
EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations give effect to [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”) in relation to the offences in Scotland set out in:

- section 51A(1) of the Civic Government (Scotland) Act 1982 (“extreme pornography offence”);
- section 22(1) of the Criminal Justice (Scotland) Act 2003 (“traffic in prostitution offence”);
- section 182(2) of the Children’s Hearing (Scotland) Act 2011 (“children’s hearings publishing restrictions offence”);
- section 6(1) of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (“threatening communications offence”);
- section 1(1) of the Human Trafficking and Exploitation (Scotland) Act 2015 (“human trafficking (Scotland) offence”);
- section 22(5) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (“fatal accident inquiries publishing restrictions offence”); and
- section 2(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (“intimate images offence”).

The Regulations give effect to the Directive in relation to the offence in Northern Ireland set out in section 2(1) of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

The Regulations give effect to the Directive in relation to offences in England and Wales and Northern Ireland set out in:

- 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”) (analogous to the publishing restrictions offence 2011); and
- 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”) (analogous to the publishing restrictions offence 2016).

The Regulations also give effect to the Directive in relation to the offence set out in section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, as it extends to Scotland and Northern Ireland.

The Directive (which has been incorporated into the Agreement on the European Economic Area) seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services (“ISS”) between EEA states. Article 3 provides for the regulation of ISS on a “country of origin” basis and Articles 12 to 14 require EEA states to limit, in specified circumstances, the liability of intermediary ISS providers when they provide mere conduit, caching or hosting services.

Regulations 3, 4, 5 and 6 ensure that the offences apply on a country of origin basis. 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.

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.

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

Regulation 6 means that service providers who are established in an EEA state other than the UK can only be prosecuted for the traffic in prostitution offence, human trafficking offence, children's hearings publishing restrictions offence, threatening communications offence, extended children's hearings publishing restrictions offence, human trafficking (Northern Ireland) offence, human trafficking (Scotland) offence, fatal accident inquiries publishing restrictions offence, extended fatal accident inquiries publishing restrictions offence and intimate images offence where the conditions laid down in regulation 6(3) are met (which follows the conditions in Article 3(4) of the Directive).

Regulations 8, 9 and 10 create exceptions from liability for the traffic in prostitution offence, human trafficking offence, children's hearings publishing restrictions offence, threatening communications offence, extended children's hearings publishing restrictions offence, human trafficking (Northern Ireland) offence, human trafficking (Scotland) offence, fatal accident inquiries publishing restrictions offence and extended fatal accident inquiries publishing restrictions offence for intermediary ISS providers when they provide mere conduit, caching or hosting services in the circumstances specified by Articles 12, 13 and 14 of the Directive.

Regulation 11 relates to section 28 of the Small Business, Enterprise and Employment Act 2015 (duty to review regulatory provisions in secondary legislation). Regulation 11 requires the Secretary of State to review the operation and effect of these Regulations and publish a report within five years after they come into force and within every five years after that. Following a review it will fall to the Secretary of State to consider whether the Regulations should remain as they are, or be revoked or be amended. A further instrument would be needed to revoke the Regulations or to amend them, if the Secretary of State so decides.

A Transposition Note has been produced for these Regulations and is published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.