PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Fifth Delegated Legislation Committee

DRAFT COMMUNICATIONS ACT (E-COMMERCE) (EU EXIT) REGULATIONS 2020

Tuesday 20 October 2020

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Saturday 24 October 2020

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Chair: James Gray

† Anderson, Lee *(Ashfield)* (Con)
† Baldwin, Harriett *(West Worcestershire)* (Con)
Blake, Olivia *(Sheffield, Hallam)* (Lab)
† Caulfield, Maria *(Lewes)* (Con)
† Colburn, Elliot *(Carshalton and Wallington)* (Con)
† Crosbie, Virginia *(Ynys Môn)* (Con)
† Daly, James *(Bury North)* (Con)
Harman, Ms Harriet *(Camberwell and Peckham)* (Lab)
Hendrick, Sir Mark *(Preston)* (Lab/Co-op)
† Howell, Paul *(Sedgefield)* (Con)
† Lamont, John *(Berwickshire, Roxburgh and Selkirk)* (Con)
† Loder, Chris *(West Dorset)* (Con)
† Onwurah, Chi *(Newcastle upon Tyne Central)* (Lab)
† Smith, Jeff *(Manchester, Withington)* (Lab)
Spellar, John *(Warley)* (Lab)
Thompson, Owen *(Midlothian)* (SNP)
† Whittingdale, Mr John *(Minister for Media and Data)*

Jack Dent, *Committee Clerk*

† attended the Committee

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[James Gray *in the Chair*]

Draft Communications Act (e-Commerce) (EU Exit) Regulations 2020

9.25 am

The Minister for Media and Data (Mr John Whittingdale): I beg to move,

That the Committee has considered the draft Communications Act (e-Commerce) (EU Exit) Regulations 2020.

It is a pleasure to serve under your chairmanship, Mr Gray, and to welcome my colleagues who are here in quality, if not in quantity. These regulations were laid in both Houses on 24 September. They seek to end the direct effect of article 3 of the e-commerce directive, which is also known as the country of origin principle, with regard to sections 120 to 124 and 128 to 131 of the Communications Act 2003. If these regulations were not in place, these provisions would become retained EU law after the end of the transition period.

The country of origin principle is an EU internal market measure designed to facilitate digital trade among businesses in the European economic area. It would not be appropriate to retain this measure in UK legislation beyond the end of the transition period. These regulations do not create new policy; instead, they are technical measures to fix failures of retained EU law arising from the withdrawal of the United Kingdom from the European Union. This intervention is essential to ensure that UK rules can be effectively enforced at the end of the year.

Turning to the detail of the regulations, the primary impact is that they will allow a UK regulator—the Phone-paid Services Authority—to enforce its code of practice against online service providers based in the European economic area. At the moment, article 3 of the e-commerce directive inhibits the exercising of the PSA's powers under sections 120 to 124 against EEA businesses. These regulations will also allow Ofcom to enforce rules under section 128 to 131 of the Act. Again, at the moment, article 3 of the e-commerce directive inhibits Ofcom from enforcing these rules on the misuse of electronic communications services against EEA businesses. This change will allow quicker regulatory action and more efficient user redress. UK regulators will be able to enforce UK laws for the protection of UK consumers.

I should also bring to the attention of the Committee the reports of the European Statutory Instruments Committee and the Secondary Legislation Scrutiny Committee, and I thank those Committees for their work. I will address a couple of the points they raised in a moment, but before I do so, I will explain again why the Government are intervening in this area and give a little more background to the proposal.

The e-commerce directive seeks to contribute to the proper functioning of the European internal market by ensuring the free movement of online service providers within the European economic area. However, that directive will no longer apply to the UK at the end of the transition period, including the country of origin principle. That principle applies to online service providers based in any EEA state that operates across the European economic area, and it means that the service provider only has to follow the requisite rules of the state in which it is based, rather than the rules in each state where its service is received. If the state where the service is received wishes to enforce its own laws against the online service provider, it can only do so where certain conditions set out in article 3 are met. That state must also follow a derogation procedure, notifying the European Commission and the relevant member state before enforcing its rules.

While the UK has been bound by the directive, this exemption has been reciprocal between the UK and European economic area member states. UK-based online services have been exempt from relevant laws in EEA states, as provided for by the country of origin principle, and equivalent businesses in EEA member states are exempt from those relevant laws in the UK. The country of origin principle is implemented in relevant pieces of national law. Once the transition period ends, we will no longer be bound by the directive and UK-based online service providers will lose their exemption from relevant laws in EEA states, as currently provided for. If we do not intervene to remove article 3's effect on the 2003 Act, then online service providers in the EEA will continue to receive preferential market access beyond the end of the transition period, while the same benefit will not be afforded to UK online service providers.

The regulations remove the direct effect of the country of origin principle from the 2003 Act, and they remove the exemption from rules under sections 120 to 124 and 128 to 131 of the Act for businesses based in the EEA. The principle will be removed for all UK legislation in due course, to ensure that businesses in the EEA will be in scope of all the UK laws from which they are currently exempt.

Of course, the loss of the country of origin principle as a result of leaving the EU also means that UK businesses will be newly in scope of certain EEA laws from which they were previously exempt. However, we expect that the impact on UK businesses will be relatively low. The scope of the directive is narrow and we do not expect the regulatory regimes to be markedly different in the UK in comparison with other EEA states. Depending on the nature of the online service, many UK businesses may already be compliant and there will be little to no immediate change that they need to make in order to be compliant from 1 January 2021.

These regulations are, as I say, a technical measure to fix failures of retained EU law to operate effectively, arising from the withdrawal of the UK from the EU. They will ensure that our regulators are able to effectively apply their laws to online service providers based in the EEA and to ensure that UK consumers are protected by UK law.

9.32 am

Chi Onwurah (Newcastle upon Tyne Central) (Lab): It is a pleasure to serve under your chairmanship, Mr Gray. Like the Minister, I congratulate colleagues on being here and our team in particular, which is strong in knowledge, as we shall see. I must declare an interest inasmuch as I was tangentially involved in the regulation of the premium rate industry when I worked as head of telecoms technology for Ofcom before entering

Parliament, so I may be going into a little bit more detail than members of the Committee would expect with regard to this statutory instrument.

As the Minister told us, the premium rate industry in the UK incorporates a range of services, from simple directory inquiries and 087 business information lines to innovative mobile games, competitions, charity giving and chat services. It is a diverse and complicated sector. Research commissioned by mobile insight specialists Mobilesquared found that in 2017, premium rate services contributed more than £700 million to the UK economy, with more than 22 million people using UK services.

However, as with every sector, there is risk; nearly 200,000 people a year suffer from text message scams, ITV faced a £70 million fine after phone-in competition winners were cheated out of millions, and we have all seen the regular news reports of children running up thousands in costs to their parents' credit cards on mobile games. That is why it is so important that we get regulation, oversight and governance in this area right, providing consumers with the protections and confidence they need and good businesses with the regulatory environment to thrive. I myself have been on the end of a text messaging scam and had to complain to Ofcom in order to get it resolved. I put on record my thanks to Ofcom and the Phone-paid Services Authority for their continuing hard work. I am pleased that the this SI will give power to UK regulatory authority bodies to tackle key issues.

As you may have concluded from that, Mr Gray, we do not oppose the SI, but we do have some concerns and some questions. As the Minister has set out, the SI allows us to regulate services in the UK, bringing enforcement powers against EEA companies into line with UK companies. Currently, as we have heard, the country of origin principle is in force in the EEA. Article 3 of the directive—the internal market clause—provides that firms supplying online services are subject to the law of the member state in which they are established, not the law of the member state where the service is accessible. This is the country of origin principle.

As things stand, on 1 January 2021 at the end of the transition period, under the withdrawal agreement signed by this Government, UK businesses will no longer benefit from the country of origin principle when operating in the EEA and will therefore be subject to local regulations. The direct effect of retaining the country of origin benefits for EEA members in UK law would be that EEA businesses would continue to be exempt from UK rules, while the same benefits are not afforded to businesses operating in the EEA. This would give EEA-based information society services preferential market access, with no reciprocity from the EEA for UK businesses. The SI addresses this issue by removing that competitive disadvantage for UK-based companies.

I was pleased to hear the Minister set out that there would be little or no change for UK businesses. With so many businesses currently awaiting some kind of clarity on our trading arrangements with the EU, I know that they will appreciate that. I am also pleased that this SI effectively recognises the importance of regulatory purchase in protecting our citizens from communications technology harm.

As I said, Mr Gray, I previously worked for Ofcom. It is worthwhile remembering that the regulatory arrangements for premium rate services followed a self- and co-regulatory approach, until the celebrated "Richard and Judy" quiz "You Say We Pay" scandal of 2007, when I was working as head of telecoms technology at Ofcom. I remember well the public concern over the way in which premium rate services exploited consumers with unclear numbering systems and charges. At the time, the demand for regulation was criticised by some at the time as stifling innovation, but regulation was eventually put on a statutory footing to protect consumers.

It is unfortunate that mobile users still experience many harms that have no regulatory oversight. I do hope the Minister might say a word about when we can expect the long-awaited online harms White Paper to come before the House. I remind the Minister that the powers that he referred to give Ofcom the power to take enforcement action against those who persistently misuse the electronic communications network. Persistent misuse is defined as

"using a network or service in ways which cause or are likely to cause someone else, especially consumers, to suffer harm."

We can all agree that there are many, many users of networks—Facebook in particular—that allow harm to be caused to consumers, yet we still do not have effective regulatory oversight.

Returning to the specifics, the SI raises some questions for UK firms. Could the Minister elaborate a little on his reasons for believing that there will be "little or no"—I believe those were his words—implications for UK companies that provide services in the EEA? Specifically, what is his view based on?

My concern is that firms will now feel that they have to research every regulatory requirement in every member state in which their services are accessible. Will the Minister cite the evidence on which he based his assessment? How are companies are being communicated with, so that they understand that the change, under which they are now subject to regulations in each of the EU countries in which they operate, will not put a burden on them? That burden could simply be researching lawyers' fees in order that they feel confident to continue to operate, for example. Will all UK firms now have to work to 26 changing legislative agendas in practice? The Minister said that the regulatory regimes were similar, but for how long will that continue? If the European economic area rules change for UK companies providing premium services in member states, does he anticipate that UK law changes will reflect those changes? If not, how will the Government avoid divergence, creating increasing regulatory burdens in the future?

UK businesses must be protected—I am sure the Minister agrees—and they need to see some long-term thinking on this really important issue. Premium rate services play an important role in the UK economy, and I specifically emphasise their role in supporting UK charities. In 2018, the Phone-paid Services Authority found that the amount donated by typically generous UK citizens to UK charities by text messages grew by 30%; we might not have anticipated that, given that the text message is not the latest technology. In addition, it is estimated that a quarter of all donations to TV charity events, such as Red Nose Day or Children In Need, came from premium rate services.

Also, the PSA has stated that there is considerable potential for further growth for the charity sector. Charity sector fundraising has been adversely hit by covid-19, so I would like the Minister to provide, if he can,

[Chi Onwurah]

assurances that there will be no potentially negative impact on UK charities and jobs from firms seeking to relocate within the EEA to benefit from country of origin regulations. Also, will he say how many UK-based firms currently provide these services to the EEA and how many EEA-based firms provide services that are accessible in the UK, so that we can get an idea of the size of the market that this measure will have an impact on?

Finally, I was unable to find an impact assessment. Although I welcome the Minister's words, have the Government carried out an impact assessment on the effects of these changes on UK firms, job and charities? If not, will they do so?

To conclude, we support bringing enforcement powers against EEA companies into line with those for UK businesses. This will ensure that UK companies do not suffer disproportionately from EU rule of origin laws. However, the Government should more effectively set out how they intend to maintain an open but properly regulated market in information services, both within the UK and between the UK and the European Union. I am very concerned that the Government seem to be working without an impact assessment in this area.

I thank the Minister in advance for his answers to my questions.

9.43 am

Mr Whittingdale: I am most grateful to the hon. Lady. It is always slightly alarming for a Minister to discover that the Opposition spokesperson is actually highly qualified on the subject being discussed—*[Laughter.]* She raises a number of very valid points.

First, I agree with the hon. Lady and welcome her recognition that premium rate services are not always malicious or designed to con people out of their money. They actually perform valuable services. They contribute a substantial amount to the economy and, as she said, they play an extremely important role in raising money for charity, which we are very keen to support.

Like the hon. Lady, I am of course aware of the dark side of premium rate phone messaging. While she was adjudicating on the "Richard and Judy" case, when she was at Ofcom, I recall that I was chairing the Culture, Media and Sport Select Committee in this House, where we summoned ITV to account for some of its practices, which was making it a lot of money in ways that I think most people thought were not entirely appropriate, and indeed resulted in ITV being fined a considerable sum.

Chi Onwurah: I do not mean to dwell on "Richard and Judy" for too long in this Committee. To clarify, because of the way in which the regulatory regime was set up, I did not actually adjudicate on it, but we did develop the recommendations that led to stronger regulation of premium rates.

Mr Whittingdale: I congratulate the hon. Lady on her efforts at that time. She is right that this area obviously continues to evolve, and it is important that we maintain appropriate regulation and keep it up to date. I can tell her that the Phone-paid Services Authority is currently reviewing the code to strengthen standards across the market. It tends to try to prevent harm before it occurs. It actually issued a consultation document in February and is now drafting a revised code, which we expect shortly.

I said that we expect little or no immediate change for most businesses in this country. The hon. Lady raised the impact on business. I should of course make clear that this statutory instrument does not actually have any bearing on UK businesses; UK businesses will be outside the scope of the country of origin principle as a result of our leaving the European Union transition period at the end of December. The SI is creating the level playing field so that EEA-based businesses come within the scope of UK regulation, which they would not otherwise do unless we brought in these changes.

The hon. Lady asked what evidence we have on the impact on business. It is quite difficult. We have calculated that something like 75,000 businesses are potentially in the scope of the regulations, but for the vast majority of those, the difference will be relatively minor. They are already compliant with UK regulation, and UK regulation is in most cases is similar, if not identical, to that pertaining in other EU member states. The one piece of evidence we had was the Phone-paid Services Authority's estimation of the number of derogation requests it gets each year from other EU member states, which is just a handful each year, indicating the small number of cases in which the regulations in another EEA member state are different from those that apply in the UK. On that basis, we are relatively confident that the number of companies that will have to make changes is relatively small.

We have sought to communicate. We have been engaging with sectors for at least the last six months, to alert them to this change when it comes. The Cabinet Office is conducting a communications campaign. Of course, in this case, this is not dependent on whether the UK obtains a comprehensive free trade agreement with the European Union, since we do not actually wish to maintain the country of origin principle. At the end of the transition period, it will no longer apply, whether or not negotiations on a comprehensive agreement achieve a successful outcome.

We have not published an impact assessment for the reasons I say—it is difficult to assess in detail how these changes will work—but on the evidence I suggested, we are confident that the number of affected businesses will be small, not substantial. However, it will be the responsibility of businesses in the future, if they wish to operate in another EEA member state, to ensure that they are compliant with the regulations that apply there.

Finally, the hon. Lady raised the online harms legislation which, while a little way removed from the subject we are debating, is nevertheless a matter of great importance. I can tell her—she will have heard this before, but I say it with absolute confidence—that we will publish the Government's full response to the White Paper consultation very shortly. It is almost in a state where it is ready for publication, and it is still our intention to introduce legislation to enact it early next year. We absolutely share her view that the matter is extremely important. We are determined to make the UK the safest place in which to conduct online activities and to do as much as possible to protect our children, and also to ensure that our regulatory framework is up to date and encourages innovation and growth, while at the same time installing the necessary safeguards.

I am grateful to the hon. Lady for indicating that the Opposition will not oppose the regulations, so I invite the Committee to approve them.

Question put and agreed to.

9.49 am

Committee rose.