



# **POST-BREXIT: INFORMATION SOCIETY SERVICES AND THE ECOMMERCE DIRECTIVE**

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## **Introduction**

Under the EU Directive 2000/31/EC of 8 June 2000 on certain legal aspects of society services, in particular electronic commerce, in the Internal Market (the “Ecommerce Directive”), companies established in any EU Member State are entitled to operate in any country of the EEA whilst only complying with the regulation in the relevant company’s country of establishment, as long as the regulation falls within the coordinated field.

The Brexit transition period expired 1 January 2021. Consequentially, the Ecommerce Directive no longer applies to the UK. When marketing and providing information society services to the UK within the coordinated field, companies established in any EU Member State must therefore ensure that they comply with applicable UK regulation, as they can no longer rely on merely complying with their own national legislation.

Further, companies established in the UK must now comply with the specific national regulation of the EU Member State in which such UK company is marketing or providing information society services.

### **Scope of the Ecommerce Directive**

The Ecommerce Directive applies to “information society services” provided by companies with a “place of establishment” within an EU Member State and to regulation within the “coordinated field”.

Information society services are services provided, against remuneration, at a distance by electronic means and at the individual request of a recipient. For example, marketing and online provision of goods, online retailers, internet access providers, SaaS, IaaS, and PaaS providers are covered by the definition.

The place of establishment is the fixed establishment where the Company is pursuing its economic activities over an indefinite period of time.

The coordinated field is the requirement laid down in the legal system of an EU Member State applicable to information society services and providers. This includes online information requirements, online advertisement requirements, online shopping regulation, and regulation related to online entering of contracts.

### **Geo-Blocking**

Because of Brexit, EU Regulation no. 2018/308 which contains a prohibition against geo-blocking (and other types of discrimination based on nationality, place of residence and place of establishment within the Internal Market) no longer applies in the UK.

Consequently, companies whose place of establishment is within the EU may legally discriminate UK consumers, e.g. by offering products and services at different prices or on different terms than to consumers within the EU. Companies must, however, ensure their compliance with the UK regulation applicable to the services offered.

## **Personal Data**

EU based companies transfer and receive vast amounts of personal data to and from the UK, also in relation to information society services.

Post-Brexit, the UK should generally be considered a third country in terms of processing of personal data under the General Data Protection Regulation. Any transfer of personal data to the UK would therefore have to be based on another legal foundation as known from other transfers to third countries.

In the EU-UK Trade and Cooperation Agreement of 24 December 2020, however, a six-month transition period has been implemented. This means that until 1 July 2021, the UK is still to be considered as being part of the EU/EEA in terms of transferring of personal data. Companies may therefore still transfer and receive personal data to and from the UK in the same way as they have done thus far.

21 February 2021, the European Commission published a draft adequacy decision regarding the UK under the General Data Protection Regulation. The draft adequacy decision is now awaiting comments from the European Data Protection Board, after which the Commission will request approval from a committee established by representatives of the EU Member States. If approved as is expected, personal data will still be able to flow freely between the UK and EU Members States following the expiration of the above-mentioned transition period.

## **Our Comments**

Any company exchanging information society services between UK and EU/EEA must consider the implications of Brexit regarding their ecommerce activities. Companies established in EU Member States must carefully assess the information society services provided or marketed towards the UK, to secure compliance and necessary amendments can include updates of terms and conditions, price information, warranties, marketing materials etc.

Companies established in the UK must make similar assessments when marketing or providing information society services to EU Member States to secure compliance with the specific national regulation in each EU Member State.

It is no longer sufficient to rely on compliance with regulation in the country of establishment, and thus companies should take measures to ensure that they comply with applicable regulation.

**If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:**



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