
DRAFT STATUTORY INSTRUMENTS

2010 No. ***

ELECTRONIC COMMUNICATIONS

CRIMINAL LAW, ENGLAND AND WALES

**The Electronic Commerce Directive (Hatred against Persons on
Religious Grounds or the Grounds of Sexual Orientation)
Regulations 2010**

Made - - - - **** 2010*
Coming into force - - **** 2010*

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.

Citation and commencement

1. These Regulations may be cited as the Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010 and shall come into force on the day after the day on which they are made.

Interpretation

2.—(1) In these Regulations—

“the 1986 Act” means the Public Order Act 1986(c);

“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)(d);

(a) 1972 c. 68. The powers conferred by section 2(2) of that Act were extended by virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c. 51), and modified by section 143(1) of the Coroners and Justice Act 2009 (c. 25).
(b) S.I. 2001/2555.
(c) 1986 c. 64.
(d) 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).

“hatred on the grounds of sexual orientation” has the meaning given by section 29AB of the 1986 Act (meaning of “hatred on grounds of sexual orientation”)(a);

“information society services”—

- (a) has the meaning given in Article 2(a) of the Directive (which 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(b)); and
- (b) is summarised in recital 17 of the Directive as covering “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service”;

“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;

“relevant offence” means an offence under Part 3A of the 1986 Act (hatred against persons on religious grounds or grounds of sexual orientation);

“religious hatred” has the meaning given by section 29A of the 1986 Act (meaning of “religious hatred”); and

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

(2) For the purposes of these Regulations—

- (a) a service provider is established in a particular EEA state if he effectively pursues an economic activity using a fixed establishment in that EEA state for an indefinite period and he is a national of an EEA state or a company or firm as mentioned in Article 54 of the Treaty on the Functioning of the European Union;
- (b) the presence or use in a particular place of equipment or other technical means of providing an information society service does not, of 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: England and Wales service providers

3.—(1) If—

- (a) in the course of providing information society services, a service provider established in England and Wales does anything in an EEA state other than the United Kingdom, and
- (b) his action, if done in England and Wales, would constitute a relevant offence,

he shall be guilty in England and Wales of the offence.

(2) 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.

(a) Section 29AB was inserted by paragraph 4 of Schedule 16 to the Criminal Justice and Immigration Act 2008 (c. 4).

(b) O.J. No. L 204, 21.7.1998, p. 37, as amended by Directive 98/48/EC (O.J. No. L 217, 5.8.1998, p. 18); there are other amendments but none is relevant.

Internal market: non-UK service providers

4.—(1) Proceedings for a relevant offence shall 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 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.

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

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

Exception for mere conduits

5.—(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 6 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

6.—(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—

- (a) the service provider does not modify the information;
- (b) he complies with any conditions attached to having access to the information;
- (c) in a case to which paragraph (3) applies, the service provider 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

7.—(1) A service provider is only 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 knew when the information was provided that it was threatening and was provided with the intention of stirring up religious hatred or hatred on the grounds of sexual orientation; or
- (b) upon obtaining actual knowledge that the information was threatening and was provided with the intention of stirring up religious hatred or hatred on the grounds of sexual orientation, the service provider did not expeditiously remove the information or disable 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.

Revocation

8.—(1) The Electronic Commerce Directive (Racial and Religious Hatred Act 2006) Regulations 2007(a) are revoked, but that revocation shall not have effect in relation to a relevant offence committed wholly or partly before the coming into force of these Regulations.

(2) For the purposes of paragraph (1) an offence is committed wholly or partly before the coming into force of these Regulations if any of the conduct or events alleged to constitute the offence occurred before the coming into force of the Regulations.

Signed by the authority of the Secretary of State

Name
Parliamentary Under Secretary of State
Ministry of Justice

Date

(a) S.I. 2007/2497.

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 of stirring up hatred against persons on religious grounds or on the grounds of sexual orientations contained in Part 3A of the Public Order Act 1986 (“the 1986 Act”). Part 3A was originally inserted into the 1986 Act by the Racial and Religious Hatred Act 2006, which created a number of offences in England and Wales relating to the stirring up of religious hatred. The Directive was given effect in relation to those offences by The Electronic Commerce Directive (Racial and Religious Hatred Act 2006) Regulations 2007 (“the 2007 Regulations”), which these Regulations revoke. Section 74 of and Schedule 16 to the Criminal Justice and Immigration Act 2008 (“the 2008 Act”) amend Part 3A of the 1986 Act so as to extend the offences in England and Wales which previously related to the stirring up of religious hatred so that they now relate also to the stirring up of hatred on the grounds of sexual orientation.

The Directive (which has been incorporated into the EEA agreement) 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 and 4 ensure that offences under Part 3A of the 1986 Act apply on a country of origin basis. Regulation 3 extends the application of the offences under Part 3A of the 1986 Act 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 4 means that service providers who are established in an EEA state other than the UK can only be prosecuted for an offence under Part 3A of the 1986 Act where the conditions laid down in Article 3(4) of the Directive are satisfied.

Regulations 5, 6 and 7 create exceptions from liability for the offences under Part 3A of the 1986 Act 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 8 revokes the 2007 Regulations, although the revocation does not have effect in relation to offences committed wholly or partly before these Regulations come into force. This means that the 2007 Regulations will continue to apply to any offences of stirring up religious hatred committed wholly or partly before these Regulations come into force.

A Transposition Note has been prepared for these Regulations. This is available from the Criminal Law Policy Unit, Ministry of Justice, 102 Petty France, London, SW1H 9AJ. A Regulatory Impact Assessment was prepared for the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) (which generally implemented the Directive in relation to legislation already passed or made when those Regulations were made). A copy of the latter is available from the Europe and International Competitiveness Unit, Department for Business Innovation and Skills, 1 Victoria Street, London SW1H 0ET.

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