

**EXPLANATORY MEMORANDUM TO
THE ELECTRONIC COMMERCE DIRECTIVE (ADOPTION AND CHILDREN
ACT 2002) REGULATIONS 2005**

2005 No. 3222

1. This explanatory memorandum has been prepared by the Department for Education and Skills and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 These Regulations are made under section 2(2) of the European Communities Act 1972. Their purpose is to ensure that the provisions of the Adoption and Children Act 2002 comply with the E-Commerce Directive.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Background

4.1 The Regulations are made under section 2(2) of the European Communities Act 1972. They implement the E-Commerce Directive (Council Directive 2000/31/EC on electronic commerce “the Directive”) in relation to certain provisions of the Adoption and Children Act 2002. See Transposition Note attached as **Annex A** to this Memorandum. The Regulations have been notified in draft form to the European Commission.

4.2 The Directive was adopted on 8 June 2000. The purpose of the Directive is to enhance the functioning of the internal market by removing specific legal barriers to the free movement of cross-border online services (the so called “information society services” such as online newspapers, online selling of products and online provision of financial services).

4.3 The Adoption and Children Act 2002 (“the Act”) will be fully implemented on 30 December 2005. The Act is concerned with adoption and the protection of children and certain provisions restrict the making of arrangements for adoption and advertising for adoption. In particular:

- Section 92 of the Act prohibits persons who are not registered adoption agencies from taking certain steps in relation to arranging adoptions (this might include, for example, offering over the internet to find a child for adoption. Section 93 makes the contravention of section 92 an offence.
- Section 123 prohibits persons who are not registered adoption agencies from publishing or distributing advertisements relating to adoptions and from causing such advertisements to be published or distributed. For these purposes, publishing or distributing specifically includes doing so by electronic means (for example, by means of the internet). Section 124 makes the contravention of section 123 an offence.

4.4 Because these provisions restrict activities which could be carried out electronically, they engage the Directive. Therefore, provision must be made to ensure that the Act complies with the Directive (thus ensuring that the Directive is fully implemented in the UK).

The approach taken to transposition

4.5 The Department consulted on two options to ensure that the Adoption and Children Act 2002 would be compliant with the Directive:

- **Option 1 – Make purpose built regulations accepting the full effect of the Directive:** Under this option regulations would be made to the effect that nothing in the 2002 Act conflicts with the Directive. The restrictions in sections 92, 93, 123 and 124 of the 2002 Act would be disapplied in the case of ‘incoming’ information service providers (i.e. service providers from other EU Member States). No restrictions on the making of ‘virtual arrangements’ or advertisements in cross-border situations would be allowed.
- **Option 2 – Make purpose built regulations enabling a derogation under the Directive:** Under this option, the provisions in the Directive which allow derogation from its internal market provisions would be used. This would enable the protection of children by restricting the provision of online adoption services or adoption advertising by providers established in other Member States on a case by case basis (i.e. by prosecuting under sections 92, 93, 123 and 124 of the 2002 Act) where it was considered reasonable and proportionate to do so. Regulations would be needed to implement the derogation and set out the appropriate procedure for operation of the derogation.

4.6 The Regulations reflect option 2, allowing a derogation from the Directive. This enables the original policy intention of the 2002 Act to be preserved, namely protecting the welfare of children involved in adoption.

5. Extent

5.1 Subject to what is said at paragraph 5.2 below, this instrument applies to all of the United Kingdom.

5.2 In so far as the instrument relates to sections 92 and 93 of the Act, it applies to England and Wales only.

6. European Convention on Human Rights

6.1 No statement is required.

7. Policy background

7.1 An over-arching explanatory memorandum for the Adoption and Children Act 2002 as a whole is attached.

7.2 The current legislation relating to the advertising of adoptions is set out in section 58 of the Adoption Act 1976. This provision restricts the publication of advertisements indicating that persons other than adoption agencies are willing to

make arrangements for the adoption of a child, and makes it an offence for either parents or prospective adoptive parents to advertise their desire for adoption. This provision was re-enacted with amendments by the Adoption and Children Act 2002 (“the 2002 Act”).

7.3 The 2002 Act will be fully implemented on 30 December 2005. As stated above, four sections of the 2002 Act (sections 92, 93 123 and 124) engage the E-Commerce Directive.

7.4 The regulations will ensure that the Adoption and Children Act 2002 is compliant with the E-Commerce Directive, but will also allow for derogation to be made from the terms of the Directive where the welfare of children is at risk. In practice, this means that the UK Government will be able to apply the restrictions in sections 92-3 and 123-4 to organisations in other EU Member States who are advertising children for adoption or making arrangements for adoption over the internet (accessible in the UK), and who are not registered adoption agencies. The derogation could only be used where certain procedural conditions had been met, such as first attempting to resolve the issue by inter-Governmental co-operation between the UK and the relevant other EU Member State.

Public Consultation

7.5 Draft regulations were issued in June 2005 for a three month consultation period. The regulations were also notified to the European Commission.

7.6 Responses to the consultation on the regulations came from a range of different organisations, such as adoption agencies, advertising associations, representative bodies of internet service providers (ISPs) and the European Commission. Overall, respondents were concerned that the Regulations provide adequate safeguards for children where advertising for adoption or making arrangements for adoption is taking place over the internet. Representative groups of ISPs also commented on the range of defences available to ISPs in the regulations.

7.7 Changes were made to the draft regulations as a result of consultation, including adding a defence to the restrictions for internet service providers who act a caching service. The DfES plans to issue guidance for adoption agencies and those designated as ‘responsible authorities’ in the Regulations in relation to the restrictions on advertising in the 2002 Act work, and also how these Regulations and the Directive relate to them.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this memorandum.

9. Contact

9.1 Jane Cunliffe at the Department for Education and Skills Tel: 020 7273 5223 or e-mail: jane.cunliffe@dfes.gsi.gov.uk can answer any queries regarding the instrument.

Transposition Note for the Electronic Commerce Directive as it relates to the Adoption and Children Act 2002

The Electronic Commerce Directive (Adoption and Children Act 2002) Regulations 2005 (“the Regulations”) do what is necessary to implement the Electronic Commerce Directive¹ (“the Directive”) in so far as it relates to the Adoption and Children Act 2002 (“the Act”).

Article	Objective	Implementation	Responsibility
3.1	Provides that each Member State must ensure that information society service providers established on its territory comply with the local legal requirements regardless of where in the European Economic Area (“EEA”) they may be providing the information society services. This is the first part of the “country of origin principle” created by the Directive (see under article 3.2 below).	Regulation 3 of the Regulations implements article 3.1: it provides that, for the purposes of ss. 92, 93, 123 and 124 of the Act, a UK-established information society service provider will always be regarded as carrying on that service in the UK. This means that the provisions of the Act would apply to a UK-established information society services provider wherever those services were offered, thus giving effect to the objective of article 3.1.	Secretary of State
3.2	Prohibits Member States from restricting, for reasons falling within the co-ordinated field (as defined in the Directive), the freedom to provide information society services from other Member States. This is the other part of the “country of origin” principle referred to above: a person providing information society services in the EEA should be regulated only by the authorities in the Member State in which he is established.	Regulation 4 implements article 3.2: it excludes the application of sections 92, 93, 123 and 124 of the Act to persons providing information society services from Member States other than the UK (“incoming providers”), in so far as those sections of the Act constitute restrictions imposed for reasons falling within the co-ordinated field (as defined in the Regulations).	Secretary of State
3.4	Allows Member States to derogate from article 3.2 in respect of a given information society service where certain “policy conditions” and “procedural conditions” are met. Article 3.4(a) sets out the policy	Regulation 5 gives effect to the derogation in article 3.4: it permits a responsible authority (as defined in the Regulations), in cases where the policy and procedural conditions are met, to apply the restrictions in sections 92, 93, 123 and 124 of the Act to anything done by the incoming provider. Regulations 6 and 7 of the Regulations	Secretary of State

¹ Directive 2000/31/EC of the European Parliament 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).

Article	Objective	Implementation	Responsibility
	conditions and article 3.4(b) sets out the procedural conditions that must be met in order for any derogations to be made.	implement article 3.4(a) and (b) by setting out the policy conditions and the procedural conditions that must be met in order for any derogation to be made.	
3.5	Allows Member States to derogate from article 3.2 without fulfilling the procedural conditions where the case is urgent. In such cases, the Member State must notify the Commission and the Member State in which the incoming provider is established as soon as possible.	Regulation 8 implements article 3.5 of the Directive: it provides that a responsible authority may dispense with the need to satisfy the conditions in regulation 7 in urgent cases and that in such cases, it must notify the Commission and the appropriate authority of the Member State in which the provider is established (defined in the Regulations as the “relevant EEA authority”) as soon as possible.	Secretary of State
12	Provides a defence against any liability for information transmitted, for intermediary information society service providers who are “mere conduits” in relation to the information and where certain conditions are met.	Regulation 9 implements article 12 by providing a defence to section 124 of the Act where an information society service provider is a mere conduit and where the conditions set out in article 12 are met.	Secretary of State
13	Provides a defence against any liability for information transmitted, for intermediary information society service providers whose services consist of “caching” that information and where certain conditions are met.	Regulation 10 implements article 13 by providing a defence to section 124 of the Act where an information society service provider is caching the information which contravenes section 123 of the Act and where the conditions set out in article 13 are met.	Secretary of State
14	Provides a defence against any liability for information transmitted, for intermediary information society service providers whose services consist of “hosting” that information and where certain conditions are met.	Regulation 11 implements article 14 by providing a defence to section 124 of the Act where an information society service provider is hosting the information which contravenes section 123 of the Act and where the conditions set out in article 12 are met.	Secretary of State

EXPLANATORY MEMORANDUM ON THE IMPLEMENTATION OF THE ADOPTION AND CHILDREN ACT 2002

1. This explanatory memorandum has been prepared by the Department for Education and Skills and is submitted voluntarily.

Description

2. This is an overarching explanatory memorandum which explains the context of the Adoption and Children Act 2002² (“the 2002 Act”), and relates to a series of Statutory Instruments, as set out in paragraphs 14 and 15, which are intended to be made and laid during 2005 to implement the 2002 Act.

Matters of special interest to the Joint Committee on Statutory Instruments

3. Three of these Statutory Instruments will be subject to the affirmative resolution procedure. These are The Restriction on the Preparation of Adoption Reports Regulations 2005, The Suitability of Adopters Regulations 2005 and an Order to be made under section 142 of the 2002 Act to amend the statutory adoption pay provisions as a consequence of unmarried couples being able to apply to adopt jointly.

Legislative background

4. Following a review of adoption law carried out by the Department of Health between 1991 and 1993, a draft Adoption Bill was published in 1996. The Bill was generally well received, but was never introduced into Parliament. In February 2000, the Prime Minister announced that he would lead a thorough review of adoption policy. He commissioned the Performance and Innovation Unit (PIU) to carry out a review of adoption and make recommendations to the Government for future action. The PIU review reported in July 2000 and made a number of recommendations to Government, including several related to changes in adoption legislation.
5. In December 2000, the Department of Health published a White Paper *Adoption: a new approach*, which took on board many of the PIU recommendations. The Government made a commitment to legislate in 2001 to ‘overhaul and modernise the legal framework for adoption.’³

² 2002 c.38.

³ *Adoption: a new approach*, White Paper, December 2000, p.25.

6. The Adoption and Children Bill was subsequently introduced in 2001, and received Royal Assent in November 2002. The 2002 Act:
- aligns adoption law with the relevant provisions of the Children Act 1989⁴ to ensure that the child's welfare is the paramount consideration in all decisions relating to adoption;
 - places a duty on local authorities to maintain an adoption service, including arrangements for the provision of adoption support services;
 - provides a new right to an assessment of needs for adoption support services for adoptive families and others;
 - sets out a new regulatory structure for adoption support agencies (requiring them to be registered under the Care Standards Act 2000⁵);
 - enables the appropriate Minister to establish an independent review mechanism in relation to qualifying determinations made by an adoption agency;
 - makes provision for the process of adoption including new measures for placement for adoption with consent and placement orders;
 - provides for adoption orders to be made in favour of single people, married couples and, for the first time, unmarried couples (amended by the Civil Partnership Act);⁶
 - provides for a new framework designed to ensure a more consistent approach by adoption agencies in respect of access to information held about adoptions which take place after the 2002 Act comes into force;
 - provides for a new regulatory framework within which intermediary agencies (registered adoption support agencies or adoption agencies) will be able to assist adopted adults to obtain information about their adoption and facilitate contact between them and their adult birth relatives, where the person was adopted before the 2002 Act came into force;
 - provides additional restrictions on bringing a child into the UK in connection with adoption;
 - provides for restrictions on arranging adoptions and advertising children for adoption other than through adoption agencies;
 - makes provision enabling the Secretary of State to establish a statutory Adoption and Children Act Register to suggest matches between children waiting to be adopted and approve prospective adopters; and
 - amends the Children Act 1989 to introduce a new special guardianship order, intended to provide permanence for children for whom adoption is not appropriate.
7. The 2002 Act provides the framework for the new approach to adoption, which is to be complemented by secondary legislation.

⁴ 1989 c.41.

⁵ 2000 c.14.

⁶ The definition of couple in section 144(4) of the 2002 Act has been amended by the Civil Partnership Act 2004 (2004 c.33) to include a civil partnership.

Early implementation

8. In accordance with commitments made by Ministers during the passage of the 2002 Act through Parliament, the 2002 Act included provisions to amend the existing Adoption Act 1976⁷ to enable important elements of the new adoption framework to be implemented in advance of the full implementation of the 2002 Act (see Schedule 4 of the 2002 Act).
9. In June 2003 the Intercountry Adoption (Hague Convention) Regulations 2003⁸ and Adoption (Bringing Children into the United Kingdom) Regulations 2003⁹ came into force. These Regulations put in place the necessary provisions to give effect to the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption concluded at the Hague on the 29 May 1993 (“the Hague Convention”) and provide an increased level of protection to children coming into the UK from other countries.
10. The first phase of the adoption support services framework was implemented on 30 October 2003 when the Adoption Support Services (Local Authorities) (England) Regulations 2003¹⁰ came into force. These Regulations give adoptive families an entitlement to receive an assessment of their adoption support needs and give birth relatives an entitlement to receive an assessment in relation to support for contact arrangements. They also require local authorities to make arrangements for the provision of a range of adoption support services, including financial support, and to appoint an adoption support services adviser to act as a first port of call for enquiries and signpost families to services.
11. The independent review mechanism in respect of qualifying determinations made by adoption agencies, where they consider that a prospective adopter is not suitable to be an adoptive parent and does not propose to approve him as suitable to be an adoptive parent was introduced in April 2004 when the Independent Review of Determinations (Adoption) Regulations 2004¹¹ came into force.
12. As the early implementation relates to the current Adoption Act 1976 scheme for adoption, similar provision in secondary legislation needs to be made in the context of the 2002 Act scheme for adoption in respect of those elements of the Act which have been implemented early.
13. The annex summarises the position regarding implementation of amendments to the Children Act 1989 made by the 2002 Act which relate to areas other than adoption and special guardianship.

⁷ 1976 c.36.

⁸ SI 2003/118.

⁹ SI 2003/1173.

¹⁰ SI 2003/1348.

¹¹ SI 2004/190 as corrected, and as amended by SI 2004/1081 and 2004/1868.

Implementation

14. The statutory instruments necessary to implement the 2002 Act are to be made in two main stages. The first series of statutory instruments will be as follows, and each will be accompanied by an individual explanatory memorandum setting out the detail of the SI, and a regulatory impact assessment:
- **The Adoption Agencies Regulations 2005** will provide for the duties agencies will have in relation to arranging adoptions under the 2002 Act, including agency arrangements for adoption work, considering whether a child should be placed for adoption, approval of prospective adopters and whether a particular child should be placed with prospective adopters.
 - **The Adoptions with a Foreign Element Regulations 2005** will provide additional requirements for, and set out additional procedures in relation to, the adoption of children from abroad by British residents and the adoption of children in England and Wales by persons resident abroad. This includes adoptions falling within the scope of the Hague Convention and non-Convention adoptions.
 - **The Suitability of Adopters Regulations 2005 (affirmative)** will prescribe the matters which must be taken into account by an adoption agency in preparing reports on and determining the suitability of a person wishing to adopt a child.
 - **The Restriction on the Preparation of Adoption Reports Regulations 2005 (affirmative)** will specify who may prepare reports in specified circumstances in connection with adoption.
 - **The Adoption Support Services Regulations 2005** will build on the framework established through the 2003 Regulations, widening the pool of people entitled to an assessment of their need for adoption support services and extending the list of adoption support services that local authorities are required to maintain to explicitly include services to assist with disruption. The 2005 Regulations also further refine the process for assessment of need and for the planning and review of service provision as well as further clarifying the role of the adoption support services adviser.
 - **The Adoption Support Agencies Regulations 2005** together with accompanying national minimum standards issued under section 23 of the Care Standards Act 2000 will govern the management and general operation of adoption support agencies, including making provision for their registration.
 - **The Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005** will apply to adoptions made after the 2002 Act came into force and will provide adoption agencies with a framework within which they are required to consider certain issues, such as the adopted person's welfare, before making a determination as to whether to disclose sensitive identifying information which would identify persons affected by an adoption.

- **The Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005** will enable registered adoption support agencies and adoption agencies to operate a regulated intermediary service so that adults adopted before the 2002 Act comes into force can obtain information about their adoption and contact between adopted adults and their adult birth relatives can be facilitated where appropriate.
- **The Adopted Children and Adoption Contact Registers Regulations 2005** will prescribe the form of entry in the Adopted Children Register, requirements etc. in relation to registrable foreign adoptions, information for the purposes of the Adoption Contact Register and for obtaining information from the registers and information about adopted persons and their relatives for the purposes of the Adoption Contact Register.
- **The Special Guardianship Regulations 2005** will prescribe the list of special guardianship support services which local authorities are required to maintain, the process for assessing special guardianship support needs, and requirements in respect of the planning, delivery and review of special guardianship support services. The Regulations will also prescribe the matters that local authorities are required to include in the report that the court must receive before it can make a special guardianship order.

15. The second series of statutory instruments will be as follows:

- **The Independent Review of Determinations (Adoption) Regulations 2005** will provide for the continued operation of an independent review mechanism in respect of qualifying determinations made by adoption agencies under the new scheme for adoption.
- **Adoption Agencies (Prescribed Fees) (England) Regulations 2005** will provide that fees may be charged by adoption agencies for their services in certain circumstances, for example, fees local authorities may charge for the preparation and assessment of prospective adopters who wish to adopt a child who is not resident in this country.
- Regulations made under section 108 of the 2002 Act regarding corresponding provisions in the Channel Islands and the Isle of Man. This will allow us to make the new adoption system work with the adoption system in the Channel Islands and the Isle of Man, for example in terms of mutual recognition of orders.
- Regulations made under section 87 of the 2002 Act prescribing the requirements that ought to be met by an adoption for it to be an “overseas adoption”. An overseas adoption is an adoption of a description specified in an order (to be made under section 87), being a description of an adoption effected under the law of any country or territory outside the British Islands. The status of children adopted under an overseas adoption is recognised by virtue of section 66 of the 2002 Act.
- **Non-Agency Adoptions Regulations 2005** will prescribe the local authority responsible for assessing the suitability of prospective adopters and providing a report to the court where the child is already living with the applicants and they give notice of their intention to apply for an adoption order, such as foster carers or relatives of the child and require the local authority to carry out CRB checks in respect of the applicants.

- Regulations making provision for any necessary consequential and transitional provisions.
- Regulations under section 2(2) of the European Communities Act 1972 to ensure the 2002 Act is consistent with Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services.
- An order (affirmative) made under section 142 of the 2002 Act will amend the statutory adoption pay provisions as a consequence of unmarried couples being able to apply to adopt jointly.

16. The intention is that all of the SIs set out in paragraphs 14 and 15 above will come into force on 30 December 2005.

17. As noted above, the White Paper recommended the establishment of a statutory adoption register – the Adoption and Children Act Register – for which provision was made in the 2002 Act. This provision is not being implemented at present. Ministers have decided to continue with a non-statutory register for the next three years. This will give a stronger evidence base on which to assess the effectiveness of a non-statutory register and the desirability of moving to a statutory register.

Extent

18. Regulations will apply either in England only or in England and Wales. Each individual explanatory memorandum will set out the application of each statutory instrument.

Policy background

19. The total number of adoption orders made in England has declined from 5,657 in the year ending 31 December 2001, to 4,479 in 2003. At the same time, the number of adoptions in respect of looked after children in England has increased from 3,400 in the year ending 31 March 2002, to 3,700 in 2004. The number of applications to adopt a child from overseas processed by the DfES has remained relatively steady at around 300 each year (330 in year ending 31 December 2004).

20. The PIU review of adoption in 2000 and the White Paper *Adoption: a new approach* identified some key problems which meant the needs of looked after children were not consistently being met, including:

- wide variation by councils in the use and practice of adoption;
- to the detriment of children, the adoption process was widely seen as prone to delay, with clear concerns over the consistency, quality and clarity of the process;
- a lack of consistency in the law;
- the review mechanism for those applying to adopt was seen as unfair and not impartial;
- little support was available for adopters; and
- delays in the court processes over adoption.

21. Implementation of the 2002 Act will fulfil the Government's intention to reform adoption law and implement the proposals in the 2000 White Paper which require legislation. The overriding aim of improving the adoption service and promoting greater use of adoption will be furthered by the implementation of the SIs.

Public Consultation

22. There has been extensive public consultation upon the adoption procedures set out in the regulations. The explanatory memorandum to accompany each statutory instrument will give further details of the public consultations.
23. Five consultation packages on draft regulations and draft guidance to be made under the 2002 Act were published in 2003 and 2004. A further consultation document will be issued in early 2005 to cover the key draft SIs in the second series set out in paragraph 15 above which introduce the final changes. The numbers of respondents for each package are listed below. The overall number of written responses was 422.
- Arranging Adoptions and Assessing Prospective Adopters – (115 responses)
 - Adoption Reports and Adoptions with a Foreign Element – (50 responses)
 - Access to Information (including the Registrar General's functions) – (124 responses)
 - Adoption Support and Adoption Support Agencies (75 responses)
 - Care Planning and Special Guardianship (58 responses)
24. The responses to these documents together with the information gathered at 14 regional consultation events and 15 focus groups and numerous other meetings held earlier in the year have informed the development of the Regulations and implementation arrangements. The explanatory memorandum in relation to the individual SIs will provide more detail.

Impact

25. Each Statutory Instrument will have a regulatory impact assessment attached.

Contact

26. Helen Steele, Head of Adoption, 4th Floor, Caxton House, Tothill Street, London, SW1H 9NA.

Annex: Implementation of amendments to the Children Act 1989 that are not adoption or special guardianship related

The Government has already implemented the following key provisions of the Adoption and Children Act 2002:

- On Royal Assent (7 November 2002): provision in respect of local authorities' power to provide accommodation for children in need under section 17 of the Children Act 1989.
- 1 December 2003: parental responsibility for unmarried fathers who jointly register the birth of their child with the mother.
- 1 April 2004: advocacy services for children and young people. Amendment and widening of the application of, the procedure for making representations under that Act and to impose a duty on local authorities to make arrangements for the provision of advocacy services to children or young people making or intending to make representations.
- 27 September 2004: Independent Reviewing Officers, responsible for chairing statutory reviews of all looked after children.
- 31 January 2005: Amendment to the definition of 'harm' in the 1989 Act to make clear that harm includes any impairment of the child's health or development as a result of witnessing the ill treatment of another person.

The remaining provisions will be implemented as follows:

- 30 December 2005: Amendment enabling the acquisition of parental responsibility by a step-parent either by agreement of both parents or a court order.
- 30 December 2005: Amendment enabling local authority foster carers to seek leave of the court to apply for an order under section 8 of the 1989 Act (including a residence order) if the child has been living with them for one year, rather than the current three years.
- 30 December 2005: Amendment enabling courts to make residence orders that have effect until the child reaches the age of 18.
- DfES have consulted on the draft Regulations required to implement the provisions in respect of inquiries by local authorities into representations. Ministers are considering the timetable for implementation in the light of the responses to that consultation.

REGULATORY IMPACT ASSESSMENT

ELECTRONIC COMMERCE DIRECTIVE (ADOPTION AND CHILDREN ACT 2002) REGULATIONS 2005

Purpose and intended effect

1. The purpose of the regulations is to ensure that the Adoption and Children Act 2002 is compliant with the E-Commerce Directive 2000 whilst also ensuring that the policy intentions behind the Act are preserved and that we are able to protect children where their welfare is being put at risk.

Background

2. There are four sections in the 2002 Act which engage the Directive:
 - Section 92 prohibits persons who are not, in effect, registered adoption agencies from taking certain steps in relation to arranging adoptions (for example, offering to find a child for adoption). Section 93 makes the contravention of section 92 an offence where it is proved that the person knew or had reason to suspect that the step would contravene that section. The offence is punishable with up to six months imprisonment or with a fine of up to £10,000, or both. Sections 92 and 93 apply only in England and Wales.
 - Section 123 prohibits persons who are not registered adoption agencies from publishing or distributing advertisements relating to adoptions and from causing such advertisements to be published or distributed. For these purposes, publishing or distributing specifically includes doing so by electronic means. Section 124 makes the contravention of section 123 an offence where it is proved that the person knew or had reason to suspect that section 123 applied to the information. The offence is punishable with up to 3 months imprisonment or with a fine not exceeding level 5 on the standard scale, or both. Sections 123 and 124 apply in the whole of the United Kingdom
3. The E-Commerce Directive seeks to remove obstacles to cross-border online services in the internal market on the one hand, by requiring each Member State to ensure that providers established on its territory comply with the local legal requirements regardless of where in the EEA they may be providing the information society services, and on the other hand, by prohibiting Member States from restricting such services provided by information society service providers established in another Member State. A person providing information society services in the European Economic Area should be regulated only by the authorities in the Member State in which he is established. These are called the 'internal market' provisions of the Directive.
4. The Directive does provide for certain limited derogations to the internal market provisions. Furthermore, there is provision for a case by case derogation from the internal market provisions which Member States may use to take measures, such as sanctions and injunctions, to restrict the provision of a particular online service from another Member State where there is a

need to protect certain identified interests. These interests can include the protection of minors.

5. The regulations introduce a framework for derogations from the internal market provisions of the Directive. The derogations will enable us to protect children by restricting the provision of online adoption services or adoption advertising services from other Member States on a case by case basis where we considered it reasonable and proportionate to do so.

Risks

6. The main risks that the regulations are addressing are to the welfare of children. Making arrangements for adoption and the advertisement of children for adoption on the internet has risks for both the children and the adults involved. Current adoption legislation is based on the principle that only approved adoption agencies should be responsible for these types of transactions, as they have the necessary skills and experience, have proven their credibility and are tightly regulated by the Commission for Social Care Inspection.
7. In the context of the E-Commerce Directive the electronic communications concerned would be between a UK resident and an organisation or individuals from another country, i.e. for the purposes of intercountry adoption. UK residents wishing to adopt from abroad are required by law to undergo an assessment and approval process via an adoption agency. The risk to children is that those who respond to these advertisements and make arrangements over the internet have not gone through the appropriate assessment and approval process.

Options

Option 1 – Make purpose built regulations accepting the full effect of the Directive

8. Under this option regulations would be made to the effect that nothing in the 2002 Act conflicts with the Directive. We would, therefore, disapply the restrictions in sections 92, 93, 123 and 124 of the 2002 Act in the case of 'incoming' information service providers (i.e. service providers from other EU Member States). We would not be able to restrict the making of 'virtual arrangements' or advertisements in cross-border situations.

Option 2 – Make purpose built regulations enabling a derogation under the Directive

9. Under this option, we would take advantage of the provisions in the Directive which allow derogation from its internal market provisions. This would enable us to protect children by restricting the provision of online adoption services or adoption advertising by providers established in other Member States on a case by case basis (i.e. by prosecuting under sections 92, 93, 123 and 124 of the 2002 Act) where we considered it reasonable and proportionate to do so. Regulations would be needed to implement the derogation and set out the appropriate procedure for operation of the derogation.

Costs

Option 1 – Make purpose built regulations accepting the full effect of the Directive

10. All ISSPs are already required to comply with legislation and statutory instruments governing e-commerce in the Member State where they are based. By ensuring that the specific restrictions set out in sections 92 and 123 of the 2002 Act did not apply to ISSPs based in other Member States, we would not increase any costs for these types of businesses.
11. Costs that would have been incurred include, for example, the company needing to seek legal advice in order to ensure its compliance with the different sets of legislation. A respondent to the DTI consultation on the draft Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) estimated that a review of the regulatory framework for online services in the UK alone had cost €60,000.

Option 2 – Make purpose built regulations enabling a derogation under the Directive

12. The introduction of a framework for a derogation to the principles of the Directive could have increased costs for ISSPs based in other Member States, as they would potentially be required to comply not only with the relevant legislation in the Member State where they were based, but also with the restrictions set out in the 2002 Act.
13. The cost of applying the restrictions which are enabled by the derogation would vary depending on the size and type of the organisation, the extent of the action required to comply with the restrictions and the level of systems change required.
14. The first stage of any enforcement measures taken under the derogation would be notice and takedown procedures brought in relation to the ISP. In performing this action, an ISP is likely to incur technical costs associated with the taking down of the information from the internet and legal costs where the ISP has a contract with the content owner.
15. We have been unable to assess the costs of a single, standard notice and takedown action. However, one respondent to the DTI public consultation on the draft Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) who engages in notice and takedown activities estimated that to establish an effective regime in the 13 Member States where it operates would cost £60-90,000 in legal costs and £80-120,000 in engineering and technical costs. It is not expected that the derogation to the Directive to enforce the restrictions in the 2002 Act would be used on a frequent basis. Although ISPs would incur costs for associated notice and takedown procedure were the derogation to be used, the increase in marginal costs against the overall notice and takedown regime would be negligible.
16. The second stage of enforcement would be enforcement action against the content owner. In certain circumstances, the government (or the responsible authorities) may consider invoking the derogations and taking action against the content owner under sections 93 and 124 of the 2002 Act. (Note that it is

not anticipated that such enforcement action would be taken against the ISP on the basis that the defences for mere conduits and hosting would apply.)

17. If, however, the organisation wished to continue advertising adoptions or arranging adoptions in the UK, it would have to register as an adoption agency. The costs associated with setting up as an adoption agency include an initial registration fee with the Commission for Social Care Inspection, and an annual fee of £600. The organisation would also need to have a suitably qualified manager, qualified social workers and suitable premises, in accordance with the National Minimum Standards.

Securing compliance

18. Breaches of sections 92 and 123 of the 2002 Act are likely to be brought to the attention of a responsible authority (as defined in the regulations) by a range of sources. These could include adoption agencies based in the UK or abroad, individuals concerned and adoption authorities in other countries. These concerns will be investigated by the relevant responsible authority.
19. Where there is cause to believe that the actions identified constitute an offence under sections 93 and 124 of the 2002 Act, the regulations set out policy conditions that must be met before the derogation can be used (Regulation 7).
20. If the policy conditions are met, regulation 8 sets out procedural conditions that must be met before the derogation can be used. These are that the responsible authority must have:
 - asked the country where the e-commerce provider is based to take measures to rectify the situation giving cause for concern.
 - satisfied itself that authorities in the other country have not taken any such measures within a reasonable timescale or, in the opinion of the responsible authority, have taken inadequate measures.
 - told the European Commission and the authorities in the other country that it intends to make a derogation and apply the restrictions under sections 92-3 and/or 123-4 of the 2002 Act to the e-commerce provider.
 - notified the e-commerce provider of the intention to apply the relevant restrictions under the 2002 Act and allowed time for the provider to make representations against the planned action.
21. It may be that compliance with the relevant sections of the 2002 Act can be secured as a result of these discussions as part of the procedural conditions.
22. Where these discussions are not successful or where the case is considered urgent (regulation 9), there are two stages to the enforcement of sections 92 and 123 (as explained above):
 - The first is a notice and take-down procedure, to ensure that the information is removed from the internet. Once the ISP has been notified that it is acting as a conduit for or that it is hosting illegal information, it may act to take the information off the internet.

- The second stage would be possible action against the content owner under sections 93 and 124 of the 2002 Act.

Impact on small businesses

23. Businesses or organisations in other EU Member States that advertise adoptions on the internet may be small bodies, akin to voluntary adoption agencies in the UK. The imposition of the restrictions set out in the regulations would therefore impact on their business. It may have the effect of ensuring that they are no longer able to arrange adoptions involving UK residents. We do not believe, however, that this is disproportionate to the aim of safeguarding the welfare of the children involved. The costs of ensuring compliance with the restrictions in the 2002 Act are set out above.

Consultation

24. Draft regulations were issued in June 2005 for a three month consultation period. The regulations were also notified to the European Commission.
25. Responses to the consultation on the regulations came from a range of different organisations, such as adoption agencies, advertising associations, representative bodies of internet service providers (ISPs) and the European Commission. Overall, respondents were concerned that the regulations provide adequate safeguards for children where advertising for adoption or making arrangements for adoption is taking place over the internet. Representative groups of ISPs also commented on the range of defences available to ISPs in the regulations.
26. Changes were made to the draft regulations as a result of consultation, including adding a defence to the restrictions for internet service providers who act a caching service. The DfES plans to issue guidance for adoption agencies and those designated as 'responsible authorities' in the regulations as to how the restrictions on advertising in the 2002 Act work, and also how these regulations and the Directive relate to them.

Monitoring and evaluation

27. The DfES Adoption Team will be monitoring the impact of the regulations and any restrictions that are introduced on all involved, including ISSPs, the relevant organisations and authorities in the other Member State. We will evaluate whether any changes are needed to the framework established in the regulations