EUROPEAN UNION (WITHDRAWAL) BILL

ILLUSTRATIVE SAMPLES OF STATUTORY INSTRUMENTS TO CORRECT INOPERABILITIES OR DEFICIENCIES IN RETAINED EU LAW AFTER EXIT

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Introduction

The European Union (Withdrawal) Bill ("the Bill", or EUWB) will repeal the European Communities Act 1972 on the day the United Kingdom leaves the European Union (EU). The purpose of the Bill is to provide a functioning statute book on the day we leave the EU.

The Bill will create powers to make secondary legislation, including temporary powers, to enable corrections to be made to laws that would otherwise no longer operate appropriately once the UK has left the EU.

The *Memorandum concerning the Delegated Powers in the Bill*[1] provided some examples of how the powers in the Bill could be used to make secondary legislation, and stated that more sample drafting will become available during the Bill's passage.

The Government has also published, during the House of Commons committee stage of the Bill, two draft statutory instruments (SIs) to illustrate how it is likely to use these powers to make amendments to employment legislation to ensure it

[1] https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20(Withdrawal)%20Bill.pdf

operates correctly.[2]

These sample SIs should be taken as illustrative examples of how the powers in the Bill may be used, and not as final drafts for consultation. Where appropriate, departments will work with their counterparts in the Devolved Administrations to ensure law operates correctly after exit.

1 Ministry of Justice: The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018 Context and Overview

An illustrative draft of this SI is published alongside this covering note.

The Government has stated in its position paper, "Providing a cross border civil judicial cooperation framework", published on 22 August 2017, that it intends to incorporate Regulation (EC) No. 593/2008 on the law applicable to contractual obligations ("the Rome I Regulation") and Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (the "Rome II Regulation") into domestic law.

The Rome I Regulation contains rules that determine which country's laws courts should apply when adjudicating on contractual disputes raising cross-border issues. The Rome II Regulation contains similar rules for non-contractual disputes.

Detail

Under clause 3 of the EUWB, the Rome I and Rome II Regulations will form part of domestic law on and after exit day. Ministers intend using the power in clauses 7(2)(a), (b) and (g) of the EUWB to make amendments to the Rome I and Rome II Regulations to ensure they will operate effectively once the UK leaves the European Union.

The amendments are necessary because, in their present form, the Rome I and Rome II Regulations apply only to EU Member States. The main focus of the SI will be to amend the Rome I and Rome II Regulations so that both will continue to apply to the UK once it ceases to be an EU Member State. The amendments illustrated in this draft SI include replacing references to "Member State" with "relevant state" (defined to mean either the UK and all the EU Member States or, where necessary, the UK and only the Member States bound by the Regulations, which currently excludes Denmark) and replacing references to "Community law" with references to "retained EU law", which reflects the language of the EUWB. The final SI will include other amendments which are still under consideration and are not shown in this draft.

This draft SI is being shared as part of a set of illustrative samples
to show how the powers in the Bill may be used to correct retained law. It should not

[2] https://www.gov.uk/government/publications/information-about-the-withdrawal-bill

be taken as the final version. In relation to extent, preparing our statute book for exit day will be a joint endeavour between the different governments and legislatures of the UK.

2 The Harbours, Highways, Merchant Shipping and Other Transport (Environmental Protection) (EU Exit) Regulations 2018

Introduction

An illustrative draft of this SI is published alongside this covering note.

This draft instrument is being shared as an example of how powers under clause 7 of the EUWB might be used to correct retained EU law. It ensures that environmental protection provisions relating to environmental impact assessments, air pollution (specifically the sulphur content of marine fuels) and anti-fouling systems (used to inhibit the growth of organisms on a ship's hull) are legally operable when the UK withdraws from the EU.

The instrument would correct a number of legal deficiencies in transport legislation relating to environmental protection. Those deficiencies are found both in EU-derived domestic legislation and in direct EU legislation.

The draft instrument also relies on powers under section 2(2) of the European Communities Act 1972 in order to update references to Directive 1999/32, which was repealed and replaced on 21 May 2016 by consolidated Directive 2016/802 (OJ No L 132, 21.05.2016, p. 58). These provisions are contained in Part 1 of the instrument.

Use of section 2(2) is possible because this instrument would be made and (in respect of Part 1) come into force before the European Communities Act 1972 is repealed on exit day. In this way, retained existing UK law will refer to the latest consolidated directive from 2016.

The extent of this instrument is England, Wales, Scotland and Northern Ireland, and the territorial application of this instrument is the United Kingdom and United Kingdom ships wherever they may be. This draft is an illustrative sample, and the department will work with the Devolved Administrations as appropriate on the final draft.

The instrument is designed to ensure that the existing regulatory framework for transport-related environmental protection remains operable in UK law when the United Kingdom withdraws from the European Union. The instrument does this by amendment to primary legislation and existing SIs which form part of EU-derived domestic legislation and EU direct legislation.

Environmental Impact Assessments

Regulations 3 to 6 amend the following existing transport legislation relating to environmental impact assessments:

- Schedule 3 of the Harbours Act 1964;
- Part VA of the Highways Act 1980;
- Part 1 of the Transport and Works Act 1992; and
- The Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006.

These amendments ensure that the UK continues to take a coordinated and streamlined approach to environmental impact assessments where an assessment is required under more than one aspect of EU law, for example where the obligation arises under both Transport and Works legislation, and under legislation on the protection of habitats. The amendments also ensure that where a UK project is likely to have significant environmental effects an EU Member State, the Secretary of State will continue to consult that country before deciding whether to grant permission.

Maritime environmental protection
In relation to maritime environmental provisions, this draft instrument would make amendments to the following legislation in relation to the sulphur content of marine fuels:

- The Merchant Shipping (Prevention of Air Pollution from Ships) Regulations (S.I.2008/2924) ("the 2008 Regulations"); and
- Commission Implementing Decision (EU) 2015/253 of 16 February 2015 laying down the rules concerning the sampling and reporting under Council Directive 1999/32/EC as regards the sulphur content of marine fuels (OJ No L 41, 17.02.2015, p.55) ("the 2015 Sulphur Decision").

In relation to anti-fouling systems, the draft instrument would amend the following legislation:

- The Merchant Shipping (Anti-Fouling Systems) Regulations (S.I.2009/2796);
- Regulation (EC) 782/2003 of the European Parliament and of the Council of 14 April 2003 on the prohibition of organotin compounds on ships (OJ No L 115, 09.05.2003, p. 1) ("the 2003 AFS Regulation");
- Commission Regulation (EC) 536/2008 of 13 June 2008 giving effect to Article 6(3) and Article 7 of the Regulation (EC) No 782/2003 of the European Parliament and of the Council on the prohibition of organotin compounds on ships (OJ No L 156, 14.06.2008, p. 10) ("the 2008 AFS Regulation").

This instrument makes amendments necessary to ensure that the existing regulatory framework for maritime environmental protection is retained, and operates effectively, following the UK's exit from the European Union. In addition to ensuring that the same regulatory requirements continue to apply to UK-registered ships, the amendments also ensure that UK regulators are able to enforce these standards against foreign vessels in UK waters, including EU vessels. The amendments:

- replace references to the UK as a Member State with the Secretary of State

or the United Kingdom in order to ensure that legislative regulatory requirements continue to apply within the UK when we are no longer a Member State;

- insert, omit or amend definitions to ensure compatibility or consistency with other legislation;
- omit or amend wording to reflect the United Kingdom will no longer be in the European Union or the European Economic Area;
- ensure that the UK continues to recognise emissions abatement methods approved by EU Member States;
- ensure that certain marine diesel engines in recreational or pleasure craft will continue to benefit from an exemption to certain regulatory requirements;
- remove what will become redundant requirements on the UK to make certain reports to the Commission;
- remove what will become redundant references to EU databases which we will no longer have access to, whilst ensuring that their role is replicated domestically; and
- transfer to the Secretary of State, Commission powers to amend references to provisions of international law governing the use of anti-fouling systems.

3 Department of Health and Social Care: Amendments to regulation 18 of the Quality and Safety of Organs Intended for Transplantation Regulations 2012

The following draft amendments to regulation 18 of the Quality and Safety of Organs Intended for Transplantation Regulations 2012 are being shared as an illustrative sample to show how the powers in the Bill may be used to correct retained law and make it operable upon exit from the EU. They should not be taken as the final version:

"**18 Organs sent to or received from another country**

(1) Where an organ is sent to a country in the European Union and that country requests provision of information necessary to meet that country's obligations under relevant European Union legislation in relation to that organ, including--

(a) information on organ and donor characterisation; and
(b) information to ensure the traceability of the organ,

The Authority [Human Tissue Authority] shall ensure that the information is transmitted to that country to the extent necessary to meet that country's obligations.

(2) Where an organ is sent to, or received from, a country in the European Union and the Authority is notified of a serious adverse event or reaction that it suspects relates to that organ, it shall ensure that information in relation to that serious adverse event or reaction is transmitted to the competent authority of the country to which the organ was sent or from which the organ was received.

(3) The Authority shall ensure that any organs sent to, or received from, countries

outside the United Kingdom can--

(a) be traced from the donor to the recipient; and
(b) meet quality and safety standards that are equivalent to those required by these Regulations.

(4) For the purposes of paragraph (3), the Authority may conclude agreements with countries that are outside the United Kingdom.

(5) In this regulation, "competent authority" in relation to a country in the European Union has the same meaning as Article 3 of the Directive."

Detail

The Government intends to use the powers under clause 7 of the EUWB to make amendments to the above Regulations concerning the quality and safety of organs for transplantation.

The Government is committed to maintaining high standards of quality and safety by ensuring that information relating to donors and organs is shared in a confidential and non-identifying manner to ensure that high quality and traceable organs are available for transplantation.

Summary of Regulation 18

Regulation 18 implements certain requirements of Directive 2010/53/EU (and Implementing Directive 2012/25/EU) on standards of quality and safety of human organs intended for transplantation. In particular, it deals with information which must be provided to or transmitted by the Human Tissue Authority ("HTA") when an organ is imported from, or exported to, another EU country, and it imposes an obligation on the HTA to report serious adverse reactions or events in such cases. Further provisions impose requirements on the HTA relating to the traceability of organs received from countries outside the EU and quality and safety standards relating to those organs.

The Government's view is that, when the UK is no longer a member of the EU, it will still be possible for the UK to share organs with EU Member States. Amendments are therefore proposed to allow continued organ sharing, while also making necessary changes to reflect the UK's new status outside of the EU.

Particular changes

Regulation 18(1) – Where an organ is sent to an EU Member State, this paragraph currently requires the HTA to send certain information to that country about the characteristics of the donor and the organ and to ensure the traceability of the organ. When the UK leaves the EU and *if* there is no deal, there will be no requirement on the other country in the EU to accept the provision of this information. The revised draft regulation therefore provides that information must be sent as requested so far as is necessary to meet that country's obligations under EU law. This ensures that the UK can continue to send organs to EU countries.

Regulation 18(1A) and (3) – Paragraph 1A imposes an obligation on the HTA to ensure that certain information, as specified in the Directive, is received where an organ is imported from an EU Member State in order to ensure traceability.

Paragraph (3) implements the provisions in the Directive which require that organ exchange with third countries may only take place where the organs can be traced from donor to recipients and where quality and safety standards are equivalent to those in the Directive.

This illustrative sample is drafted on the assumption that post-exit and without a deal, the UK will be a third country vis-a-vis the EU. There is no need to separate out the obligation in respect of EU countries and other countries, so paragraph (1A) is omitted and regulation 18(3) amended to provide a duty upon the HTA to ensure that organs sent to or received from countries outside the UK can be traced from donor to recipient and meet the quality and safety standards set out in the Regulations

Regulation 18(2) - This imposes obligations on the HTA relating to arrangements for reporting serious adverse events and reactions where an organ has been exported to or imported from an EU Member State. Post Exit there would be no requirement under the Directive for EU Member States to send reports relating to organs shared to the UK, this will be secured as part of the agreement made to receive an organ from a Member State instead. The amendments retain the existing duty for the HTA to notify EU Members States of these matters in the interests of sharing patient safety information.

4 Department for Environment, Food and Rural Affairs: The Exotic Disease (Amendment) (England) (EU Exit) Regulations 2018; The Seal Products (Amendments) (EU Exit) Regulations 2018; The Timber and Timber Products (Placing on the Market) Regulations 2018

The Exotic Disease (EU Exit)(Amendment)(England) Regulations

Notifiable diseases are animal diseases that keepers are legally obliged to report to the Animal and Plant Health Agency (APHA), even if an animal keeper only suspects that an animal may be affected. Exotic diseases are not normally present in the UK, and include foot and mouth disease (FMD), avian influenza, bluetongue and African Horse sickness. Some of these diseases are zoonotic which means they can pass between animals and humans, such as avian influenza. There are a number of English SIs that set out the way in which we are able to respond to outbreaks of various exotic diseases.

The draft Exotic Disease (EU Exit)(Amendment)(England) Regulations make minor amendments to deficiencies in nine English domestic exotic notifiable disease SIs to

ensure that on the day of exit from the EU, if there were to be an outbreak of animal disease the response could operate without issue.

The new SI will remove all references to requiring any EU commission approvals or allowing EU officials to access any restricted premises. A number of the amendments also clarify the position with regard to trade in products from restricted premises that may not be exported to any country, thereby removing references to intra-EU or intra-Community trade.

For example, the Avian Influenza and Influenza of Avian Origin in Mammals (England) (No 2) Order 2006 sets out the measures that can be used to reduce the risk of avian influenza outbreaks. These are currently being used in the Avian Influenza Prevention Zone put in place on 15th January 2018 to ensure poultry keepers undertake the required biosecurity measures. The amendments in the new SI will ensure that movements of birds outside of the UK (instead of to other Member States) are not licensed without authorisation from the receiving country. The amendments also revise the references to 'intra-Community' to refer to 'trade to the EU'.

The Seal Products (Amendments) (EU Exit) Regulations 2018

Seals are hunted in some countries and used for obtaining products such as meat, oil, blubber and fur skins which are sold commercially. The inhumane nature of seal hunting practices in certain parts of the world caused considerable concern to be expressed by members of the public, animal welfare NGOs, Members of Parliament, national Governments and the European Parliament. The EU was keen to take a coordinated approach to avoid trade distortion and saw a trade ban as a reasonable and justifiable response to these concerns.

Council Regulation EC No. 1007/2009 on trade in seal products introduced a Europe-wide ban on the import of seal products from commercial hunts, and is implemented domestically in the UK by the Seal Products Regulations 2010.

Commission Implementing Regulation (EU) No 2015/1850 lays down detailed rules for the implementation of Regulation (EC) No 1007/2009.

The Seal Products (Amendments) (EU Exit) Regulations 2018 ensure that the controls on trade in seal products as set out in Regulations 1007/2009 and 2015/1850, will continue to be operable after the UK leaves the EU. In the main this SI domesticates the legislation by changing references to the EU, EU Commission or Member States to the UK, Secretary of State or competent authority, respectively. The SI also removes sections of the regulations that refer to EU committee procedures or exercising of delegated acts by the EU Commission which will no longer be relevant.

One example of the changes this SI makes is that it removes the requirement on the EU Commission to provide information to the public, and competent authorities, regarding how seal products from Inuit or other indigenous peoples' hunts may be placed on the market (Article 5a of 1007/2009). This was deleted because it could be seen to promote trade in seal fur when government policy is to support the ban.

In addition to this negative SI there will be a further, affirmative, SI which amends the seal products legislation, and this SI will transfer some necessary functions from the EU Commission to the Secretary of State.

The Timber and Timber Products (Placing on the Market) (EU Exit) Regulations 2018

Illegal logging is one major driver of global deforestation, which constitutes annual losses of forest areas the size of England and has significant negative impacts. These losses are felt both locally, by the rural poor in developing countries, and globally, through the link to climate change and loss of biodiversity. Further, illegal logging results in revenue losses to governments and legitimate businesses.

The EU timber regulations aim to eliminate the demand for illegally harvested timber and timber products in the EU by prohibiting the placing of illegally harvested timber on the EU market, and by requiring those placing timber on the EU market to undertake risk management of their supply chain (due diligence) to minimise the risk of illegally harvested timber entering the EU market. The intended consequence is that the need for increased accountability and evidence regarding legality will be driven back up supply chains to the sources of harvested timber, ultimately reducing demand for illegally harvested timber. The desired outcome is that a reduction in unsustainable illegal logging practices will reduce global deforestation and its associated negative impacts.

Regulation (EU) No 995/2010 of the European Parliament and of the Council (the EUTR) counters the trade in illegally harvested timber and timber products through three key obligations:

1. It prohibits the placing on the EU market for the first time of illegally harvested timber and products derived from such timber;
2. It requires EU traders who place timber products on the EU market for the first time to exercise 'due diligence'; and
3. It obliges traders to keep records of their suppliers and customers.

The Timber and Timber Products (Placing on the Market) Regulations 2013 introduced new criminal offences in the UK for: placing illegally harvested timber or timber products on the EU market; failure to exercise due diligence when placing

timber or timber products on the EU market; and failure to maintain and regularly evaluate the due diligence system used. Related enforcement powers of entry, inspection, and seizure of illegally harvested timber were also provided for.

The Timber and Timber Products (Placing on the Market) (EU Exit) Regulations 2018 ensure that these controls on trade of illegally harvested timber will continue after the UK leaves the EU. This SI domesticates the legislation by changing references to the EU, European Commission or Member States to the UK, Secretary of State or competent authority, as appropriate. The SI also amends sections of the EUTR, and the associated delegated and implementing regulations (Commission Delegated Regulation (EU) No 363/2012 and Commission Implementing Regulation (EU) No 607/2012), that refer to reporting procedures such as those required through the Official Journal of the European Union.

An example of the changes this SI makes is that it amends the role of the Commission to publish a list of monitoring organisations (Article 9) and allocates this to the competent authority. A further example is to amend the reporting requirements so that information will be published and submitted to the UK Parliament rather than the Commission (Article 20).

5 Health and Safety Executive: The Health and Safety (Miscellaneous Amendments) (EU Exit) Regulations 2018

Draft Health and Safety (Miscellaneous Amendments) (EU Exit) Regulations 2018 example of technical amendments

The EUWB will give powers to ensure that EU-derived health and safety protections will continue to be available in domestic law after the UK has left the EU. Technical amendments to existing legislation will be required to ensure these protections will continue to operate effectively in their current form, maintaining the UK's high regulatory standards.

Such technical amendments are contained in The Draft Health and Safety (Miscellaneous Amendments) (EU Exit) Regulations 2018 Statutory Instrument (SI), which the Government has made available in draft form as an illustrative example to show how the powers in the EUWB, may be used to correct retained law relating to health and safety protections. This should not be taken as the final version.

Alongside the technical amendments to EU-derived domestic health and safety legislation, the SI also makes provision to amend a direct-acting EU Regulation that will be brought into UK law. This SI will not contain any policy changes beyond the intent of ensuring continued effective operability. For example, by removing EU

references (for example references to member States) that are no longer appropriate.

Certain areas of health and safety legislation, such as chemical regulation will require more fundamental review to ensure operability. These will be dealt with in separate legislation which will also be made under EUWB powers; these policy areas are cross-cutting and require a specific regime approach.

This draft SI will rely on powers in Clause 7/Schedule 7 of the EUWB. The SI makes amendments to health and safety legislation (for which the Minister of State for Disabled People, Health and Work is responsible).

This SI would be subject to the negative resolution procedure.