EXPLANATORY MEMORANDUM TO

THE ELECTRONIC COMMERCE DIRECTIVE (MISCELLANEOUS PROVISIONS) REGULATION 2018

2018 No. [XXXX]

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.

2. Purpose of the instrument

2.1 These Regulations implement the e-Commerce Directive (2000/31/EC - ECD) in relation to various offences. This is to ensure that these offences are consistent with the European law in this area, whilst we are still a member of the EU.

2.2 The full list of offences in relation to which we are implementing the ECD are listed below:

2.3 Section 51A(1) of the Civic Government (Scotland) Act 1982 ("extreme pornography offence");

2.4 Section 22(1) Criminal Justice (Scotland) Act 2003 ("traffic in prostitution offence");

2.5 Section 4 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("human trafficking offence");

2.6 Section 182(2) of the Children's Hearings (Scotland) Act 2011 ("children's hearings publishing restrictions offence");

2.7 Section 6(1) of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 ("threatening communications offence");

2.8 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");

2.9 Section 1(1) Human Trafficking and Exploitation (Scotland) Act 2015 ("Human trafficking (Scotland) offence");

2.10 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");

2.11 Section 2(1) Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 ("Human trafficking (Northern Ireland) offence");

2.12 Section 22(5) of the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 ("fatal accident inquiries publishing restrictions offence "); and

2.13 Section 2(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 ("intimate images offence").

3. Matters of special interest to Parliament

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

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument varies between provisions. See paragraph headed Extent for further information.

4. Legislative Context

4.1 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") was originally implemented by the Electronic Commerce (EC Directive) Regulations 2002 ("the E-Commerce Regulations"). However, the relevant provisions of the E-Commerce Regulations only apply in relation to Acts passed on or before the date on which the E-Commerce Regulations were made and in relation to "the exercise of a power to legislate" on or before that date. For legislation that postdates the E-Commerce Regulations, Articles 3 and 12-14 of the Directive need to be implemented on a case-by-case basis. The Directive is concerned with the regulation of "information society services" which are, broadly speaking, commercial services provided on the Internet.

4.2 Article 3 of the Directive sets out 'country of origin' rules in relation to the regulation of information society services. Generally, these rules provide that, within the "coordinated field" (as defined in the Directive), information society services must be regulated by the law of the EEA[1] 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 means that, on the one hand, where the UK regulates 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)). On the other hand, the UK must not, for services falling within the "coordinated field", restrict the freedom of a person established in another EEA state to provide information society services in the UK (Article 3(2)). It is, however, possible to derogate from Article 3(2) if certain conditions are met (Article 3(4)).

4.3 Articles 12-14 of the Directive require the UK to limit, in specified circumstances, the liability of intermediary service providers who carry out certain activities essential for the operation of the internet, namely those who act as "mere conduits" and those who "cache" or "host" information.

4.4 A Transposition Note in respect of the Directive is submitted with this EM.

4.5 The original Explanatory Memorandum 5123/99 on the Commission's draft Directive on certain legal aspects of Electronic Commerce in the internal market from the Department for Trade and Industry dated 8 February 1999 was considered by the

[1] The Directive has been incorporated into the EEA Agreement by Decision 91/2000 of the EEA Joint Committee.

European Standing Committee. The Committee reported twice in reports 9 & 28, 98/99 as legal and politically important and recommended for debate. The Debate was held in European Standing Cttee C on 27 October 1999. It was sifted to sub-committee E (sift 984) where it was cleared on 11 June 1999.

5. Extent and Territorial Application

5.1 The extent of this instrument varies between provisions.

5.2 The Regulations extend to the United Kingdom except as described below.

5.3 Regulation 3 extends to Scotland only. Regulation 3 extends the application of the extreme pornography offence, children's hearings publishing restrictions offence, threatening communications offence, human trafficking (Scotland) offence, fatal accident inquiries publishing restrictions offence, and the intimate images offence so that they apply 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.

5.4 Regulation 4, which extends to England and Wales only. Regulation 4 extends the application of the extended children's hearings publishing restrictions offence and the extended fatal accident inquiries publishing restrictions offence 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.

5.5 Regulation 5, which extends to Northern Ireland only. Regulation 5 extends the application of the extended children's hearings publishing restrictions offence, the human trafficking (Northern Ireland) offence and the extended fatal accident inquiries publishing restrictions offence so that these offences apply 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.

5.6 Regulations 6-10, insofar as they apply to the human trafficking offence, do not extend to England and Wales. Provision to implement the Directive in relation to the human trafficking offence in England and Wales was made in the Electronic Commerce Directive (Trafficking People for Exploitation) Regulations 2013 (SI 2013/817).

5.7 The territorial application of this instrument is described below:

Offences in Scotland:

5.8 Intimate images offence contained in section 2(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016;

5.9 Extreme pornography offence (under section 51A(1) of the Civic Government (Scotland) Act 1982); as inserted by the Criminal Justice and Licensing (Scotland) Act 2010)

5.10 Threatening communications offence (under section 6(1) of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012);

5.11 Accidents and Sudden Deaths etc (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016);

5.12 Traffic in prostitution offence – section 22 Criminal Justice (Scotland) Act 2003 ;

5.13 Publishing restrictions offence 2011 - Section 182 of the Children's Hearings (Scotland) Act 2011;

5.14 Human trafficking (Scotland) offence – section 1 Human Trafficking and Exploitation (Scotland) Act 2015; and

5.15 Publishing restrictions offence 2016 - section 22(5) Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016.

Offences in England and Wales and Northern Ireland:

5.16 Extended children's hearings publishing restrictions offence 2013 - Article 12(2) of the Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013 (SI 2013/1465); and

5.17 Extended fatal accident inquiries publishing restrictions offence 2016 - article 4(1) Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016.

Offences in Northern Ireland:

5.18 Human trafficking (Northern Ireland) offence – section 2 Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

Offences in Scotland and Northern Ireland:

5.19 Human trafficking offence - section 4 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

6. European Convention on Human Rights

6.1 The Minister for State for Digital and the Creative Industries, Margot James MP has made the following statement regarding Human Rights:

"In my view the provisions of the Electronic Commerce Directive (Miscellaneous Provisions) Regulations 2018 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 The E-Commerce Directive seeks to contribute to the proper functioning of the Internal Market by ensuring the free movement of Information Society Services within the EEA. One way that it seeks to achieve this is through the country of origin rules described in paragraph 4.5 above.

7.2 These Regulations are essentially a technical measure to ensure that these offences are consistent with the Directive. Please see Paragraph 5 headed Extent and Territorial Application as to how the various offences are being extended by regulations 3-5 to cover the activities of UK established providers in other EEA states.

7.3 The Government considers that these regulations will in practice only cover a small number of new cases. In many cases such providers will already be covered by these offences, because they will for example, be providing a service in question in Scotland as well as in an EEA state other than the UK.

7.4 Regulation 6 limits the circumstance in which service providers established in other EEA states but not the UK can be prosecuted for these offences.

7.5 Regulation 8 - 10 put beyond doubt the position regarding the liability of providers as conduits, caches or hosts.

Consolidation

7.6 Not applicable.

8. Consultation outcome

8.1 No consultation has been considered necessary with respect to these Regulations.

9. Guidance

9.1 No guidance will be produced in respect of this instrument.

10. Impact

10.1 The impact on business, charities or voluntary bodies is minimal.

10.2 The impact on the public sector is low.

10.3 We do not have to provide an impact assessment for this instrument as it was deemed to be under £5million threshold of costs to business by the Regulatory Policy Committee.

11. Regulating small business

11.1 The legislation applies activities that are undertaken by small businesses to the extent that such businesses provide information society services.

12. Monitoring & review

12.1 The Regulations will be reviewed within five years of the date that they come into force.

13. Contact

13.1 Jeff Alford at the Department for Digital, Culture, Media and Telephone: 07947 203470 or email: jeff.alford@culture.gov.uk can answer any queries regarding the instrument.