PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Fourth Delegated Legislation Committee

DRAFT CRIMINAL JUSTICE (ELECTRONIC COMMERCE) (AMENDMENT) (EU EXIT) REGULATIONS 2021

Tuesday 29 June 2021

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The Committee consisted of the following Members:

Chair: MRS MARIA MILLER

Byrne, Liam *(Birmingham, Hodge Hill)* (Lab)
Caulfield, Maria *(Lewes)* (Con)
† Chalk, Alex *(Parliamentary Under-Secretary of State for Justice)*
† Clarkson, Chris *(Heywood and Middleton)* (Con)
Cooper, Rosie *(West Lancashire)* (Lab)
† Cunningham, Alex *(Stockton North)* (Lab)
Duguid, David *(Parliamentary Under-Secretary of State for Scotland)*
Harris, Rebecca *(Lord Commissioner of Her Majesty's Treasury)*
Hillier, Meg *(Hackney South and Shoreditch)* (Lab/Co-op)
Mann, Scott *(Lord Commissioner of Her Majesty's Treasury)*
Morris, James *(Lord Commissioner of Her Majesty's Treasury)*
† Owen, Sarah *(Luton North)* (Lab)
† Pursglove, Tom *(Corby)* (Con)
Rutley, David *(Lord Commissioner of Her Majesty's Treasury)*
Thomson, Richard *(Gordon)* (SNP)
† Throup, Maggie *(Lord Commissioner of Her Majesty's Treasury)*
Vaz, Valerie *(Walsall South)* (Lab)

Dominic Stockbridge, *Committee Clerk*

† attended the Committee

Fourth Delegated Legislation Committee

Tuesday 29 June 2021

[MRS MARIA MILLER *in the Chair*]

Draft Criminal Justice (Electronic Commerce) (Amendment) (EU Exit) Regulations 2021

2.30 pm

The Chair: Before we begin, I remind Members to observe social distancing and to sit only in places that are clearly marked. I also remind Members that Mr Speaker has stated that masks should be worn in Committee, unless of course you are speaking. *Hansard* colleagues will be most grateful if Members could send their speaking notes to them by email.

Motion made, and Question proposed,

That the Committee has considered the draft Criminal Justice (Electronic Commerce) (Amendment) (EU Exit) Regulations 2021.—*(Alex Chalk.)*

2.31 pm

Alex Cunningham (Stockton North) (Lab): Let me just say that it is a pleasure to speak under your chairmanship for the first time, Mrs Miller. This is the first time since Thursday that I have been in this particular Committee Room; we were dealing then with the Police, Crime, Sentencing and Courts Bill. Then, I was working with two Ministers, and today I am pleased to welcome this Minister, who is almost ready to go, so I will sit down.

2.31 pm

The Parliamentary Under-Secretary of State for Justice (Alex Chalk): I thank the hon. Gentleman for his point, which I think added significantly to the proceedings. I thank him very much indeed.

The draft regulations do not create new policy or change the nature of the related offences. Instead, they are a technical measure to fix deficiencies in retained EU law arising from the withdrawal of the United Kingdom from the European Union. This statutory instrument addresses reciprocal jurisdictional rules linked to the internal market contained in article 3 of the e-commerce directive. Although the directive was largely retained in UK law, the rules—more commonly referred to as the country of origin principle—rely on reciprocal application and therefore no longer operate as intended. The removal of the provisions from Ministry of Justice legislation is therefore the object of the proposed instrument.

Similar statutory instruments have already been brought forward to remove the country of origin principle from other legislation and, if time had allowed, the Government would have brought forward the regulations before the end of the transition period. However, as we are not aware that the rules in question have ever been relevant to a prosecution for the offences to which the draft instrument relates, we prioritised other more urgent legislation to be laid before the end of last year. Now that such other more important legislation is in force, it is necessary that we address any remaining deficiencies in retained EU law.

Turning now to the detail, the rules apply to organisations operating online that meet the definition of an information society service or ISS, which can be summarised as a service that is normally provided for payment at a distance by electronic means and at the request of the recipient of the service. That covers, among other things, online retailers, video-sharing sites, search tools, social media platforms and internet service providers.

The country of origin principle aims to make it easier for organisations to operate online across borders by making them subject only to the law of the country in which they were established when operating across the European economic area. For relevant offences, therefore, ISSs would need to comply only with one set of laws, rather than deal separately with each state in which they operate.

For example, a British bookshop selling online in various EEA states may have unknowingly sold a book that was banned in one of those countries. If the rules were applied to the offence of selling the prohibited book, the shop would be liable only under UK law, not under the local laws banning the book, except in exceptional circumstances. Although entirely hypothetical, I hope that example serves to highlight how the system was intended to make online operations across many jurisdictions and across the single market simpler for a business.

The system, however, worked between jurisdictions, so ISSs established in the EEA, but operating in the UK, were not fully liable under UK law. As I said, those provisions, which limited the liability of EEA-based ISSs operating in this country under UK law, no longer function as intended. This is because the EU no longer has reciprocal rules of this nature in place with regard to the United Kingdom, and could even put British businesses at a disadvantage, as I will set out further in a moment.

Implementation of the country of origin principle rules for the offences for which the MOJ is responsible has two strands. First, it made ISSs based in any EEA state subject to the law of that state for their conduct across the EEA. Secondly, it created a procedural bar restricting prosecutions of ISSs based in the EEA for their conduct in another country, on the basis that they would have been prosecuted by the state in which they are established.

The instrument removes both aspects of this implementation in the UK, removing an inconsistency where UK ISSs operating in the EEA were liable under UK law in a way that is not the case when operating in other foreign countries. It also means there will no longer be a procedural bar restricting prosecutions of EEA-based ISSs operating in the UK, meaning proceedings against them would operate in the same way as for domestic or other foreign ISSs. To put all that in plain English, what it means is that at the moment we have a lopsided arrangement whereby a UK-based ISS is liable for action in EEA countries, but the EEA ISS is effectively shielded from prosecution in the UK—and that is a lopsided arrangement that we need to put right.

This instrument was first considered by the European Statutory Instruments Committee back in March, and the Government accept the Committee's recommendation to put it under the affirmative procedure, ensuring that it receives the scrutiny of Parliament. However, I would like to take the opportunity to reassure the Committee and address its concerns about the effect of this instrument. These rules—the country of origin principle—were never intended to contribute to the wider regulation of publication of illicit materials internationally. They apply only to

organisations meeting the definition of information society service, to just a small range of offences and to activity in the EEA. They were part of heart of the wider e-commerce directive that aimed to remove obstacles to organisations offering cross-border online services.

Although there are some situations in which it is advantageous to be able to prosecute UK offenders for their conduct abroad or online, the Government's view is that generally criminal offending is best dealt with by the criminal justice system of the state in which the offence took place. If UK-established ISSs need to be held accountable for any conduct abroad, that should be done in a way which produces the same effect in every country, not limited to the EEA. In other words, treat all countries the same.

Finally, the Government believe that these regulations are necessary irrespective of whether parallel offences exist. Where parallel offences do exist, failing to make the amendments means UK ISSs could be dually liable; in other words, facing prosecutions in the EEA state in which any offending took place as well as in the UK. As I indicated before, that is a lopsided arrangement. It would be unfair, and would place an unreasonable burden on British companies. It could also potentially put them at a competitive disadvantage when operating abroad. Where parallel offences do not exist, failing to make these amendments could result in proceedings being brought against conduct that was legal in one state, but not in the other. Again, that could put British companies operating abroad at a competitive disadvantage.

Overall, removal of the country of origin principle will mean that UK ISSs operating in the EEA are treated in the same way under our law as when operating in other foreign countries. In light of the UK's withdrawal from the European Union and the end of the reciprocal arrangements, it is necessary in the interests of fairness and clarity that these laws are revoked, and I hope the Committee will join me in supporting the regulations.

2.38 pm

Alex Cunningham: I am sorry to disappoint you, Mrs Miller, by not allowing you to oversee your first Division in Committee. I thank the Minister for outlining the proposal so comprehensively.

As he explained, the e-commerce directive no longer applies in the UK following the end of the transition period on 31 December 2020. As a result the country of origin principle whereby an EEA-established ISS is liable for relevant offences only to the laws of the state in which it is established, rather than being subject to the individual laws of each state in which it operates, no longer functions as it used to.

There are also a couple of adverse possible consequences of not removing provision of the country of origin principle, which the Minister outlined. There would be a dual legislative burden for UK-established ISSs while operating in the EEA, and it would leave a gap with liability for EEA-established ISSs when operating in the UK. Of course, I recognise the volume of legislative change that was needed to extricate the UK from the EU, and that within the bulk of work, some parts would need to be prioritised over others. However, it would have been far preferable for the Government to finalise the necessary changes before the transition period ended. That would have been entirely possible had it not been for the Government's insistence on seeking arbitrary deadlines throughout the Brexit process that they consistently failed to meet.

I would also welcome some reassurance from the Minister on a point raised by the European Statutory Instruments Committee, which said:

> "The Committee is concerned that the effect of this instrument could be to dilute regulation of the international effect of publication of certain kinds of material (particularly online material with global reach) as it is not clear whether equivalent offences exist across the EEA."

I am glad the Government have responded positively to the Committee's recommendation of using the affirmative resolution procedure, but they have chosen not to carry out the review of equivalent provision across the EEA, as requested by the Committee.

I can understand that a full and comprehensive review would have taken a good amount of time and resources and I recognise the Government's point that the impact of the changes will be minimal, because, as far as they are aware, there have been no prosecutions of information society services for these offences, or even any use of the country of origin principle jurisdictional rules that the instrument will remove. Yet, I am still surprised to see a Government who have had much publicity on how seriously they take the dangers of online harms shrug off the Committee's response so quickly.

The Minister was in the Chamber earlier today to hear one of his own Members raise this very matter during Justice questions. It would therefore be useful to hear from the Minister whether any other sort of less comprehensive and therefore less resource-intensive research was considered by his Department before it chose the option of doing nothing at all.

That said, as I explained earlier, the Opposition understand the aim of this change and are sympathetic to it. We recognise that some Brexit-related deficiencies still need to be addressed and so we will not oppose this instrument today.

2.41 pm

Alex Chalk: I thank the hon. Gentleman for his points and his support for the provisions. As he indicates, the SI is necessary to address a lopsided arrangement and I am delighted to have the support of the Opposition in that regard.

On the issue of timing, I have been very clear that, if time had allowed, the Government would have brought forward the regulations before the end of the transition period, but, as I have indicated already, we are not aware that the rules in question have ever been relevant to a prosecution. In other words, there is no sense in which this has impeded justice in any way. It was important to prioritise the most urgent legislation, but now that the other more important legislation has been passed, we recognise it is right that we attend to this and do so in short order. That is precisely what we have done.

As I indicated earlier, the instrument is necessary to remove rules based on reciprocity that no longer exist. It is a function of our departure from the European Union and it is important that our statute book should function correctly. On that basis, I commend the draft instrument to the House.

Question put and agreed to.

2.42 pm

Committee rose.