EXPLANATORY MEMORANDUM TO

THE ELECTRONIC COMMERCE DIRECTIVE (EDUCATION, ADOPTION AND CHILDREN) (AMENDMENT ETC.) REGULATIONS 2021

2021 No. 0000

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Education 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 These Regulations are being made under the European Union (Withdrawal) Act 2018 to address deficiencies that arise from the United Kingdom's withdrawal from the European Union ("EU").

2.2 These Regulations amend two pieces of legislation, which stem from 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, commonly referred to as the Electronic Commerce Directive ("eCD"). The pieces of legislation amended by these Regulations are Schedule 11B to the Education Act 2002 ("2002 Act"), and the Electronic Commerce Directive (Adoption and Children Act 2002) Regulations 2005 ("the 2005 Regulations").

Explanations

What did any relevant EU law do before exit day?

2.3 The eCD (which has been incorporated into the European Economic Area (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 and approximating EEA states' laws concerning the regulation and provision of information society services. The EEA Agreement brings EU member states plus Iceland, Liechtenstein and Norway together in the single market. ISS refers to any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing and storage of data, at the individual request of a recipient of the service e.g. an internet service provider,

2.4 Article 3 of the Directive sets out the country of origin ("CoO") principle in relation to the regulation of ISS. Generally, this principle provides that, within the "coordinated field", ISS 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. This meant that, whilst the UK was a member of the EAA, where the UK regulated information society services within the co-ordinated field, such regulation must extend to information society services provided by persons established in the UK, even where such services are provided elsewhere in the EEA (Article 3(1)). In addition, for services falling within the "coordinated field", the UK must not restrict the freedom of a person established in another EEA state to provide those services in the UK (Article 3(2)).

2.5 Schedule 11B to the 2002 Act and the 2005 Regulations gave effect to the CoO principle in two particular contexts. Specifically, they made provision relating to the prosecution of certain criminal offences ("relevant offences") created by the 2002 Act and, further to modifications made by the 2005 Regulations, the Adoption and Children Act 2002 ("ACA 2002").

2.6 The relevant provision in the 2002 Act relates to the offence at section 141G, which is committed where a person breaches a reporting restriction set out at section 141F in respect of a teacher who has been accused of an offence involving a pupil at their school.

2.7 The relevant provisions in the 2005 Regulations make provision in respect of a breach of section 92 of the ACA 2002, which imposes certain restrictions on arranging adoptions (section 93 creates the offence of breaching that prohibition). The 2005 Regulations also make provision in relation to a breach of section 123 of ACA 2002, which relates to the publishing or distributing of adoption-related advertisements (section 124 of the ACA 2002 creates the offence of breaching that prohibition).

Why is it being changed?

2.8 These Regulations amend the 2002 Act and the 2005 Regulations to remove provisions that are inappropriate following the UK's withdrawal from the EU, ensuring the law continues to function effectively. The provisions in question engage the CoO principle, a reciprocal arrangement between EU Member States, which do not apply to the United Kingdom following its exit from the EU. The removal of these provisions is necessary, therefore, to reflect the loss of this reciprocity, and as a consequence to ensure that domestic legislation continues to operate effectively post-exit.

What will it now do?

2.9 The CoO principle is a reciprocal arrangement between EEA states, from which the UK no longer benefits as it has left the EU. These Regulations disapply that principle as it relates to the subject matter of Schedule 11B to the 2002 Act (which applies to England and Wales) and the 2005 Regulations (which apply across the whole of the UK).

2.10 The amendments will mean that a domestic ISS (i.e. an ISS based in England and Wales for the purposes of Schedule 11B to the 2002 Act, and the UK for the purposes of the 2002 Regulations) will no longer be automatically treated as having committed a relevant publishing offence in England and Wales, or as the case may be the UK if they publish prohibited information in an EEA state. They will instead be subject to the laws of the EEA state in which they are operating. Equally, it will mean that any EEA ISS will not automatically be exempt from prosecution in England and Wales or as the case may be the UK.

2.11 The changes will ensure equal treatment in England and Wales, or as the case may be, the UK for all ISS worldwide, should they commit a relevant offence. It will also mitigate the risk of any breach of World Trade Organisation obligations as treating ISS in other countries and domestic ISS less favourably than those from EEA ISS would likely breach World Trade Organisation Most Favoured Nation obligations.

2.12 These Regulations therefore disapply the CoO principle as it relates to the relevant provisions in the 2002 Act and the provisions in the ACA 2002 as modified by the

2005 Regulations. This means that post EU exit, domestic ISS will not be automatically treated as having committed a relevant offence domestically if they publish restricted information in an EEA state. It will also mean that EEA ISS will not automatically be exempt from prosecution for the relevant offences in the UK.

2.13 These Regulations do not revoke any criminal offences either in the UK or across the EEA but as explained in paragraph 2.10 they will affect where ISS are liable for prosecution if they commit a relevant offence. However, it will be the case that proceedings may be commenced or continued, after these Regulations come into force, in respect of a relevant offence committed before the coming into force of these Regulations.

2.14 The changes will ensure equal treatment in England and Wales or as the case may be the UK for all ISS worldwide should they commit a relevant offence.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument was sent to the sifting committees on 25 June 2019. The sifting committees recommended that the instrument be upgraded to the affirmative procedure highlighting the removal of the country of origin (CoO) principle as being of policy interest. The amendments reflect the fact that CoO arrangements are necessarily reciprocal, and that such reciprocity no longer applies following the UK's exit from the European Union.

3.2 Proceeding under the affirmative procedure was approved by the then Parliamentary Under-Secretary of State for Children and Families, Kemi Badenoch.

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)

3.3 This instrument is subject to Parliamentary procedure and will be scheduled for debate, and for the purpose of Standing Order No. 83P, does not apply in its entirety to England and Wales only.

3.4 The territorial application of this instrument varies between provisions.

4. Extent and Territorial Application

4.1 These Regulations extend to the United Kingdom.

4.2 These Regulations make amendments to Schedule 11B to the 2002 Act, which extend to England and Wales.

4.3 These Regulations also amend provision in the 2005 Regulations, which extend to the United Kingdom.

4.4 The territorial application of the Regulations is the same as their extent except to the extent that the Regulations amend the 2005 Regulations in relation to sections 92 and 93 of ACA 2002, in which case they apply to England and Wales only.

5. European Convention on Human Rights

5.1 The Parliamentary Under-Secretary of State for Children and Families, Vicky Ford has made the following statement regarding Human Rights:

"In my view the provisions of The Electronic Commerce Directive (Adoption and Children) Amendment Etc.) Regulations are compatible with the Convention rights."

6. Legislative Context

6.1 The Government intends to remove provisions in all UK legislation which give effect to the CoO principle in the 2002 Act and 2005 Regulations

6.2 The changes are being made under powers in the European Union (Withdrawal) Act 2018.

6.3 These Regulations amend Schedule 11B to the 2002 Act. Section 141F of the 2002 Act prohibits information being published that identifies a teacher accused of committing a criminal offence by, and against, a pupil in a school in England and Wales. This restriction is predominately intended to ensure anonymity of a teacher who is the subject of the allegation pending prosecution for the offence, or the Secretary of State announcing a disciplinary investigation or a decision on the matter. Section 141G of the 2002 Act creates an offence of breaching the reporting restrictions in section 141F. Paragraphs 2 and 3 of Schedule 11B to the 2002 Act give effect to the CoO principle by providing (i) that a domestic ISS who publishes information in an EEA state other than England and Wales in breach of section 141F may be treated as having committed the offence in England and Wales, and may be tried for the offence in England and Wales, and (ii) that an ISS established in an EAA state other than England and Wales may not be prosecuted for an offence under section 141G.

6.4 These Regulations also amend the 2005 Regulations, which were made under section 2(2) of the European Communities Act 1972. The 2005 Regulations modified provision in ACA 2002 in relation to the place where prosecutions for certain criminal offences under ACA 2002 would be dealt with. The effect of the modifications made by the 2005 Regulations in respect of ACA 2002 is to provide that ISS established in the UK that publishes or distributes adoption related material in another EEA state in breach of section 92 or 123 of the Act (an offence under sections 93 and 124 respectively), may be treated as having committed an offence in the UK and may be tried for the offence domestically. Likewise, subject to certain exceptions, non-UK EEA ISS operating in the UK would not be liable to be prosecuted for an offence under section 93 or 124 of ACA 2002.

6.5 However, it will be the case that proceedings may be commenced or continued, after these Regulations come into force, in respect of a relevant offence committed before the coming into force of these Regulations. There is no specific provision to this effect in the Regulations, but that is the effect of section 16 of the Interpretation Act 1978 (general savings).

7. Policy background

What is being done and why?

7.1 The CoO principle is a reciprocal arrangement between EEA states. It no longer applies to the UK now the UK has left the EU. These Regulations will remove provisions giving effect to the CoO principle in the eCD. These changes are necessary so that it is clear where prosecutions for criminal offences created by the 2002 Act and ACA 2002 can be brought. The amendments will mean that domestic ISS will no longer be automatically treated as having committed a relevant publishing offence in

England and Wales or as the case may be the UK if they publish prohibited information in an EEA state. They will instead be subject to the laws of the EEA state in which they are operating. Equally, it will mean that EEA ISS will not automatically be exempt from prosecution in England and Wales or as the case may be the UK.

7.2 The changes will ensure equal treatment in the UK and, as the case may be, England and Wales for all ISS worldwide, should they commit a relevant publishing offence. It will also mitigate the risk of any breach of World Trade Organisation obligations as treating ISS in other countries and domestic ISS less favourably than those from EEA ISS would likely breach World Trade Organisation Most Favoured Nation obligations.

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 UK 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 Since these Regulations do no more than disapply the country of origin principle as it relates to the subject matter of Schedule 11B to the 2002 Act and the 2005 Regulations, there are no plans to undertake a consolidation exercise.

10. Consultation outcome

10.1 The Department has not undertaken a formal public consultation. DCMS (the department responsible for the eCD parent legislation) has consulted a wide range of stakeholders on the eCD more broadly.

11. Guidance

11.1 There is no guidance associated with the eCD and the legislation being amended, and no future guidance is planned. However, DCMS has published general guidance in relation to the eCD at ttps://www.gov.uk/government/publications/ecommerce-eu-exit-guidance.

12. Impact

12.1 There is no significant impact on the public sector.

12.2 There is no significant impact on the private sector.

12.3 A Regulatory Triage Assessment (RTA) has been completed. The RTA assesses low cost and having an equivalent annual net direct cost to business which is below the £5m (de-minimis limit) cost to business, therefore a Full Impact Assessment has not been completed.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses but does apply to non-profit making voluntary adoption agencies who charge local

authorities a fee to recruit, assess and approve families for children for whom adoption is the plan

13.2 The amendments will have little effect on voluntary adoption agencies. They will ensure the future operability of the legislation when the UK leaves the EU and ensure all ISS worldwide are treated equally in the UK if they commit a relevant publishing offence.

14. Monitoring & review

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

15. Contact

15.1 Debra Gilder at the Department for Education, email: debra.gilder@education.gov.uk can be contacted with any queries regarding the instrument in so far as it amends The Electronic Commerce Directive (Adoption and Children Act 2002) Regulations 2005.

15.2 Lisa Binks at the Department for Education, email: lisa.binks@education.gov.uk can be contacted with any queries regarding the instrument in so far as it amends Schedule 11B to the Education Act 2002.

15.3 John Myers, Deputy Director for the Adoption, Care Leavers, Children's Rights and Family Justice Division and Sue Whitehouse, Deputy Director for Independent Education Division at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.

15.4 Vicky Ford MP, Parliamentary Under-Secretary of State for Children and Families at the Department for Education 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 include these statements alongside all EUWA SIs	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 law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
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 for Children and Families, Vicky Ford has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the amending statutory instrument - *The Electronic Commerce Directive (Education, Adoption and Children) (Amendment Etc.) Regulations 2021* - does no more than is appropriate."

1.2 This instrument corrects deficiencies in both the 2002 Act and 2005 Regulations by disapplying the country of origin (CoO) principle in relation to the relevant offences. The changes are minimal but necessary to ensure similar treatment of all ISS now the UK has left the EU and are in line with the intention that underpins the EU (Withdrawal) Act which is to maximise certainty for individuals and businesses.

1.3 The changes are consistent with the approach taken by the Department for Digital, Culture, Media and Sport who is responsible for Government policy in relation to the eCD.

2. Good reasons

2.1 The Parliamentary Under-Secretary of State for Children and Families, Vicky Ford 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 making this instrument. The CoO principle is a reciprocal arrangement between the UK and other member States, which no longer applies to the UK now that the UK has left the EU. The instrument reflects the loss of this reciprocity and ensures that domestic legislation continues to operate effectively post-exit. It will ensure equal treatment in the UK/England and Wales for all ISS worldwide, should they commit a relevant publishing offence."

3. Equalities

3.1 The Parliamentary Under-Secretary of State for Children and Families, Vicky Ford has made the following statement:

"The 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."

4. Explanations

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

5. Criminal offences

5.1 Both the 2002 Act and the 2005 Regulations make provision for where prosecutions for the relevant offences can be brought.

5.2 The amending SI will mean that domestic ISS will no longer be automatically treated as having committed the offence in the UK or, as the case may be, England and Wales if they publish prohibited information in European Economic Area (EEA) states, and any ISS established in EEA states will not automatically be exempt from prosecution in the UK / England and Wales. However, it will be the case that proceedings may be commenced or continued, after these Regulations come into force, in respect of a relevant offence committed before the coming into force of these Regulations. There is no specific provision to this effect in the Regulations, but that is the effect of section 16 of the Interpretation Act 1978 (general savings).