

2018 No. 477

CRIMINAL LAW

ELECTRONIC COMMUNICATIONS

**The Electronic Commerce Directive (Miscellaneous Provisions)
Regulations 2018**

Made - - - - *3rd April 2018*

Coming into force in accordance with regulation 1

CONTENTS

1.	Citation, commencement and extent	2
2.	Interpretation	2
3.	Internal market – service providers established in Scotland	3
4.	Internal market – service providers established in England and Wales	4
5.	Internal market – service providers established in Northern Ireland	4
6.	Non-UK service providers – restriction on institution of proceedings	5
7.	Definition of “relevant offence” in regulations 8 to 10	5
8.	Exception for mere conduits	6
9.	Exception for caching	6
10.	Exception for hosting	7
11.	Review	7

The Secretary of State is designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to information society services(b).

The Secretary of State makes the following Regulations in exercise of the powers conferred by that section.

(a) 1972 c. 68. Section 2(2) was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c. 51) and section 3 of, and Part 1 of the Schedule to, the European Union (Amendment) Act 2008 (c. 7). The powers conferred by section 2(2) were extended, in particular, by virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c. 51). They were modified by section 45(4) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6) and section 143(1) of the Coroners and Justice Act 2009 (c. 25). Under section 57(1) of the Scotland Act 1998 (c. 46), despite the transfer to the Scottish Ministers of functions in relation to implementing obligations under EU law in respect of devolved matters, the function of the Secretary of State in relation to implementing those obligations continues to be exercisable as regards Scotland.

(b) S.I. 2001/2555.

In accordance with paragraph 2(2) of Schedule 2 to the European Communities Act 1972, as modified by section 143(2)(a) of the Coroners and Justice Act 2009^(a), a draft of these Regulations was laid before Parliament and approved by a resolution of each House of Parliament.

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Electronic Commerce Directive (Miscellaneous Provisions) Regulations 2018 and come into force on the day after the day on which they are made.

(2) Subject to paragraph (3), these Regulations extend to the United Kingdom except—

- (a) regulation 3, which extends to Scotland only;
- (b) regulation 4, which extends to England and Wales only;
- (c) regulation 5, which extends to Northern Ireland only.

(3) Regulations 6 to 10 do not extend to England and Wales insofar as they apply to the human trafficking offence.

Interpretation

2.—(1) In these Regulations—

“children’s hearings publishing restrictions offence” means an offence under section 182(2) of the Children’s Hearings (Scotland) Act 2011^(b) (publishing restrictions);

“the Directive” means Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)^(c);

“extended children’s hearings publishing restrictions offence” means an offence under article 12(2) of the Children’s Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013^(d) (publishing restrictions);

“extended fatal accident inquiries publishing restrictions offence” means an offence under article 4(1) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016^(e) (publishing restrictions in relation to children);

“extreme pornography offence” means an offence under section 51A(1) of the Civic Government (Scotland) Act 1982^(f) (extreme pornography);

“fatal accident inquiries publishing restrictions offence” means an offence under section 22(5) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016^(g) (publishing restrictions in relation to children);

“human trafficking offence” means an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004^(h) (trafficking people for exploitation);

(a) 2009 c. 25.

(b) 2011 asp 1.

(c) O.J. No. L 178, 17.7.2000, p.1. The Directive has been incorporated into the EEA Agreement by Decision 91/2000 of the EEA Joint Committee (O.J. No. L 7, 11.1.2001, p.13).

(d) S.I. 2013/1465.

(e) S.I. 2016/1142.

(f) 1982 c. 45. Section 51A was inserted by section 42(2) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13).

(g) 2016 asp 2.

(h) 2004 c. 19.

“human trafficking (Northern Ireland) offence” means an offence under section 2(1) of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015(a) (human trafficking);

“human trafficking (Scotland) offence” means an offence under section 1(1) of the Human Trafficking and Exploitation (Scotland) Act 2015(b) (human trafficking);

“information society services” has the meaning given in article 2(a) of the Directive(c);

“intimate images offence” means an offence under section 2(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016(d) (disclosing, or threatening to disclose, an intimate photograph or film);

“recipient of the service” means any person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;

“service provider” means a person providing an information society service;

“threatening communications offence” means an offence under section 6(1) of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012(e) (threatening communications);

“traffic in prostitution offence” means an offence under section 22(1) of the Criminal Justice (Scotland) Act 2003(f) (traffic in prostitution etc.).

(2) For the purposes of these Regulations—

(a) a service provider is established in a particular part of the United Kingdom or in a particular EEA state other than the United Kingdom, if the service provider effectively pursues an economic activity using a fixed establishment in that part of the United Kingdom or that EEA state, for an indefinite period and is a national of an EEA state or a company or firm mentioned in Article 54 of the Treaty on the Functioning of the European Union(g);

(b) the presence or use in a particular place of equipment or other technical means of providing an information society service does not, or itself, constitute the establishment of a service provider;

(c) where it cannot be determined from which of a number of establishments a given information society service is provided, that service is to be regarded as provided from the establishment where the service provider has the centre of his activities relating to the service,

and references to a person being established in any place must be construed accordingly.

Internal market – service providers established in Scotland

3.—(1) If—

(a) in the course of providing information society services, a service provider established in Scotland does an act in an EEA state other than the United Kingdom; and

(a) 2015 c. 2.

(b) 2015 asp 12.

(c) Article 2(a) of the Directive refers to article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22nd June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations. Directive 98/34/EC was repealed by Article 10 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9th September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification). Article 10 of Directive (EU) 2015/1535 provides that references to the repealed Directive are to be construed as references to Directive (EU) 2015/1535 and are to be read in accordance with the correlation table in Annex IV to Directive (EU) 2015/1535.

(d) 2016 asp 22.

(e) 2012 asp 1.

(f) 2003 asp 7.

(g) Cm 7310.

- (b) that act, if done in Scotland, would constitute any of the offences specified in paragraph (2),

that service provider is guilty in Scotland of that offence.

(2) The offences referred to in paragraph (1)(b) are—

- (a) the children’s hearings publishing restrictions offence;
- (b) the extreme pornography offence;
- (c) the fatal accident inquiries publishing restrictions offence;
- (d) the intimate images offence;
- (e) the threatening communications offence.

(3) Paragraph (4) applies to a service provider established in Scotland (“a Scottish service provider”) who:

- (a) is not a UK national;
- (b) at the time of the offence was not habitually resident in Scotland; and
- (c) is not a body incorporated under the law of a part of the United Kingdom.

(4) A Scottish service provider acting in the course of providing information society services commits the human trafficking (Scotland) offence if—

- (a) any part of the relevant action takes place in an EEA state other than the United Kingdom; or
- (b) the relevant action is taken with a view to a person arriving in or entering into, departing from, or travelling within, an EEA state other than the United Kingdom.

(5) For the purposes of paragraph (4), “relevant action” has the meaning given in section 1(2) of the Human Trafficking and Exploitation (Scotland) Act 2015.

(6) If paragraph (1) or (4) applies—

- (a) proceedings for the offence may be taken at any place in Scotland; and
- (b) the offence may for all incidental purposes be treated as having been committed at any such place.

Internal market – service providers established in England and Wales

4.—(1) If—

- (a) in the course of providing information society services, a service provider established in England and Wales does an act in an EEA state other than the United Kingdom; and
- (b) that act, if done in England and Wales would constitute any of the offences specified in paragraph (2),

that service provider is guilty in England and Wales of that offence.

(2) The offences referred to in paragraph (1)(b) are—

- (a) the extended children’s hearings publishing restrictions offence;
- (b) the extended fatal accident inquiries publishing restrictions offence.

(3) If paragraph (1) applies—

- (a) proceedings for the offence may be taken at any place in England and Wales; and
- (b) the offence may for all incidental purposes be treated as having been committed at any such place.

Internal market – service providers established in Northern Ireland

5.—(1) If—

- (a) in the course of providing information society services, a service provider established in Northern Ireland does an act in an EEA state other than the United Kingdom; and

- (b) that act, if done in Northern Ireland would constitute any of the offences specified in paragraph (2),

that service provider is guilty in Northern Ireland of that offence.

(2) The offences referred to in paragraph 1(b) are—

- (a) the extended children’s hearings publishing restrictions offence;
- (b) the extended fatal accident inquiries publishing restrictions offence;
- (c) the human trafficking (Northern Ireland) offence.

(3) If paragraph (1) applies—

- (a) proceedings for the offence may be taken at any place in Northern Ireland; and
- (b) the offence may for all incidental purposes be treated as having been committed at any such place.

Non-UK service providers – restriction on institution of proceedings

6.—(1) Proceedings for an offence specified in paragraph (2) may not be instituted against a non-UK service provider in respect of anything done in the course of provision of information society services unless the derogation condition is satisfied.

(2) The offences referred to in paragraph (1) are—

- (a) the children’s hearings publishing restrictions offence;
- (b) the extended children’s hearings publishing restrictions offence;
- (c) the extended fatal accident inquiries publishing restrictions offence;
- (d) the fatal accident inquiries publishing restrictions offence;
- (e) the human trafficking offence;
- (f) the human trafficking (Northern Ireland) offence;
- (g) the human trafficking (Scotland) offence;
- (h) the intimate images offence;
- (i) the threatening communications offence;
- (j) the traffic in prostitution offence.

(3) The derogation condition is satisfied where the institution of proceedings—

- (a) is necessary for the purposes of the public interest objective;
- (b) relates to an information society service that prejudices that objective or presents a serious and grave risk of prejudice to it; and
- (c) is proportionate to that objective.

(4) The public interest objective means the pursuit of public policy.

(5) In this regulation “non-UK service provider” means a service provider who is established in an EEA state other than the United Kingdom.

Definition of “relevant offence” in regulations 8 to 10

7. In regulations 8 to 10, “relevant offence” means—

- (a) the children’s hearings publishing restrictions offence;
- (b) the extended children’s hearings publishing restrictions offence;
- (c) the extended fatal accident inquiries publishing restrictions offence;
- (d) the fatal accident inquiries publishing restrictions offence;
- (e) the human trafficking offence;
- (f) the human trafficking (Northern Ireland) offence;
- (g) the human trafficking (Scotland) offence;

- (h) the threatening communications offence;
- (i) the traffic in prostitution offence.

Exception for mere conduits

8.—(1) A service provider is not capable of being guilty of a relevant offence in respect of anything done in the course of providing so much of an information society service as consists in—

- (a) the provision of access to a communication network; or
- (b) the transmission in a communication network of information provided by a recipient of the service,

if the transmission condition is satisfied.

(2) The transmission condition is that the service provider does not—

- (a) initiate the transmission;
- (b) select the recipient of the transmission; or
- (c) select or modify the information contained in the transmission.

(3) Paragraph (1)(b) does not apply if the information is information to which regulation 9 applies.

(4) For the purposes of this regulation, the provision of access to a communication network and the transmission of information in the network includes the automatic, intermediate and transient storage of information for the purpose of carrying out the transmission in the network.

(5) Paragraph (4) does not apply if the information is stored for longer than is reasonably necessary for the transmission.

Exception for caching

9.—(1) This regulation applies to information which—

- (a) is provided by a recipient of the service; and
- (b) is the subject of automatic, intermediate and temporary storage which is solely for the purpose of making the onward transmission of the information to other recipients of the service at their request more efficient.

(2) A service provider is not capable of being guilty of a relevant offence in respect of anything done in the course of providing so much of an information society service as consists in the transmission in a communication network of information to which this regulation applies if the service provider—

- (a) does not modify the information;
- (b) complies with any conditions attached to having access to the information; and
- (c) in a case to which paragraph (3) applies, expeditiously removes the information or disables access to it.

(3) This paragraph applies if the service provider obtains actual knowledge that—

- (a) the information at the initial source of the transmission has been removed from the network;
- (b) access to such information has been disabled; or
- (c) a court or administrative authority has ordered the removal from the network of, or the disablement of access to, such information.

Exception for hosting

10.—(1) A service provider is not capable of being guilty of a relevant offence in respect of anything done in the course of providing so much of an information society service as consists in the storage of information provided by a recipient of the service if—

- (a) the service provider had no actual knowledge when the information was provided that the information was part of the commission of a relevant offence; or
- (b) where the service provider subsequently obtained such knowledge, the service provider expeditiously removed the information or disabled access to it.

(2) Paragraph (1) does not apply if the recipient of the service is acting under the authority or control of the service provider.

Review

11.—(1) The Secretary of State must from time to time—

- (a) carry out a review of the regulatory provision in these Regulations, and
- (b) publish a report setting out the conclusions of the review.

(2) The first report must be published before the end of the period of five years beginning with the date on which these Regulations come into force.

(3) Subsequent reports must be published at intervals not exceeding five years.

(4) Section 30(3) of the Small Business, Enterprise and Employment Act 2015^(a) requires that a review carried out under this regulation must, so far as is reasonable, have regard to how Articles 3, 12, 13 and 14 of the Directive are implemented in other member States.

(5) Section 30(4) of the Small Business, Enterprise and Employment Act 2015 requires that a report published under this regulation must, in particular—

- (a) set out the objectives intended to be achieved by the regulatory provision referred to in paragraph (1)(a);
- (b) assess the extent to which those objectives are achieved;
- (c) assess whether those objective remain appropriate; and
- (d) if those objectives remain appropriate, assess the extent to which they could be achieved in another way which involves less onerous regulatory provision.

(6) In this regulation, “regulatory provision” has the same meaning as in sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 (see section 32 of that Act).

Margot James

Minister for Digital and the Creative Industries
Department for Digital, Culture, Media and Sport

3rd April 2018

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations give effect to Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (“the Directive”) in relation to the offences in Scotland set out in:

- section 51A(1) of the Civic Government (Scotland) Act 1982 (“extreme pornography offence”);
- section 22(1) of the Criminal Justice (Scotland) Act 2003 (“traffic in prostitution offence”);

(a) 2015 c. 26. Section 30(3) was amended by section 19 of the Enterprise Act 2016 (c. 12).

- section 182(2) of the Children’s Hearing (Scotland) Act 2011 (“children’s hearings publishing restrictions offence”);
- section 6(1) of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (“threatening communications offence”);
- section 1(1) of the Human Trafficking and Exploitation (Scotland) Act 2015 (“human trafficking (Scotland) offence”);
- section 22(5) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (“fatal accident inquiries publishing restrictions offence”); and
- section 2(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (“intimate images offence”).

The Regulations give effect to the Directive in relation to the offence in Northern Ireland set out in section 2(1) of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

The Regulations give effect to the Directive in relation to offences in England and Wales and Northern Ireland set out in:

- article 12(2) of the Children’s Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013 (“extended children’s hearings publishing restrictions offence”) (analogous to the publishing restrictions offence 2011); and
- article 4(1) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland Act) 2016 (Consequential Provisions and Modifications) Order 2016 (“extended fatal accident inquiries publishing restrictions offence”) (analogous to the publishing restrictions offence 2016).

The Regulations also give effect to the Directive in relation to the offence set out in section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, as it extends to Scotland and Northern Ireland.

The Directive (which has been incorporated into the Agreement on the European Economic Area) seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services (“ISS”) between EEA states. Article 3 provides for the regulation of ISS on a “country of origin” basis and Articles 12 to 14 require EEA states to limit, in specified circumstances, the liability of intermediary ISS providers when they provide mere conduit, caching or hosting services.

Regulations 3, 4, 5 and 6 ensure that the offences apply on a country of origin basis. Regulation 3 extends the application of the extreme pornography offence, children’s hearings publishing restrictions offence, threatening communications offence, human trafficking (Scotland) offence, fatal accident inquiries publishing restrictions offence, and the intimate images offence so that they apply to ISS providers established in Scotland not only where they provide ISS in Scotland, but also where they provide ISS in EEA states other than the UK.

Regulation 4 extends the application of the extended children’s hearings publishing restrictions offence and the extended fatal accident inquiries publishing restrictions offence so that these offences apply to ISS providers established in England and Wales not only where they provide ISS in England and Wales, but also where they provide ISS in EEA states other than the UK.

Regulation 5 extends the application of the extended children’s hearings publishing restrictions offence, the human trafficking (Northern Ireland) offence and the extended fatal accident inquiries publishing restrictions offence so that these offences apply to ISS providers established in Northern Ireland not only where they provide ISS in Northern Ireland, but also where they provide ISS in EEA states other than the UK

Regulation 6 means that service providers who are established in an EEA state other than the UK can only be prosecuted for the traffic in prostitution offence, human trafficking offence, children’s hearings publishing restrictions offence, threatening communications offence, extended children’s

hearings publishing restrictions offence, human trafficking (Northern Ireland) offence, human trafficking (Scotland) offence, fatal accident inquiries publishing restrictions offence, extended fatal accident inquiries publishing restrictions offence and intimate images offence where the conditions laid down in regulation 6(3) are met (which follows the conditions in Article 3(4) of the Directive).

Regulations 8, 9 and 10 create exceptions from liability for the traffic in prostitution offence, human trafficking offence, children's hearings publishing restrictions offence, threatening communications offence, extended children's hearings publishing restrictions offence, human trafficking (Northern Ireland) offence, human trafficking (Scotland) offence, fatal accident inquiries publishing restrictions offence and extended fatal accident inquiries publishing restrictions offence for intermediary ISS providers when they provide mere conduit, caching or hosting services in the circumstances specified by Articles 12, 13 and 14 of the Directive.

Regulation 11 relates to section 28 of the Small Business, Enterprise and Employment Act 2015 (duty to review regulatory provisions in secondary legislation). Regulation 11 requires the Secretary of State to review the operation and effect of these Regulations and publish a report within five years after they come into force and within every five years after that. Following a review it will fall to the Secretary of State to consider whether the Regulations should remain as they are, or be revoked or be amended. A further instrument would be needed to revoke the Regulations or to amend them, if the Secretary of State so decides.

A Transposition Note has been produced for these Regulations and is published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.