce Regulations 2002 were made and in relation to “the exercise of a power to legislate” before that date. For legislation that postdates the e-Commerce Regulations 2002, Articles 3 and 12-14 of the Directive need to be implemented on a case-by-case basis.

Among these other items of legislation which implement Articles 3 and 12-14 of the Directive, the e-Commerce Regulations 2018 implement these Articles in relation to specific offence in Scotland, England and Wales, and Northern Ireland.

DCMS is also responsible for these 2018 regulations in addition to the initial 2002 implementing regulations, and is amending them via this instrument.

Why is it being changed?

- 2.3 This instrument amends provisions in the eCommerce Regulations 2002 and the eCommerce Regulations 2018 which are inappropriate as a result of the UK’s withdrawal from the EU without a deal and makes changes to ensure that the law functions effectively.

What will it now do?

- 2.4 The changes being implemented via this Statutory Instrument will provide continuity in terms of the effect of the 2002 and 2018 Regulations insofar as possible in a ‘no deal’ EU exit scenario. The instrument makes amendments to the Regulations to address references that will be inappropriate when the UK has left the EU in a no deal scenario.

The exception to this are changes to the implementations of the Directive’s Country of Origin principle (described above). Provisions in those Regulations that extend UK requirements to UK providers of ISS where they provide ISS in EEA states other than the UK are being removed.

It is not possible to use the powers in the European Union (Withdrawal) Act 2018 to remove the provision restricting the application of UK requirements to service providers who are established in an EEA state other than the UK. This is subject to a derogation condition, which in the e-Commerce Regulations 2002 includes a requirement to liaise with other member States and the Commission. It is considered that it would not be appropriate to retain this liaison requirement once the UK has left the EU in a no deal scenario, and so this aspect of the derogation procedure in the e-Commerce Regulations 2002 is being removed.

Provisions in the e-Commerce Regulations 2002 and the e-Commerce Regulations 2018 implementing Articles 12-14 of the Directive are unaffected by this instrument.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This statutory instrument was laid for sifting on 18 December 2018 as a proposed negative resolution procedure instrument. The sifting committees agreed with the government that this statutory instrument should be subject to negative resolution.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 An amendment or revocation made by this instrument has the same extent as the provision amended or revoked. The provisions being amended or revoked all extend to the United Kingdom, except regulations 3, 4 and 5 of the e-Commerce Regulations 2018, which extend to Scotland, England and Wales, and Northern Ireland respectively.
- 4.2 The territorial application of this instrument is the United Kingdom, except in relation to those provisions described in the previous paragraph.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 These Regulations are made in exercise of the powers in section 8 of the European Union (Withdrawal) Act 2018 (c. 16) in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. It amends EU references and makes appropriate provision to correct deficiencies arising from withdrawal and to ensure the continued operation of the regulatory framework.
- 6.2 Regulation 3 amends the e-Commerce Regulations 2002. Amendments to these Regulations include amendments to ensure that the Regulations operate effectively once the United Kingdom is no longer a member State and amending inappropriate references. For example, defining “Community acts” to specify that this means Community acts as existed immediately before exit day, and amending the definitions of “established service provider” and “regulated profession” to reflect that the UK will no longer be a member State. The current definition of “regulated profession” in regulation 2 (interpretation) of the eCommerce Regulations 2002 cross-refers to two Directives, which define “regulated profession” in relation to member States and member States’ qualifications etc. As the UK will no longer be a member State after exit, this is no longer appropriate.
- 6.3 Regulations 4 and 5 of the e-Commerce Regulations 2002 implement the country of origin principle, which is a reciprocal arrangement between the United Kingdom and other member States which will no longer exist in a no deal scenario. This instrument

removes those provisions in regulation 4 which apply UK requirements to UK providers of ISS where they are providing ISS in EEA states.

- 6.4 Regulation 5 of the e-Commerce Regulations 2002 implemented the derogation procedure. This instrument removes those provisions that require an enforcement authority to liaise with other member States and the Commission, as this will no longer be appropriate after the UK has withdrawn from the EU in a no deal scenario.
- 6.5 Regulation 4 amends the e-Commerce Regulations 2018. It removes provisions that apply specific offences in Scotland, England and Wales and Northern Ireland to service providers established in those parts of the UK respectively where those service providers offer ISS in the EEA. The extreme pornography offence is only referred to in regulation 3 of the e-Commerce Regulations 2018 (which is being removed by the SI), and so the definition of that offence (provided in Regulation 2 of the 2018 Regulations) is also removed by this instrument.

7. Policy background

What is being done and why?

- 7.1 As summarised at paragraph 2.2 (Explanations), the eCommerce Regulations 2002, and the eCommerce Regulations 2018 implement various Articles of the eCommerce Directive into UK law. The primary purpose of the eCommerce Directive is to establish an internal market for online service providers operating within the EEA.
- 7.2 This Statutory Instrument is necessary for correcting deficiencies that will arise in this legislation, in a ‘no deal’ scenario with the EU. We are carrying out this course of action under the powers afforded by the EU Withdrawal Act. In line with the intent that underpins the EU (Withdrawal) Act, the guiding purpose (‘policy’) behind the draft Regulations is to maximise certainty for individuals and businesses as we leave the EU. This is so that the rules that we have now - including with respect to regulation of internet services and therefore provision of internet services in the UK - continue to apply insofar as possible.
- 7.3 The country of origin principle is a reciprocal arrangement between EEA states, from which the UK will no longer benefit in a no deal exit. This instrument removes one aspect of the implementation of the country of origin principle, which is the application of UK requirements to UK providers of ISS when providing ISS in EEA states. However, it is not possible to use the powers in the European Union (Withdrawal) Act 2018 to remove the other aspect of the implementation of the country of origin principle, which is the restriction on applying those requirements to EEA service providers when they are providing services in the UK.
- 7.4 This is because EU Withdrawal Act powers cannot be used to create a new criminal offence for which an individual is capable of being sentenced to imprisonment for more than two years. Removal of the provisions implementing the Country of Origin principle in relation to non-UK EEA service providers is likely to create a criminal offence within the meaning of the Withdrawal Act.
- 7.5 In light of this inability to remove this aspect of the Country of Origin principle which exempts EEA-based providers from UK laws, the provisions in the Regulations which allow UK authorities to derogate from the Country of Origin exemption for (non-UK) EEA online service providers are also being retained.

- 7.6 These derogation provisions allow UK authorities to apply UK regulations to EEA based online service providers and so it is in the UK's interests that these be retained while the Country of Origin exemption for online providers based in EEA states continues to be in place. However, aspects of the implementation of the derogation which require that the UK and UK regulatory bodies first seek agreement from the relevant EEA country and the Commission before derogating from the Country of Origin exemption so that they can apply laws and regulations to EEA-based providers (e.g. paragraphs 4, 5, 6 and 7 of Regulation 5 of the 2002 Regulations) are being removed.
- 7.7 All other aspects of the 'Country of Origin Principle' implementation, including provisions in the 2002 and 2018 Regulations that extend UK requirements to UK providers of ISS where they provide ISS in EEA states other than the UK, are being removed.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 Consolidation is not being done.

10. Consultation outcome

- 10.1 As the EU (Withdrawal) Act 2018 does not require a formal consultation to take place for instruments relating to exit, a public consultation was not held so as to avoid prejudicing ongoing exit negotiations, and also because of the limited scope of policy options in relation to fixing deficiencies. However a wide range of stakeholders including from across government, devolved administrations and industry was consulted on their views on the eCommerce Directive more broadly. For example, the Scottish Government was informed that it was considered by the UK Government that it was legislating in relation to a reserved area. That view was not shared by the Scottish Government. The UK Government wrote to the Scottish Government in December 2018 saying that given that both governments were closely aligned on the substance of the policy, they should proceed with their shared objective of ensuring a functioning statute book in time for EU exit, without prejudice to any ongoing discussions regarding devolved competence in that area.

11. Guidance

- 11.1 No new obligations on stakeholders will arise as a result of this Statutory Instrument, which amends legislation which implements the eCommerce Directive. Therefore we will not publish information to explain any new obligation arising from this instrument.
- 11.2 Although not a consequence of this instrument, the UK's change in status to a 'third country' in the event of a 'no deal' EU exit will mean that online services established

in the UK will no longer be able to rely on the Country of Origin principle provided for in the eCommerce Directive. This will result in UK based information society services being newly required to adhere to the rules governing online activities within each EEA state in which they operate, in a no deal scenario.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this Statutory Instrument because there is a low level of impact per business. A De-Minimis Assessment showed that, whilst there were annual time-saving benefits to certain UK businesses resulting from removal of the application of UK requirements to UK providers of ISS when providing ISS in EEA states, wider ‘transition’ costs will result in a small annual net direct cost to business of £0.9m over 10 years. Transition costs refer to the cost incurred by businesses when adjusting to new legislation, in this case the time that organisations will have to take to familiarise themselves with this new legislation.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that it will not be monitored as the changes are technical and minimal.
- 14.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required

15. Contact

- 15.1 Iona Shaw at the Department for Digital, Culture, Media and Sport Telephone: 020 7211 6439 or email: iona.shaw@culture.gov.uk can answer any queries regarding the instrument.
- 15.2 Oscar Scott-Tapping at the Department for Digital, Media, Culture and Sport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Margot James, Minister for Digital and the Creative Industries, at the Department for Digital, Media, Culture and Sport can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement(s)

1.1 The Minister for Digital and the Creative Industries Margot James has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

1.2 “In my view the Electronic Commerce (Amendment etc.) (EU Exit) Regulations 2019 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure).

1.3 This is the case because it does not meet the criteria for an affirmative procedure in the Withdrawal Act.

2. Appropriateness statement

2.1 The Minister for Digital and the Creative Industries Margot James has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Electronic Commerce (Amendment etc.) (EU Exit) Regulations 2019 does no more than is appropriate”.

2.2 This is the case because the instrument corrects legislative deficiencies arising from EU exit. It amends EU references and makes appropriate provision to correct deficiencies arising from withdrawal and to ensure the continued operation of the regulatory framework. Further detail is given in sections 6 and 7 of this explanatory memorandum.

3. Good reasons

3.1 The Minister for Digital and the Creative Industries Margot James has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

3.2 These are that the instrument addresses failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU. The policy reasons for the changes are set out in section 7 of this explanatory memorandum.

4. Equalities

4.1 The Minister for Digital and the Creative Industries Margot James has made the following statement(s):

“The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts”.

- 4.2 The Minister for Digital and the Creative Industries Margot James has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the Electronic Commerce (Amendment etc.) (EU Exit) Regulations 2018 instrument, I, The Minister for Digital and the Creative Industries, Margot James, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010”.

5. Explanations

- 5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.