

Transposition Note for the Electronic Commerce Directive (Miscellaneous Provisions) Regulations 2018

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”)

These Regulations implement the Directive specifically in the context of the offences under:

- Section 51A(1) of the Civic Government (Scotland) Act 1982 (“extreme pornography offence”);
- The Directive has already been implemented in relation to the human trafficking offence as it extends to England and Wales - see the Electronic Commerce Directive (Trafficking People for Exploitation) Regulations 2013 (SI 2013/817).
- Section 4 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (“human trafficking offence”);¹
- Section 182(2) of the Children’s Hearings (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”);
- 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”);
- Section 1(1) Human Trafficking and Exploitation (Scotland) Act 2015 (“human trafficking (Scotland) offence”);
- 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”);
- Section 2(1) Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 (“human trafficking (Northern Ireland) 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 Directive was incorporated into the EEA Agreement by Decision 91/2000 of the EEA Joint Committee.

¹ The Directive has already been implemented in relation to the human trafficking offence as it extends to England and Wales - see the Electronic Commerce Directive (Trafficking People for Exploitation) Regulations 2013 (SI 2013/817).

Article	Objective	Implementation	Responsibility
3 Internal Market	<p>Article 3 is intended to contribute to the smooth functioning of the Internal Market by promoting the free movement of information society services among EEA states. It requires the regulation of information society services on a country of origin basis.</p>	<p>See below.</p>	<p>Secretary of State</p>
3 (1)	<p>Paragraph (1) of Article 3 requires each EEA state to ensure that information society services provided by service providers established on its territory comply with the national provisions applicable in that EEA state which fall within the “coordinated field”, even where the information society services are provided in another EEA state.</p>	<p>Regulation 3 extends the application of:</p> <ul style="list-style-type: none"> • the extreme pornography offence; • the intimate images offence; • the children’s hearings publishing restrictions offence; • the fatal accident inquiries publishing restrictions offence; and • the threatening communications offence; and • the human trafficking (Scotland) offence) <p>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.</p> <p>Regulation 4 extends the application of the:</p> <ul style="list-style-type: none"> • extended children’s hearings publishing restrictions offence; and • extended fatal accident inquiries publishing restrictions offence. <p>to ISS providers established in England and Wales not only where they provide</p>	<p>Secretary of State</p>

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		<p>ISS in England and Wales, but also where they provide ISS in EEA states other than the UK.</p> <p>Regulation 5 extends the application of the:</p> <ul style="list-style-type: none"> • extended children’s hearings publishing restrictions offence; • extended fatal accident inquiries publishing restrictions offence; and • The human trafficking (Northern Ireland) offence. <p>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</p>	
3 (2) (4) (5)	<p>Paragraph (2) of Article 3 provides that EEA states may not, for reasons falling within the “coordinated field”, restrict the freedom to provide information society services from another EEA state. However, it is permissible to derogate from this rule if the conditions set out in paragraph (4) of Article 3 are satisfied. By virtue of this provision, EEA states may take measures to restrict the freedom to provide information society services from another EEA state where such measures are necessary for reasons including</p>	<p>Regulation 6 means that proceedings for the following offences:</p> <ul style="list-style-type: none"> • the extended children’s hearings publishing restrictions offence; • the extended fatal accident inquiries publishing restrictions offence; • the human trafficking offence; • the human trafficking (Northern Ireland) offence; • the human trafficking (Scotland) offence; • the intimate images offence; • the children’s hearings publishing restrictions offence; 	Secretary of State

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	<p>public policy. The measures must be taken in relation to an information society service that prejudices, or presents a serious and grave risk of prejudice, to the above objectives and they must be proportionate to those objectives. Except where court proceedings and acts carried out in the framework of a criminal investigation are concerned, before taking restrictive measures an EEA state must take the steps mentioned in paragraph (4)(b) to ensure cooperation with the Commission and the EEA state in which the service provider in question is established. Paragraph (5) of Article 3 provides that the steps in paragraph (4)(b) may be dispensed with in urgent cases..</p>	<ul style="list-style-type: none"> • the fatal accident inquiries publishing restrictions offence ; • the threatening communications offence; and • the traffic in prostitution offence. <p>may not be brought against information society service providers who are established in an EEA state other than the UK unless the condition set out in Regulation 6(3) is satisfied.</p>	
12 to 14	<p>Articles 12 to 14 are intended to promote the smooth functioning of the Internal Market by seeking to remove disparities in the liability of intermediary information society service providers.</p>	See below.	Secretary of State
12	<p>‘Mere conduit’</p> <p>Paragraphs (1) and (2) of Article 12 require EEA states to ensure that intermediary service providers who merely transmit information provided by a recipient of a service</p>	<p>Regulation 8 ensures that the intermediary service providers covered by Article 12 are not capable of being guilty of a relevant offence under:</p> <ul style="list-style-type: none"> • the extended children’s hearings publishing restrictions offence; 	Secretary of State

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	<p>or provide access to a communication network are not liable for the information transmitted provided certain conditions are satisfied. The conditions are 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.</p>	<ul style="list-style-type: none"> • the extended fatal accident inquiries publishing restrictions offence; • the human trafficking offence; • the human trafficking (Northern Ireland) offence; • the human trafficking (Scotland) offence; • the children’s hearings publishing restrictions offence; • the fatal accident inquiries publishing restrictions offence; • the threatening communications offence; and • the traffic in prostitution offence. <p>provided conditions reflecting those set out in Article 12 are satisfied.</p>	
13	<p>‘Caching’</p> <p>Article 13(1) requires EEA states to ensure that intermediary service providers who transmit information are not liable for the automatic and temporary storage of information supplied by a recipient of a service, where such storage is performed solely for the purpose of making more efficient the information’s onward transmission to other recipients of the service upon their request, provided certain conditions are satisfied. The conditions are that the service</p>	<p>Regulation 9 ensures that the intermediary service providers covered by Article 13 are not capable of being guilty of a relevant offence under:</p> <ul style="list-style-type: none"> • the extended children’s hearings publishing restrictions offence; • the extended fatal accident inquiries publishing restrictions offence; • the human trafficking offence; • the human trafficking (Northern Ireland) offence; • the human trafficking (Scotland) offence; • the children’s hearings publishing restrictions offence; 	Secretary of State

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	<p>provider: (a) does not modify the information, (b) complies with conditions on access to the information, (c) complies with rules regarding the updating of information, specified in a manner widely recognised and used by industry, (d) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information, and (e) acts expeditiously to remove or disable access to the information stored upon obtaining actual knowledge of the fact that the information has been removed or access to it has been disabled at the initial source of transmission or a court or administrative authority made an order to such effect.</p>	<p>restrictions offence; <ul style="list-style-type: none"> • the fatal accident inquiries publishing restrictions offence ; • the threatening communications offence; and • the traffic in prostitution offence. <p>provided conditions reflecting those set out in Article 13 are satisfied.</p> </p>	
14	<p>‘Hosting’</p> <p>Article 14 requires EEA states to ensure that intermediary service providers who provide a service consisting of the storage of information are not liable for information stored at the request of a recipient of the service as long as the service provider: (a) does not have actual knowledge of illegal activity or information, or (b) upon</p>	<p>Regulation 10 ensures that the intermediary service providers covered by Article 14 are not capable of being guilty of a relevant offence under:</p> <ul style="list-style-type: none"> • the extended children’s hearings publishing restrictions offence ; • the extended fatal accident inquiries publishing restrictions offence ; • the human trafficking offence; • the human trafficking (Northern 	Secretary of State.

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	<p>obtaining such knowledge or awareness, the service provider acts expeditiously to remove or disable access to the information. EEA states are not required to protect a service provider from liability where the recipient of the service is acting under the authority or control of the service provider.</p>	<p>Ireland) offence;</p> <ul style="list-style-type: none"> • the human trafficking (Scotland) offence; • the children’s hearings publishing restrictions offence ; • the fatal accident inquiries publishing restrictions offence; • the threatening communications offence; and • the traffic in prostitution offence. <p>provided conditions reflecting those set out in Article 14 are satisfied.</p>	