Changes to legislation: *The Electronic Commerce Directive (Miscellaneous Provisions) Regulations 2018 is up to date with all changes known to be in force on or before 25 November 2019. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

STATUTORY INSTRUMENTS

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

The Secretary of State is designated for the purposes of section 2(2) of the European Communities Act 1972 [F1] in relation to information society services [F2].

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

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 [F3], a draft of these Regulations was laid before Parliament and approved by a resolution of each House of Parliament.

F1 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.

F2 S.I. 2001/2555.

F3 2009 c. 25.

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 [F4] (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) [F5];

"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 [F6] (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 [F7] (publishing restrictions in relation to children);

"extreme pornography offence" means an offence under section 51A(1) of the Civic Government (Scotland) Act 1982 [F8] (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 [F9] (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 [F10] (trafficking people for exploitation);

"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 [F11] (human trafficking);

"human trafficking (Scotland) offence" means an offence under section 1(1) of the Human Trafficking and Exploitation (Scotland) Act 2015 [F12] (human trafficking);

"information society services" has the meaning given in article 2(a) of the Directive [F13];

"intimate images offence" means an offence under section 2(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 [F14] (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 [F15] (threatening communications);

"traffic in prostitution offence" means an offence under section 22(1) of the Criminal Justice (Scotland) Act 2003 [F16] (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 [F17];

(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.

F4 2011 asp 1.
F5 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).
F6 S.I. 2013/1465.
F7 S.I. 2016/1142.
F8 1982 c. 45. Section 51A was inserted by section 42(2) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13).
F9 2016 asp 2.
F10 2004 c. 19.
F11 2015 c. 2.
F12 2015 asp 12.
F13 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.
F14 2016 asp 22.
F15 2012 asp 1.
F16 2003 asp 7.
F17 Cm 7310.

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

(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;