

UK MINISTERS ACTING IN DEVOLVED AREAS

215 - Electronic Commerce Directive (Education, Adoption and Children) (Amendment etc.) Regulations 2021

Laid in the UK Parliament: 18 January 2021

Sifting

Subject to sifting in UK Parliament?	No
Procedure:	Draft Affirmative
Date of consideration by the House of Commons European Statutory Instruments Committee	N/A
Date of consideration by the House of Lords Secondary Legislation Scrutiny Committee	N/A
Date sifting period ends in UK Parliament	N/A
SICM under SO 30A (because amends primary legislation)	SICM(5)39

Scrutiny procedure

Outcome of sifting	N/A
Procedure	Draft Affirmative
Date of consideration by the Joint Committee on Statutory Instruments	Not known
Date of consideration by the House of Commons Statutory Instruments Committee	Not known
Date of consideration by the House of Lords Secondary Legislation Scrutiny Committee	Not known

Background

The Electronic Commerce Directive (Education, Adoption and Children) (Amendment etc.) Regulations 2021 (“the Regulations”) are proposed to be made by the United Kingdom (“UK”) Government pursuant to section 8(1) of, and paragraph 21(b) of Schedule 7 to the European Union (Withdrawal) Act 2018.

Summary

The Regulations”) amend the following pieces of legislation:

- The Education Act 2002 (“2002 Act”)
- The Electronic Commerce Directive (Adoption and Children Act 2002) Regulations 2005 (“2005 Regulations”)

The Regulations contain provisions which are considered to fall within devolved competence in respect of the legislative competence of the Senedd in so far as it relates to education.

The Regulations make technical amendments to the 2002 Act and the 2005 Regulations to correct provisions which are deficient following the UK's withdrawal from the European Union ("EU"), ensuring the law continues to function effectively.

The provisions in question engage the 'Country of Origin' ("CoO") principle, a reciprocal arrangement between EU Member States, which no longer applies to the UK following its exit from 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). The amendment of these provisions is necessary, therefore, to reflect the ending of this reciprocity, and to ensure that domestic legislation continues to operate effectively post-exit.

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 created by the 2002 Act and, further to modifications made by the 2005 Regulations to the Adoption and Children Act 2002 ("ACA 2002").

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. 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 the 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).

The Electronic Commerce Directive ("eCD") regulates certain legal aspects of "information society services" across the European Economic Area ("EEA") that aim to remove obstacles to cross-border online services in the EU and to provide legal certainty to business and citizens in cross-border online transactions. In effect, it creates a mutual recognition scheme.

The eCD makes specific provision as to the CoO principle. In the field of electronic commerce, this is a reciprocal arrangement which means that where an online information society service provider (ISSP) operates from an establishment in an EEA state, the law of that particular state will apply to the ISSP's activities, rather than the law of the EEA state in which the services are received.

This reciprocal arrangement no longer applies to UK based ISSPs as the UK has left the EEA and the transition period is over. This means that UK based ISSPs are required to comply with the rules that govern online activities in each EEA state in which they operate, and EEA based ISSPs will be required to comply with the law of the UK when providing services in the UK. ISSPs from EEA states operating in the UK will therefore be liable to prosecution in the UK for offences established by the ACA 2002 and the 2002 Act, and ISSPs based in the UK that commit such offences in an EEA state will be liable to prosecution in that EEA State.

Statement by Welsh Government

Legal Advisers make the following comment in relation to the Welsh Government's statement dated 19 January 2021 regarding the effect of these Regulations.

Whilst the statement asserts, "The Regulations contain provisions which are considered to fall within devolved competence", it does not particularise which area of devolved competence is engaged. It is noted that the relevant Statutory Instrument Consent Memorandum (laid on 19 January 2021) provides further detail on this regard: "It is the Welsh Government's view that the provisions described in paragraphs 5 to 6 above fall within the legislative competence of the Senedd in so far as they relate to education", (N.B. the internal references are incorrect, and should read paragraphs 6 to 7). The relevant paragraphs refer to Schedule 11B, and sections 141F and 141G, of the 2002 Act in so far as they relate to education.

Intergovernmental Agreement on the European Union (Withdrawal) Bill

The above summary and the content of the Explanatory Memorandum to these Regulations confirm their effect.

Consent motion under Standing Order 30A.10

The Welsh Government laid a Statutory Instrument Consent Memorandum in respect of these Regulations on 19 January 2021, because the Regulations amend primary legislation within the legislative competence of the Senedd (in this case, Schedule 11B of the 2002 Act in so far as it relate to education).

However, the Welsh Government is not proposing to table a motion to debate the SICM in Plenary.