EXPLANATORY MEMORANDUM TO

THE ELECTRONIC COMMERCE DIRECTIVE (TRAFFICKING PEOPLE FOR EXPLOITATION) REGULATIONS 2013

2013 No. [XXXX]

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations implement the E–Commerce Directive in so far as it applies to human trafficking offences in England and Wales.

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

3.1 In defining the exception for hosting at regulation 7 of the Regulations, the Government has followed the language of the E-Commerce Directive to ensure correct implementation. Regulation 7(1) creates an exception that covers two separate points in time. The first (in sub-paragraph (a)) covers the moment in time when the information is first provided to the service provider – and here the exception will only be available if the service provider had no "actual knowledge" at that moment in time. The second (in sub-paragraph (b)) covers the scenario where the service provider obtains "actual knowledge" at some later point in time – and here the exception will only be available if the service provider expeditiously removed the information or disabled access to it.

3.2 This drafting follows precedents for previous legislation implementing the Directive and is in line with Government policy of copying out Directives when implementing.

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 E-Commerce Regulations only apply in relation to Acts passed on or after 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. Subsequently, the Electronic Commerce (EC Directive) (Extension) Regulations 2004 applied the E-Commerce Regulations to the Sexual Offences Act 2003. However, for other legislation that postdates the E-Commerce Regulations, the Directive needs to be implemented case-by-case.

4.2 The Directive is concerned with the regulation of "information society services" which are, broadly speaking, commercial services provided on the Internet.

Following amendments made by the Protection of Freedoms Act 2012, trafficking offences in England and Wales are set out in section 59A of the Sexual Offences Act 2003 and section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (the "trafficking offences"). The Directive applies to trafficking offences because, although the offences are general in their application, it is possible to commit such offences by providing commercial services on the Internet.

4.3 It is the Government's intention to commence the amendments made by the Protection of Freedoms Act 2012 on 6th April 2013. The Regulations will implement the Directive in respect of the trafficking offences from that date.

4.4 Section 143 of the Coroners and Justice Act 2009 disapplies the limitations on the penalties that can be imposed by regulations made under section 2(2) of the European Communities Act 1972 (the 1972 Act) for the purposes of implementing the Directive. These Regulations make use of the provisions in the 2009 Act by not applying the penalty limitation in the 1972 Act. This ensures that the penalties available for offences committed by virtue of these Regulations are the same as the penalties available for the trafficking offences in all other circumstances.

4.5 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 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, permissible to derogate from this latter rule if the public interest conditions and procedural requirements in Article 3(4) are satisfied.

4.6 The Government considers that the trafficking offences fall within the "coordinated field" as defined in the Directive.

4.7 Articles 12 to 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.

4.8 A Transposition Note in respect of the Directive is set out in Annex A.

4.9 The scrutiny history of the Directive is set out in Annex B.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Immigration Minister, Mark Harper, has made the following statement regarding Human Rights:

In my view the provisions of the Electronic Commerce Directive (Trafficking People for Exploitation) Regulations 2013 are compatible with the Convention rights.

7. Policy background

- What is being done and why

7.1 The 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 in which it seeks to achieve this objective 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 the trafficking offences are consistent with the Directive. Regulation 3 extends the offences in Section 59A of the Sexual Offences Act 2003 and Section 4 of the Asylum and Immigration Act 2004 to cover service providers established in England and Wales where they provide services in EEA states other than the UK. The Government considers that this will, in practice, cover a very small number of new cases. In many cases such providers will in any event be covered by the offences because, for example, they will be providing the services in question in England and Wales, as well as an EEA state other than the UK. It is expected that the public interest conditions in regulation 4, which limit the circumstances in which service providers established in other EEA states can be prosecuted for the offences, will in practice almost always be met.

7.3 Regulations 5 - 7 put beyond doubt the position regarding the liability of providers acting as conduits, caches or hosts.

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 the instrument. The Crown Prosecution Service will produce guidance to prosecutors on the trafficking offences to coincide with the introduction of the human trafficking Directive in April 2013.

10. Impact

10.1 The impact on business, charities or voluntary bodies is minimal. This is for the reasons given in paragraph 7.2.

10.2 The impact on the public sector is low. The number of prosecutions is expected to be small and the impact on the criminal justice system will therefore be negligible.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The Regulations apply to small business to the extent that such businesses provide information society services. However, any impact is negligible for the easons given in paragraph 7.2.

12. Monitoring & review

12.1 The Regulations will be reviewed within 5 years of the date they came into force.

13. Contact

David Armour at the Home Office Tel: 020 7035 4179 or email: david.armour@homeoffice.gsi.gov.uk can answer queries regarding the instrument.

Annex A

Transposition Note for the Electronic Commerce Directive (Trafficking People for Exploitation) Regulations 2013

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")

These Regulations apply the Directive specifically in the context of the offences in Section 59A of the Sexual Offences Act 2003 and amended Section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

Article	Detail	Implementation	Responsibility
3 Internal Market	Article 3 is intended to contribute to the smooth functioning of the Internal Market by promoting the free movement of information society services among EEA states[1]. It requires the regulation of information society services on a country of origin basis.	See below.	
3(1)	Paragraph (1) of Article 3 requires each EEA state to ensure that information society services provided by service providers established on its territory comply with the national provisions applicable in that EEA state which fall within the "coordinated field", even where the information society services are provided in another EEA state.	Regulation 3 extends the application of section 59A of the Sexual Offences Act 2003 and section 4 of the Asylum and Immigration Act 2004 to established service providers in England and Wales when they provide services in EEA states other than the UK.	Secretary of State
3(2), (4) and (5)	Paragraph (2) of Article 3 provides that EEA states may not, for reasons falling within the "coordinated field", restrict the freedom to provide information society services from another EEA state. However, it is permissible to derogate from this rule if the conditions set out in paragraph (4) of Article 3 are satisfied. By virtue of this provision, EEA states may take measures to restrict the freedom to provide information society services from another EEA state where such measures are necessary for reasons including public policy. The measures	Regulation 4 means that proceedings for an offence under section 59A of the Sexual Offences Act 2003 and section 4 of the Asylum and Immigration Act 2004 may not be brought against information society service providers who are established in an EEA state other than the UK unless the conditions set out in paragraph (4) of Article 3 are satisfied, where required. There is no requirement to comply with the cooperation steps in	Secretary of State

[1] The Directive was incorporated into the EEA agreement by Decision 91/2000 of the EEA Joint Committee; the definitions of "EEA agreement" and "EEA state" inserted into Schedule 1 to the Interpretation Act 1978 by section 26 of the Legislative and Regulatory Reform Act 2006 are adopted in this note.

	must be taken in relation to an information society service that prejudices, or presents a serious and grave risk of prejudice, to the above objectives and they must be proportionate to those objectives. Except where court proceedings and acts carried out in the framework of a criminal investigation are concerned, before taking restrictive measures an EEA state must take the steps mentioned in paragraph (4)(b) to ensure cooperation with the Commission and the EEA state in which the service provider in question is established. Paragraph (5) of Article 3 provides that the steps in paragraph (4)(b) may be dispensed with in urgent cases.	paragraph (4)(b) before bringing proceedings for an offence under section 59A of the Sexual Offences Act 2003 and section 4 of the Asylum and Immigration Act 2004, as bringing such proceedings falls under the exception in paragraph (4)(b) for court proceedings and criminal investigations.	
12 to 15 Liability of intermediary service providers	Articles 12 to 15 are intended to promote the smooth functioning of the Internal Market by seeking to remove disparities in the liability of intermediary information society service providers.	See below.	
12	'Mere conduit' Paragraphs (1) and (2) of Article 12 require EEA states to ensure that intermediary service providers who merely transmit information provided by a recipient of a service or provide access to a communication network are not liable for the information transmitted provided certain conditions are satisfied. The conditions are 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.	Regulation 5 ensures that the intermediary service providers covered by Article 12 are not capable of being guilty of a relevant offence under section 59A of the Sexual Offences Act 2003 and section 4 of the Asylum and Immigration Act 2004 provided conditions reflecting those set out in Article 12 are satisfied.	Secretary of State
13	'Caching' Article 13(1) requires EEA states to ensure that intermediary service providers who transmit information are not liable for the automatic and temporary storage of information supplied by a recipient of a service, where	Regulation 6 ensures that the intermediary service providers covered by Article 13 are not capable of being guilty of an offence under section 59A of the Sexual Offences Act 2003 and section 4 of the Asylum and Immigration Act 2004 provided that they comply with	Secretary of State

	such storage is performed solely for the purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, provided certain conditions are satisfied. The conditions are that the service provider: (a) does not modify the information, (b) complies with conditions on access to the information, (c) complies with rules regarding the updating of information, specified in a manner widely recognised and used by industry, (d) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information, and (e) acts expeditiously to remove or disable access to the information stored upon obtaining actual knowledge of the fact that the information has been removed or access to it has been disabled at the initial source of transmission or a court or administrative authority made an order to such effect.	conditions reflecting those set out in Article 13. Conditions (c) and (d) of Article 13(1) are not expressly reflected in regulation 6 as currently there are no readily identifiable industry standards of the kind referred to in those paragraphs.	
Article 14	'Hosting' Article 14 requires EEA states to ensure that intermediary service providers who provide a service consisting of the storage of information are not liable for information stored at the request of a recipient of the service as long as the service provider: (a) does not have actual knowledge of illegal activity or information, or (b) upon obtaining such knowledge or awareness, the service provider acts expeditiously to remove or disable access to the information. EEA states are not required to protect a service provider from liability where the recipient of the service is acting under the authority or control of the service provider.	Regulation 7 ensures that the intermediary service providers covered by Article 14 are not capable of being guilty of an offence under section 59A of the Sexual Offences Act 2003 and section 4 of the Asylum and Immigration Act 2004 provided that they comply with conditions reflecting those set out in Article 14.	Secretary of State

Annex B

Scrutiny History

Scrutiny History
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")

The Department of Trade and Industry (as it then was) submitted an explanatory memorandum 10644/99 on 20/9/1999 on an "Amended Proposal for a Directive of the European Parliament and of the Council on certain legal aspects of electronic commerce in the Internal Market". The Commons European Scrutiny Committee considered it politically and legally important and for debate (Report 28, Item 20423, Sess 98/99). It was debated on 27/10/1999 in European Standing Committee C. The Lords Select Committee on the European Union cleared it from scrutiny (Progress of Scrutiny, 12/11/1999, Sess 98/99).

DTI submitted an OTNA explanatory memorandum on 18/10/1999 on a "Presidency proposal for a Directive of the European Parliament and of the Council on certain legal aspects of Information Society Services, in particular, electronic commerce in the Internal Market". The Commons European Scrutiny Committee considered it politically important and for debate which was held on 27/10/1999 in European Standing Committee C (Report 2, Item 20529, Sess 99/00). The Lords Select Committee on the European Union cleared it from Sub-Committee E by letter of 15/12/1999 (Progress of Scrutiny, 17/12/99, Sess 99/00).

Finally, DTI submitted explanatory memorandum 5123/99 on 8/2/99 on a "Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market". The Commons European Scrutiny Committee considered it politically and legally important and for debate (Report 9, 19753, Sess 98/99). This took place on 27/10/99 in European Standing Committee C on 27/10/99. The Lords Select Committee on the European Union did not report on it (Progress of Scrutiny, 11/6/99, Sess 98/99).