

2005 No. 3222

CHILDREN AND YOUNG PERSONS
ELECTRONIC COMMUNICATIONS

**The Electronic Commerce Directive (Adoption and Children Act
2002) Regulations 2005**

<i>Made</i> - - - -	<i>17th November 2005</i>
<i>Laid before Parliament</i>	<i>29th November 2005</i>
<i>Coming into force</i> - -	<i>30th December 2005</i>

The Secretary of State for Education and Skills(a), being designated for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to information society services, in exercise of the powers conferred by that section makes the following Regulations—

Citation, commencement and application

1.—(1) These Regulations may be cited as the Electronic Commerce Directive (Adoption and Children Act 2002) Regulations 2005 and shall come into force on 30th December 2005.

(2) In so far as these Regulations relate to sections 92 and 93 of the Adoption and Children Act 2002(c), they apply to England and Wales only.

Interpretation

2.—(1) In these Regulations—

“the Act” means the Adoption and Children Act 2002;

“the Commission” means the Commission of the European Communities;

“co-ordinated field” has the meaning given to that expression in article 2(h) of the electronic commerce directive;

“country of origin” in relation to an incoming electronic commerce activity means the EEA State in which is situated the establishment from which the information society service in question is provided;

“EEA State” means a member State of the European Union, Norway, Iceland and Liechtenstein;

(a) Section 57(1) of the Scotland Act 1998 (c. 46) allows a Minister of the Crown to implement EC obligations despite the transfer of powers to Scottish Ministers.
(b) 1972 c.68. The Secretary of State is designated for these purposes by Article 2 of, and Schedule 1 to, The European Communities (Designations) (No. 2) Order 2001 (S.I. 2001/2555).
(c) 2002 c.38.

“electronic commerce directive” means 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);

“incoming electronic commerce activity” means an activity which consists of the provision of an information society service from an establishment in an EEA State other than the United Kingdom to a person or persons in the United Kingdom;

“incoming provider” means a person carrying on an incoming electronic commerce activity;

“information society service” means an information society service within the meaning of article 2(a) of the electronic commerce directive;

“prohibited measure” means a measure imposed for reasons falling within the co-ordinated field which constitutes a restriction on the freedom to provide an incoming electronic commerce activity;

“recipient of the service” means any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible; and

“relevant EEA authority” means the authority of the EEA State (other than the United Kingdom), which is the country of origin of the incoming electronic commerce activity to which the Secretary of State is seeking to apply a prohibited measure, which appears to a responsible authority to be the appropriate authority for the purposes of meeting the procedural conditions.

(2) For the purposes of these Regulations—

- (a) an establishment, in connection with an information society service, is the place at which the provider of the service (being a national of an EEA State or a company or firm as mentioned in Article 48 of the treaty establishing the European Community) effectively pursues an economic activity for an indefinite period;
- (b) the presence or use in a particular place of equipment or other technical means of providing an information society service does not, of itself, constitute that place as an establishment of the kind mentioned in sub-paragraph (a);
- (c) where it cannot be determined from which of a number of establishments a given information society service is provided, that service is to be regarded as provided from the establishment where the provider has the centre of his activities relating to the service;
- (d) the responsible authorities are—
 - (i) in relation to England, the Secretary of State;
 - (ii) in relation to Wales, the National Assembly for Wales;
 - (iii) in relation to Scotland, the Scottish Ministers;
 - (iv) in relation to Northern Ireland, the Department of Health, Social Services and Public Safety;
 - (v) in relation to England, the Commission for Social Care Inspection^(a); and
 - (vi) in relation to Scotland, the Scottish Commission for the Regulation of Care^(b).

Application of sections 92, 93, 123 and 124 of the Act to UK-established providers

3. For the purposes of sections 92 and 93 (*restriction on arranging adoptions*), and sections 123 and 124 (*restriction on advertising adoption*) of the Act, a person who carries on an activity which consists of the provision of an information society service from an establishment in the United Kingdom to a person or persons in one or more EEA States and who would not otherwise be regarded as carrying on that activity in the United Kingdom shall be regarded as carrying it on in the United Kingdom.

(a) Established by the Health and Social Care (Community Health and Standards) Act 2003 (c. 43).

(b) Established by the Regulation of Care (Scotland) Act 2001 (2001 asp 8).

Restrictions on arranging adoption and advertising not to apply to incoming providers

4. Subject to regulation 5, so far as anything in sections 92 and 93 (*restriction on arranging adoptions*), or sections 123 and 124 (*restriction on advertising adoption*) of the Act constitutes a prohibited measure, it shall not apply to anything done by an incoming provider.

Regulation 4 not to apply in certain circumstances

5. If the policy conditions and the procedural conditions are met, nothing in regulation 4 shall prevent a prohibited measure from applying to anything done by the incoming provider.

The policy conditions

6. The policy conditions are that—
- (a) a responsible authority considers that—
 - (i) the prohibited measure is necessary for—
 - (aa) the prevention, investigation, detection or prosecution of criminal offences;
 - (bb) the protection of minors; or
 - (ii) other reasons of public policy relevant to the objectives of the Act; and
 - (iii) the carrying on of the incoming electronic commerce activity by the person to whom the prohibited measure is to apply prejudices, or presents a serious and grave risk of prejudice to, any of the objectives referred to in sub-paragraph (i); and
 - (b) the prohibited measure appears to the responsible authority to be a proportionate means of achieving, or addressing the prejudice or risk of prejudice to, any of those objectives.

The procedural conditions

7. The procedural conditions are that—
- (a) a responsible authority has requested the relevant EEA authority to take measures to remedy the situation giving rise to the request;
 - (b) the relevant EEA authority—
 - (i) has not, within what appears to the responsible authority to be a reasonable time, taken such measure; or
 - (ii) has taken such measure, but the measures appear to the responsible authority to be inadequate in the circumstances;
 - (c) the responsible authority has notified the Commission and the relevant EEA authority of its intention to apply the prohibited measure; and
 - (d) the responsible authority has notified the person to whom the prohibited measure is to apply of its proposal to do so, and afforded that person the opportunity to make representations to the responsible authority in such manner, and within such period, as the responsible authority may determine.

Urgent cases

8.—(1) If the case appears to a responsible authority to be one of urgency, it may apply the prohibited measure regardless of whether the procedural conditions are met.

(2) If a responsible authority applies a prohibited measure in reliance on paragraph (1), it must notify the Commission and the relevant EEA authority as soon as possible that the prohibited measure has been applied, and provide each of those bodies with a statement of its reasons for considering the case to be one of urgency.

Defence to section 124 for mere conduits

9.—(1) A person providing an information society service which consists of the transmission in a communication network of information provided by a recipient of the service or the provision of access to a communication network shall not be guilty of an offence under section 124 of the Act (*offence of breaching restriction under section 123*) as a result of that transmission where that person—

- (a) did not initiate the transmission;
- (b) did not select the receiver of the transmission; and
- (c) did not select or modify the information contained in the transmission.

(2) For the purposes of paragraph (1) above, the acts of transmission and of provision of access include the automatic, intermediate and transient storage of the information transmitted where—

- (a) this takes place for the sole purpose of carrying out the transmission in the communication network; and
- (b) the information is not stored for any period longer than is reasonably necessary for the transmission.

Defence to section 124 for caching

10. A person providing an information society service which consists of the transmission in a communication network of information provided by a recipient of the service shall not be guilty of an offence under section 124 of the Act as a result of that transmission where—

- (a) the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request; and
- (b) that person—
 - (i) did not modify the information;
 - (ii) complied with conditions on access to the information;
 - (iii) complied with any rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
 - (iv) did not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
 - (v) acted expeditiously to remove or to disable access to the stored information upon becoming aware that the information at the initial source of the transmission had been removed from the network, or access to it had been disabled, or that a court or a responsible authority had ordered such removal or disablement.

Defence to section 124 for hosting

11.—(1) Notwithstanding section 124(2) of the Act and unless paragraph (2) applies, a person providing an information society service which consists of the storage of information provided by a recipient of the service shall not be guilty of an offence under section 124 of the Act as a result of that storage unless—

- (a) it is proved that he knew that section 123 applied to the information; or
- (b) upon becoming aware that section 123 applied to the information, that person failed to act expeditiously to remove or to disable access to the information.

(2) This paragraph applies where the recipient of the service was acting under the authority or the control of the service provider.

17th November 2005

Maria Eagle
Parliamentary Under Secretary of State
Department for Education and Skills

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations give effect to the European Parliament and Council Directive of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (Directive 2000/31/EC) (“the Directive”), in respect of matters within the scope of sections 92 and 93 (*restriction on arranging adoptions*), and sections 123 and 124 (*restriction on advertising adoption*) of the Adoption and Children Act 2002 (“the Act”).

Article 3 of the Directive provides, inter alia, for the regulation of information society services (defined in article 2(a)) (“ISS”) on a “country of origin” basis. Member States are required to ensure that providers of ISS established on their territories comply with national legal requirements falling within the “co-ordinated field” (as defined in article 2(h) of the Directive). Article 3.2 prohibits Member States from restricting, for reasons falling within the co-ordinated field, the freedom to provide information society services from other Member States. Articles 3.4 and 3.5 of the Directive create a derogation from the country of origin approach in relation to individual information society services, to be exercised on public policy grounds, and subject to certain procedures. Articles 12, 13 and 14 of the Directive provide for limitations on the liability of internet intermediaries providing services consisting of mere conduit, caching and hosting intended to safeguard the free flow of information in the network.

Regulation 3 of these Regulations makes provision as to the application of sections 92, 93, 123 and 124 of the Act to providers of ISS established in the United Kingdom in order to give effect to the country of origin principles of the Directive.

Regulation 4 of these Regulations gives effect to the prohibition in article 3.2 of the Directive, by excluding the application of sections 92, 93, 123 and 124 of the Act to persons carrying on incoming electronic commerce activities (“incoming providers”).

Regulation 5 gives effect to the derogation in article 3.4 of the Directive. Regulation 5 permits a responsible authority, in cases where the policy and procedural conditions in article 3.4 (set out in regulations 6 and 7) are met, to apply the restrictions in sections 92, 93, 123 and 124 of the Act to anything done by the incoming provider. Regulation 8 gives effect to article 3.5 of the Directive and provides that a responsible authority may dispense with the need to satisfy the conditions in regulation 7 in urgent cases.

Regulations 9, 10 and 11 give effect to articles 12, 13 and 14 of the Directive and provide a defence to section 124 of the Act where an ISS provider is a mere conduit, caching or hosting the information in question.

These Regulations were notified in draft to the Commission of the European Communities in accordance with Directive 98/34/EC, as amended by Directive 98/48/EC.

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