

Guidance

Guidance on the eCommerce Directive in the event of a 'no deal' EU exit

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1. Introduction

Delivering the deal negotiated with the EU remains the government's top priority. This has not changed.

However, the government must prepare for every eventuality, including a no deal scenario.

For 2 years, the government has been implementing a significant programme of work to ensure that the UK is prepared to leave the EU on 29 March 2019.

It has always been the case that as we get nearer to that date, preparations for a no deal scenario would have to be accelerated. We must ensure plans are in place should they need to be relied upon.

This notice sets out guidance on the eCommerce Directive (otherwise referred to as “the Directive”), and actions UK online businesses may wish to consider in order to operate across the European Economic Area (EEA) in the event the UK leaves the EU on 29 March 2019 with no agreement in place. This includes advice on adhering to rules that govern online activities across the EEA.

Affected UK online businesses should check for possible compliance issues, in particular any resulting from the loss of the Directive’s Country of Origin principle. Further details on the Directive are below.

What is the eCommerce Directive?

The [eCommerce Directive](#) regulates certain legal aspects of “**information society services**” across the EEA. These are defined as any service normally provided for remuneration (which does not have to be direct remuneration, for example advertising revenue), at a distance, by electronic means and at the individual request of a recipient of the service. It covers the vast majority of online service providers. Examples include (but aren’t limited to):

- online retailers
- video sharing sites
- search tools
- social media platforms
- Internet service providers.

The Directive does not apply to the following matters:

- tax
- questions relating to agreements or practices governed by cartel law
- certain gambling activities, and
- matters now covered by the GDPR and e-Privacy Directive.

It also does not concern legal requirements relating to goods such as safety standards, labelling obligations or liability for goods, or requirements relating to the delivery or the transport of goods.

What does the eCommerce Directive do?

The Directive was introduced to facilitate eCommerce across EEA countries, and remove barriers to trade. To achieve this, it establishes a “**Country of Origin principle**”. This is a reciprocal arrangement so that any EEA-based information society service should only be subject to certain laws in the EEA state in which it is established.

The laws in scope of this principle fall in what the Directive calls the “**coordinated field**” . This refers to legal requirements in individual EEA states which apply to information society services, regardless of whether those requirements are of a general nature or specifically designed for them. Elsewhere in it, the Directive explains that it covers “*requirements relating to online activities such as on-line information, online advertising, online shopping [and] online contracting.*” It does not concern legal requirements relating to goods such as safety standards, labelling obligations or liability for goods, or requirements relating to the delivery or the transport of goods.

The Directive sets out how information society services should determine where they are established, and therefore which EEA state’s legal requirements they need to comply with under the Country of Origin principle. Article 2 of the Directive defines an ‘**established service provider**’ as ‘a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period’ and states that this is not dependent upon the presence of the technologies required to provide the service. Further explanation of the place of establishment of an information society service for the

purposes of this Directive is provided in paragraph (19) of the recitals to the Directive.

The Directive also sets the following rules for information society services:

- Limitations on the liability of intermediary service providers (mere conduits, or services who provide caching or hosting services) for information that they transmit or store (Articles 12-14);
- Prohibitions on imposing 'general monitoring' obligations on information society services (Article 15);
- Prohibitions on imposing 'prior authorisation' requirements on information society services (e.g. licensing requirements pre start-up) (Article 4); and
- Information that information society services must display on their sites, to commercial communications (e.g. spam), to electronic contracts and to aspects of the online purchasing procedure (Articles 5, 6 and 10).

'No deal' EU exit and the eCommerce Directive

Immediately following the UK's exit from the EU in a no deal scenario, the government will minimise disruption by prioritising continuity and stability. Therefore the UK's policy approach will continue to align with the provisions contained in the Directive, including those on liability of intermediary service providers and general monitoring.

The exception to this is the Directive's Country of Origin principle. Once the UK is no longer a member of the EU, and in a no deal scenario, information society services established in the UK will cease to benefit from the Country of Origin principle when operating in EEA states. This means they will be required to adhere to the rules that

govern online activities in each EEA state in which they operate, from which they were previously exempt under the Directive.

The Government intends to fully remove the Country of Origin principle from UK legislation that implements the Directive. As this principle is implemented via various pieces of legislation it will be removed at different points following the UK's exit from the EU in the event of 'no deal', when parliamentary time allows.

Removing this principle from UK legislation will bring EEA based information society services in scope of UK laws from which they were previously exempt.

It also means that the requirement that UK-based information society services adhere to UK law falling within the 'coordinated field' when operating in the EEA will be removed. Therefore UK-based information society services may not have to simultaneously adhere to their UK requirements when providing services in EEA states after exit day. UK legislation will continue to apply to UK-based information society services when providing services to users in the UK.

2. Advice for online service providers

Loss of the the Country of Origin principle for UK and EEA information society services

In the event a deal is not reached with the EU, information society services "established" in the UK will lose their exemption from the laws falling within the Directive's "coordinated field" in EEA countries. They will therefore have to comply with requirements of each EEA state in which they operate, from which they were previously exempt.

The reciprocal 'Country of Origin' principle for EEA-based information society services will be removed from UK legislation that implements

the Directive, should the UK leave the EU without a deal, and when parliamentary time allows.

For information society services in the field of financial services, we intend there to be a transitional period in which EEA firms can continue to legally service contracts taken out under the Directive. Guidance relating to financial services and the eCommerce Directive can be found on [gov.uk](https://www.gov.uk).

We therefore encourage UK and EEA information society services to check for any compliance issues resulting from the loss of the Directive's Country of Origin principle.

In many instances, you may already comply with these requirements, and this could mean that (depending on the nature of your online services) there is little immediate substantial change in compliance requirements that would result from the UK leaving the EU.

Despite this, we do advise that you should build on your existing processes for ensuring compliance with the legal requirements relating to online activities in *each* individual EEA country.

You should also ensure that you have processes in place for ongoing compliance in the event that individual EEA states change their requirements governing online activities.

Place of establishment

You may also consider determining your online service's 'place of establishment' (see paragraph (19) of the recitals to the Directive). This should be considered in relation to each information society service your organisation provides (if it offers more than one).

No prior authorisation

The Directive prevents EEA states from subjecting the taking up and pursuit of the activity of an EEA-based information society service to a 'prior authorisation' scheme (e.g. a licensing regime) - where that authorisation scheme is specifically and exclusively targeted at information society services. If the UK leaves the EU without a deal, information society services established in the UK may be subjected to any such prior authorisation regimes which are established in EEA states and which operate with respect to 'third country' providers.

3. More information

This notice is meant for guidance only. You should consider whether you need separate professional advice before making specific preparations.

It is part of the government's ongoing programme of planning for all possible outcomes. We expect to negotiate a successful deal with the EU.

Implementation of the eCommerce Directive into UK legislation

The eCommerce Directive has been implemented into UK law through various pieces of legislation. The Directive was originally implemented by the Electronic Commerce (EC Directive) Regulations 2002 ("the 2002 Regulations"), which amongst other things implemented the Country of Origin principle and liability provisions to all UK legislation in the 'coordinated field' made before these Regulations.

Following that date, Articles of the Directive (usually Articles 3 and 12-14) have been implemented into new legislation on a case by case basis where information society services are in scope.