EXPLANATORY MEMORANDUM TO

THE COMMUNICATIONS ACT (E-COMMERCE) (EU EXIT) REGULATIONS 2020

2020 No. 1420

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport and is laid before Parliament by Command of her Majesty.

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 ("EUWA") in order to address deficiencies arising in the operation of the Communications Act 2003 ("the 2003 Act") as a result of the United Kingdom's exit from the European Union ("EU"). This instrument will end the direct effect of Article 3 of the Electronic Commerce Directive ("eCD") on sections 120-124 and 128-131 of the 2003 Act, where it would otherwise become retained EU law following the end of the transition period. Explanations

What did any relevant EU law do before exit day?

2.2 The eCD seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between European Economic Area ("EEA") states and approximating EEA states' laws concerning the regulation and provision of information society services.

2.3 An information society service is any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of the service. Examples include, but are not limited to: online retailers, video sharing sites, search tools, social media platforms and internet service providers. The eCD has been incorporated into the Agreement on the European Economic Area.

2.4 Article 3 of the eCD sets out "country of origin" rules in relation to the regulation of information society services. Generally, these rules provide that, within the "coordinated field" of the eCD, 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.

2.5 Where the UK regulates information society services within the co-ordinated field, such regulation must extend to information society services established in the UK, even where such services are provided elsewhere in the EEA (Article 3(1)). The UK must not restrict the freedom of a person established in another EEA state to provide information society services falling within the "coordinated field" in the UK (Article 3(2)). It is, however, possible to derogate from Article 3(2) if certain conditions are met (Article 3(4)).

2.6 The eCD was originally implemented by the e-Commerce Regulations 2002 (SI 2002/2013). However, those regulations only apply in relation to legislation passed before the date on which the e-Commerce Regulations 2002 were made. For

legislation that postdates the e-Commerce Regulations 2002, Articles 3 and 12-14 of the eCD have been implemented on a case-by-case basis.

2.7 Article 3 eCD was not expressly implemented into the 2003 Act. However, it has direct effect on certain sections of the 2003 Act by virtue of the principle of supremacy of EU law. Section 4 of the EUWA has the effect of converting certain directly effective EU rights into UK law at the end of the transition period. This means EEA based information society services will continue to be exempt from certain rules under the 2003 Act that govern online activities when operating in the UK, unless its direct effect is removed under the deficiencies power in s. 8(1) EUWA.

Why is it being changed?

2.8 The country of origin principle is an internal market measure that is in place to facilitate electronic commerce across the EEA. The country of origin principle is being removed from the Communications Act 2003 as part of the Government's preparations for the end of the transition period. After the end of the transition period, UK businesses will no longer benefit from the country of origin principle when operating in the EEA. Depending on the nature of the online services UK businesses may already comply with the new requirements. This could mean that there are little or no immediate changes they need to make to be compliant from 1 January 2021. Retaining this directly effective right would mean that EEA businesses continue to be exempt from certain UK rules, while the same benefits are not afforded to UK businesses operating in the EEA. This would give EEA based information society services preferential market access, with no reciprocity from the EEA for UK businesses.

2.9 To get permission to derogate from the country of origin principle, Member State Authorities notify the Commission and other Member States using the Internal Market Information (IMI) System. At the end of the Transition Period, IMI access will not continue unless negotiated as part of the future relationship with the EU.

2.10 Since 2002, Article 3 has been implemented into relevant pieces of legislation on a case-by-case basis. Therefore, legislation that implements Article 3 of the eCD must be identified in order to remove its effect following the end of the transition period. Sections 120-124 and 128-131 of the 2003 Act have been identified as provisions on which Article 3 eCD has direct effect. This instrument will revoke Article 3's direct effect on these provisions.

What will it now do?

2.11 By removing the direct effect of the country of origin principle on sections 120-124 and 128-131 of the 2003 Act, relevant UK regulators will be able to enforce rules established within or authorised through the 2003 Act against EEA providers without needing to meet the conditions for enforcing UK rules and follow the eCD's derogation procedure.

2.12 The Phone-paid Services Authority's Code of Practice for Premium Rate Services has been authorised by Ofcom under sections 120-121 of the 2003 Act. Ofcom retains backstop responsibility for regulating premium rate services ("PRS") under sections 123-124 of the 2003 Act. By removing the direct effect of Article 3 of the eCD from the operation of these sections of the 2003 Act, Ofcom and the Phone-paid Services Authority will no longer be required to follow the eCD's derogation procedure when seeking to take enforcement action against PRS businesses established in the EEA.

This will allow the Phone-paid Services Authority to pursue enforcement action against EEA-based PRS as they currently do for UK and non-EEA based services.

2.13 Sections 128-131 of the 2003 Act set out rules to prevent the persistent misuse of electronic communications networks and services. Ofcom has responsibility for enforcing these rules. As a result of this instrument, Ofcom will not be required to notify the relevant Member State and European Commission, under the derogation procedure, when taking action against EEA businesses that contravene these rules in the future.

2.14 The SI will also remove the extension of UK law to UK service providers' activities in other EEA states, as provided for under Article 3(1) of the eCD. This means that UK service providers will not have to simultaneously comply with both UK law and EEA law when providing services in an EEA state.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments.

3.1 This instrument was laid for procedural sifting by the ESIC and SLSC on 2 July 2020. Both Committees considered the instrument on the 14 July 2020 and recommended upgrading to the affirmative procedure. The sifting period formally closed on 21 July 2020. Both Committees cited uncertainties as to the impact of the changes on UK businesses as the reason for this. The Committees considered there to be a lack of evidence of the number of UK businesses that could fall into the scope of the instrument who would be affected in practice.

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 The territorial application of this instrument includes Scotland and Northern Ireland.

3.3 The powers under which this instrument is made cover the entire United Kingdom (see section 24 of the European Union (Withdrawal) Act 2018) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is entirety of the United Kingdom.

4.2 The territorial application of this instrument is entirety of the United Kingdom.

5. European Convention on Human Rights

5.1 The The Minister of State for Media and Data, John Whittingdale, has made the following statement regarding Human Rights:

"In my view the provision of the The Communications Act (e-Commerce) (EU Exit) Regulations 2020 are compatible with the Convention rights"

6. Legislative Context

6.1 This instrument is being made in exercise of the powers in section 8 of the EUWA 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.

6.2 Article 3 of the eCD establishes the country of origin principle, which is an EU internal market principle, which will no longer apply to the UK at the end of the transition period.

7. Policy background

What is being done and why?

7.1 As summarised at paragraph 2.1 this instrument is necessary to remove the effect of an EU internal market measure – Article 3 of the eCD – in relation to sections 120-124 and 128-131 of the 2003 Act.

7.2 This instrument is necessary to fix deficiencies in UK law to enable UK regulators (the Phone-paid Services Authority and Ofcom) to enforce provisions within and rules authorised by the 2003 Act without needing to follow the procedure to derogate from the country of origin principle contained in Article 3 of the eCD.

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

8.1 This instrument does not trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There are no plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

10.1 The EUWA 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.

10.2 The Devolved Administrations have been informed of this instrument.

11. Guidance

11.1 No new obligations on UK stakeholders will arise as a result of this instrument, which amends legislation which implements the eCD. Therefore, there are no plans to issue guidance.

11.2 Although not a consequence of this instrument, the UK's change in status to a 'third country' at the end of the Transition Period, information society services established in the UK will no longer be able to rely on the country of origin principle provided for in the eCD. This will result in UK based information society services being required to adhere to the rules governing online activities within each EEA state in which they operate.

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

there were annual time-saving benefits to certain UK businesses - for businesses that only offer services to the EEA but not the UK, we estimate an annual time-saving benefit of c.£0.05m. This is because they will no longer have to comply with UK legislation as well as the domestic legislation of the EEA state where the service is received. However, there are also wider 'transition' costs associated with moving away from the country of origin principle in the Communications Act 2003. This will result in a small annual net direct cost to all businesses in scope of £0.6m 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 The legislation does not introduce new requirements on small businesses. Instead it corrects deficiencies arising from the UK's withdrawal from the EU in legislation which applies to them. No disproportionate impact on small business is therefore expected.

14. Monitoring & review

14.1 There are no plans to monitor or review this instrument as the changes are technical and minimal.

14.2 As this instrument is made under the EUWA, no review clause is required.

15. Contact

15.1 Elisona Shala at the Department for Digital, Culture, Media and Sport Telephone: 07785382503 or email: elisona.shala@culture.gov.uk can be contacted with any queries regarding the instrument.

15.2 Oscar Tapp-Scotting, Deputy Director for Security and Online Harms, at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.

15.3 John Whittingdale MP, Minister of State for Media and Data at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.