EXPLANATORY MEMORANDUM TO

THE CRIMINAL JUSTICE (ELECTRONIC COMMERCE) (AMENDMENT) (EU EXIT) REGULATIONS 2021

2021 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument is made using powers in the European Union (Withdrawal) Act 2018 ("the Withdrawal Act"). Its purpose is to address failures in retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU by amending the domestic legislation which implements a reciprocal arrangement known as the 'Country of Origin principle' ("CoOp"). This arrangement is set out in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services ("ISS"), in particular electronic commerce, in the Internal Market, known as the e-Commerce Directive ("eCD").

Explanations

What did any law do before the changes to be made by this instrument?

2.2 The e-Commerce Directive[1] (eCD) applies to all EEA states (including EU member states), with the aim of simplifying rules for companies when operating online across borders. These rules apply to companies which meet the definition of 'information society services' (ISS), which the directive defines as any service that is normally provided:

- for payment, including indirect payment such as advertising revenue
- 'at a distance' (where customers can use the service without the provider being present)
- by electronic means, and
- at the individual request of a recipient of the service

This covers the vast majority of online service providers, for example online retailers, video sharing sites, search tools, social media platforms and internet service providers.

2.3 A key aspect of this is the eCD's CoOp, a reciprocal relationship which makes an EEA-established ISS liable (for relevant offences) only to the laws of the state in which it is established, rather than being subject to the laws of each state it operates in. This aims to make it simpler for an ISS to operate across borders, as they need only conform with one set of laws across multiple EEA countries, at least for relevant offences. The CoOp relies on reciprocity between EEA states, which ceased following the end of the

[1] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

Transition Period. Although we are not aware of any prosecutions of ISS for the offences MoJ is responsible for which implement the CoOp, and this instrument was deprioritised to ensure more urgent measures were in place ahead of the end of the Transition Period, it would be inappropriate to retain the CoOp implementation indefinitely, now the reciprocity it relies on has ceased. This instrument therefore removes implementation of the CoOp from a number of criminal justice offences, all of which implement it in a similar way. However, this instrument does not alter the offences themselves. It only removes the CoOp's jurisdictional rules for ISS operating online across borders.

Why is it being changed?

2.4 The amendments in this instrument remove implementation of these EU jurisdictional rules (the CoOp) which, due to loss of reciprocity, have not operated as intended since the end of the Transition Period. Since the end of the Transition Period UK-established ISS have to adhere to the laws of each individual EEA country they operate in, however, implementation of the CoOp (which this instrument would remove) also makes UK-established ISS liable for UK offences when operating in the EEA. This creates a dual legislative burden which arguably puts UK ISS at a competitive disadvantage. Conversely, EEA-established ISS operating in the UK can only be prosecuted for offences which include CoOp implementation if a procedural gateway for instigating proceedings is met. As these EEA based ISS will no longer be prosecuted in their 'home country' for offences here and domestic and non-EEA ISS do not benefit from any similar restrictions on prosecutions being brought against them, retaining this indefinitely is inappropriate. We are unaware of any prosecutions of ISS for the offences in question, and therefore believe the direct impact of this instrument to be low. However, it is important deficiencies in retained EU law are resolved and the law treats all ISS in a consistent way, irrespective of where they are established.

What will it now do?

2.5 The effect of removing the CoOp from all the criminal justice legislation listed in paragraph 6.2 is to:

a) remove the extension of liability for UK-established ISS for the relevant offences, so that their conduct in EEA states is only liable to the laws of the EEA state where that conduct occurs; and

b) remove a procedural gateway, which needs to be met before prosecutions can be brought against EEA established ISS when operating in the UK.

The core offences and penalties are not themselves changed in any way.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument was originally laid, under the same name, as a proposed negative with the European Statutory Instruments Committee on March 2nd this year. The Committee recommended the appropriate procedure for the instrument is for a draft of it to be laid before, and approved by, a resolution of each House of Parliament before it is made (i.e. the affirmative procedure). The Government accepted this recommendation and has updated this explanatory memorandum to respond to points raised by the committee

(see sub paragraphs 7.4 to 7.8 below). The report can be found at: https://publications.parliament.uk/pa/cm5801/cmselect/cmesic/1218/121802.htm

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)

The territorial application of this instrument varies between provisions. This instrument amends or revokes retained EU law with varying territorial application, including provisions applying to Northern Ireland and one to Scotland. In each case, this instrument amends or revokes that provision in respect of its full territorial application.

4. Extent and Territorial Application

4.1 The territorial extent and application of this instrument varies between provisions. An amendment made by this instrument has the same extent and application as the provision amended. Regulation 4 extends to the UK; Regulations 5,6,7, and 9 extend to England and Wales and Northern Ireland; Regulations 3, 8 and 10 extend to England and Wales. This instrument amends or revokes retained EU law with varying territorial extent, including provision extending to Northern Ireland and Scotland. In each case, this instrument amends or revokes that provision in respect of its full territorial extent.

5. European Convention on Human Rights

5.1 The Parliamentary Under-Secretary of State for Justice, Lord Wolfson of Tredegar, QC, has made the following statement regarding Human Rights:

"In my view the provisions of the Criminal Justice (Electronic Commerce) (Amendment) (EU Exit) Regulations 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 These Regulations are made in exercise of the powers in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU. It makes appropriate provision to correct deficiencies arising from withdrawal.

6.2 As noted in paragraph 2.2 above, the CoOp, which provides for a reciprocal arrangement between the UK and other EEA states, ceased to operate as intended following the end of the Transition Period. The CoOp is implemented in a number of criminal justice legislative instruments. This instrument amends the following eight pieces of legislation, all of which implement the CoOp in a similar way:

- Children and Young Persons Act 1933 – Schedule 1A.
- Youth Justice and Criminal Evidence Act 1999 - Schedule 2A.
- Female Genital Mutilation Act 2003 – Schedule 1.
- Criminal Justice and Immigration Act 2008 – Schedule 14.
- Coroners and Justice Act 2009 – Schedule 12 and 13.
- Criminal Justice and Courts Act 2015 – Schedule 8.
- Serious Crime Act 2015 – Schedule 3.
- Electronic Commerce Directive (Hatred Against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010 (SI 2010/894).

7. Policy background

What is being done and why?

7.1 Following the end of the Transition Period, the eCD no longer applies in the UK. Although the UK continues to align with aspects of the policy approach taken in the eCD, including provisions on liability of intermediary service providers and general monitoring, this is not the case for the CoOp which depends on reciprocity between EEA member states. The absence of reciprocity means implementing legislation introduced when the UK was an EU member state, no longer functions as intended. This instrument therefore removes implementation of the CoOp from a range of criminal justice offences for which the MoJ is responsible. This instrument does not alter the offences in any way, nor is the MoJ aware of any prosecutions of ISS for these offences.

7.2 As it stands, implementation of the CoOp for these offences has two aspects. Firstly, it makes UK-established ISS operating in the EEA liable for certain offences under UK law in respect of their conduct in other EEA countries. Secondly it creates a procedural gateway before prosecutions can be brought against EEA established ISS for relevant offences in the UK. This was appropriate while the UK was in the EU as, under CoOp rules, the EEA established ISS would be prosecuted in its home country for conduct here. Since the end of the Transition Period, however, the CoOp no longer applies to the UK which means that UK ISS are liable to the law of each EEA country they operate in and EEA states will not prosecute their 'locally established' ISS for offences here.

7.3 The amendments in this instrument will fully remove implementation of the CoOp from the offences identified in paragraph 6.2, addressing the failure in retained EU law which implements the CoOp. This will establish a fairer and clearer system, ensuring ISS will be treated in the same way, irrespective of whether they are established in the UK, the EEA or another foreign country. Failing to bring forward these amendments to remove the CoOp from relevant legislation would maintain:

i) **A dual legislative burden for UK-established ISS when operating in the EEA**. This occurs because UK-established ISS remain liable under UK law for their conduct when operating in EEA states, but they no longer benefit from the restriction on prosecutions being instigated against them in those states for the same conduct. This has the effect of requiring UK-established ISS to adhere both to UK law and the law of the EEA state they are operating in.

ii) **A gap in liability for EEA-established ISS when operating in the UK**. This occurs because retaining the procedural gateway for proceedings against EEA-established ISS, while they are no longer subject to the law of their home country for their conduct in the UK, means they may not be fully accountable under either legal system.

As mentioned above we are not aware of any prosecutions of ISS for these offences so consider these issues to be largely theoretical rather than practical. Indeed, that is why this legislation is being brought forward now rather than before the end of the Transition Period.

Response to concerns raised by the European Statutory Instrument Committee

7.4 The sifting committee raised concerns that removing the extension of liability for UK ISS operating in the EEA could dilute regulation of the international effect of publication of certain kinds of material (particularly online material with global reach)

as it is not clear whether equivalent offences exist across the EEA. To understand if such an impact may occur, they asked if MoJ conducted a review of whether parallel offences exist in each EEA state.

7.5 However, the CoOp was never intended to contribute to the wider regulation of publication of illicit materials internationally. It applies only to organisations meeting the definition of ISS and only to activity in the EEA. Rather, its purpose was to make it easier for these organisations to operate in multiple countries by simplifying the regulatory framework which applies to them. Whilst in theory the CoOp makes it possible to prosecute UK-based ISSs, and in some cases individuals, for conduct that occurs in EEA states, in practice we are not aware of any such prosecutions and, it is the government's view that the removal of the CoOp as a result of UK withdrawal from the EU does not necessarily mean that the CoOP should be replaced by another measure to allow the UK to prosecute conduct that took place in an EEA state. Generally, the Government's view is that criminal offending is best dealt with by the criminal justice system of the state where the offence took place. In any event, concerns arising due to changes flowing from the end of a reciprocal arrangement with EEA states by leaving in place rules that are limited to operations of UK ISS in the EEA and depend on our membership of the EU, when we are no longer a member, would not be an effective approach. Where UK courts do have jurisdiction to try offences committed by UK nationals or residents outside the UK, the offences may be committed anywhere in the world, not just in the EEA.

7.6 More generally, the deficiencies in retained EU law implementing the CoOp relating to UK ISS operating in the EEA (identified in paragraph 6.2 above) apply irrespective of whether parallel offences exist or not. **Where parallel offences do exist**, the burden to UK ISS is that they could be held liable for conduct in the EEA state in which the conduct itself took place, as well as in the UK. This could result in two sets, or, 'parallel' proceedings being brought against the ISS, the increased cost of defending two cases and potentially two sets of sanctions. It's also potentially an unnecessary use of UK taxpayers' money – instigating proceedings against the UK ISS when they are already underway abroad. **Where parallel offences do not exist**, failing to make these amendments could result in proceedings being brought against conduct which was legal in one state but not the other. This could put UK ISS at a competitive disadvantage as they would need to comply with two regulatory frameworks (that of the UK and the country they are operating in), while their competitors in that country would only have one (the country they are established in). It would also be inconsistent with a key principle of extraterritorial jurisdiction which usually applies only if the offending behaviour is an offence in the country where it occurred as well as amounting to an offence if it had occurred in the UK (dual criminality).

7.7 As removal of the CoOp is a necessary consequence of the UK's withdrawal from the EU, irrespective of whether parallel offences exist, a full review of the law of each of the EEA states was considered unnecessary. It would have been disproportionately time-consuming and expensive, requiring expert external legal advice be commissioned looking for offences in each EU and EEA state. Even in the simplest situation, in which there were directly analogous offences in every EEA state, this would have involved us identifying and verifying several hundreds of foreign offences.

7.8 We are not aware of any proceedings against ISS for these offences, let alone anywhere these jurisdictional rules have been applied. Removal of the CoOp will only bring regulation of UK ISS operating in the EEA in line with their operation in other foreign

countries, and does not affect our ability to prosecute UK nationals or residents who commit offences outside the UK where our courts have jurisdiction to do so. Even if it did, where UK-established ISS do need to be held accountable for any conduct abroad that should be done in the same way whether they are operating in an EEA state or not.

7.9 In light of the UK's withdrawal from the EU and the end of the reciprocal arrangements on this point, it is appropriate, in the interests of fairness and clarity, that these laws are revoked without further hesitation.

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

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

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

10. Consultation outcome

10.1 There has been no formal consultation on this instrument. The amendments are a consequence of EU Exit and made under powers in the European Union (Withdrawal) Act 2018 to amend deficiencies resulting from Exit. There is a limited scope of alternative options to amend the relevant legislation and we judge that our amendments will produce a preferable outcome as compared to 'doing nothing' and leaving the legislation as it is.

10.2 DCMS published guidance on how the eCD will operate following the end of the Transition Period (see para 11.1 below).

11. Guidance

11.1 The MoJ has no plans to produce guidance on this instrument, not least because we are unaware of any prosecutions of ISS for the offences concerned, so we anticipate the impact, if any, to be low. Government guidance on how the eCD works more generally was published by the DCMS and is available at: https://www.gov.uk/guidance/the-ecommerce-directive-and-the-uk

12. Impact

12.1 There is no significant impact on business, charities, voluntary bodies, nor the public sector.

12.2 An Impact Assessment has not been prepared for this instrument because the impact will be minimal. The amendments to domestic legislation in this instrument merely correct EU exit related deficiencies. We are not aware of any prosecutions of ISS for these offences, let alone any use of the CoOp's jurisdictional rules this instrument will remove.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed as the legislation reduces the regulatory burden on UK businesses operating abroad. There will be a small increase on the regulatory burden for EEA-established ISS operating in the UK but this only brings them in line with UK ISS and non-EEA ISS. Due to the lack of prosecutions, the impacts on small business will be minimal.

14. Monitoring & review

14.1 As this instrument is made under the European Union Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Jon Burland at the Ministry of Justice Telephone: 07732 648541 or email: jon.burland1@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Kristen Tiley, Deputy Director, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Wolfson of Tredegar, QC, Parliamentary Under Secretary of State at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained

		include these statements alongside all EUWA SIs	law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Parliamentary Under Secretary of State, Lord Wolfson of Tredegar, QC, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Criminal Justice (Electronic Commerce) (Amendment) (EU Exit) Regulations 2021 does no more than is appropriate".

1.2 This is the case because: by revoking and amending the legislation that implemented the CoOp as required by the eCD, these Regulations do no more than remedy the deficiencies arising from Exit.

2. Good reasons

2.1 The Parliamentary Under Secretary of State, Lord Wolfson of Tredegar, QC, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

2.2 These are: that the Criminal Justice (Electronic Commerce) (Amendment) (EU Exit) Regulations 2021 amend legislation that implemented the UK's obligations under the eCD, specifically the CoOp which no longer operate effectively. Further details regarding the reasons are set out in paragraphs 7.1 to 7.3 of this explanatory memorandum.

3. Equalities

3.1 The Parliamentary Under Secretary of State, Lord Wolfson of Tredegar, QC, has made the following statement:

"The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts."

3.2 The Parliamentary Under Secretary of State, Lord Wolfson of Tredegar, QC, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, Lord Wolfson of Tredegar, QC, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.