

EXPLANATORY MEMORANDUM TO
THE CUSTOMS (ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS)
(AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Revenue and Customs and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Sifting Committees.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to amend European Union (EU) regulations which are being brought into force in the United Kingdom (UK) by the European Union (Withdrawal) Act 2018 (EUWA). The instrument will ensure that UK legislation is in place after exit day (29 March 2019) enabling HM Revenue and Customs (HMRC) to continue to be able to enforce intellectual property rights at the UK border in the event that the UK leaves the EU without a withdrawal agreement.

Explanations

What did any relevant EU law do before exit day?

- 2.2 Regulation (EU) No. 608/2013 (the Regulation) establishes a common process for the protection of intellectual property at the border of the EU.
- 2.3 Customs authorities in each Member State carry out checks on goods which are imported or exported until the goods are “cleared by customs” or formally released.
- 2.4 The checks are intended to intercept counterfeit goods. For example goods that are in breach of copyright or trademarks legislation.
- 2.5 The Regulation sets out how the owners of intellectual property rights can apply to customs authorities in any Member State to take action against counterfeit goods until those goods have been formally released. Once formally released however the goods enter free circulation across the EU.
- 2.6 The Regulation sets out how an application for action at the border should be processed by Member States’ customs authorities and the processes that could be enacted if consignments of goods are suspected of being counterfeit are detected upon importation or exportation. For example, goods can be detained while both the rights-holder and the importer or exporter are notified. As another example, the Regulation provides the customs authority with the right to destroy counterfeit goods once checks have been completed or after a certain period of time has elapsed.
- 2.7 The Regulation sets out who is responsible for the costs of storage of goods under enquiry and the costs of their destruction.
- 2.8 The Regulation also sets out the way in which information is shared by means of a central database, through which it can be shared across Member States.

Why is it being changed?

- 2.9 The EUWA provides that the Regulation will form part of UK domestic law as it stands on the date of withdrawal. The terminology of the Regulation therefore needs to be amended so that the language works in the context of domestic law rather than EU law. For example, references to ‘Member States’ will be changed to ‘United Kingdom’ and redundant references to EU legislation which are no longer applicable will be removed.
- 2.10 This instrument will enable the UK to continue to provide protection of intellectual property rights to the owners of the rights in the UK.

What will it now do?

- 2.11 The retained EU regulation as amended by this instrument will enable the UK to provide a system of protection of intellectual property rights to rights holders that is similar to the system provided to rights holders in the EU. It will allow rights holders to apply to UK authorities for protection. It will set out the processes that UK authorities will follow, including the establishment of a UK stand-alone database and the processes which will be carried out by the customs authorities at the UK borders.
- 2.12 In addition, under the new legislation, there will be no obligation to share the information collected with the EU.
- 2.13 The UK Government is committed to avoiding a hard border between Northern Ireland and Ireland and will do everything in its power to ensure that no new physical infrastructure is introduced at the land border in the event of no deal. The amendments to the retained EU law contained in this instrument will not have effect in relation to trade in goods between Ireland and Northern Ireland. Further details on the arrangements for trade between Northern Ireland and Ireland will be published as soon as possible.

3. Matters of special interest to Parliament

Matters of special interest to the Sifting Committees

- 3.1 The instrument was presented as a proposed negative statutory instrument to the Sifting Committees for consideration on 31 January 2019. The sifting was completed on 12 February 2019 by the European Statutory Instrument Committee (ESIC) and the Secondary Legislation Scrutiny Committee (Sub-Committee A) (SLSC). Both the ESIC and SLSC decided and agreed that the instrument should follow the negative procedure. The ESIC report, the 18th Report of Session 2017-2019 is published at <https://publications.parliament.uk/pa/cm201719/cmselect/cmestic/1933/1933.pdf>. The SLSC report, the 16th Report of Session 2017-2019 is published at <https://publications.parliament.uk/pa/ld201719/ldselect/ldseclega/285/285.pdf>.
- 3.2 The instrument has been amended so as to expand the definitions of “trade mark” and “design”. The original amendments to the definitions removed EU references but did not cover UK registered trademarks or designs which was an inadvertent omission as the original EU legislation covered them. Regulation 4(4) has been amended to correct the position. Because of this amendment the proposed negative statutory instrument is being presented again for consideration by the Sifting Committees.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.3 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The UK currently applies EU legislation and processes on the monitoring of Intellectual Property Rights. These are set out in Regulation (EU) No. 608/2013 which is given legal effect in the UK by virtue of section 2(1) of the European Communities Act 1972 (the ECA).
6.2 Section 2(1) of the ECA will be repealed on exit day by section 1 of EUWA and section 3 of that Act will incorporate Regulation (EU) No. 608/2013 along with other “direct EU legislation” (as defined in section 3(2)) into domestic law on and after exit day.
6.3 Section 8(1) of EUWA contains a power to make secondary legislation in order for deficiencies in direct EU legislation to be remedied. For example it enables amendments to terminology which no longer is applicable.

7. Policy background

What is being done and why?

- 7.1 The protection of intellectual property is required by the World Trade Organisation (WTO). Members of the WTO, which includes the UK, have agreed a minimum standard of protection to businesses who own intellectual property, such as copyrights or trademarks.
7.2 The scope of the protection has been developed through a series of agreements, including the Trade Related Aspects of Intellectual Property Rights agreement (TRIPS).
7.3 Compliance with TRIPS is a requirement of all members of the WTO.
7.4 The Regulation establishes a framework across the EU that meets its obligations under the TRIPS agreement. Through this instrument the UK is bringing into operation a scheme that closely reflects the scheme that is in operation in the EU.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8 of European Union (Withdrawal) Act in order to address failures of retained EU law to operate effectively

or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 This is new legislation and therefore no consolidation is required.

10. Consultation outcome

10.1 As the purpose of this instrument is to ensure that customs legislation currently governed by the EU is provided for in UK legislation, no formal consultation was carried out.

11. Guidance

11.1 Guidance on the protection of intellectual property rights is available on the Gov.UK website which can be found at <https://www.gov.uk/government/publications/notice-34-intellectual-property-rights>. This will be updated to inform businesses of relevant change before exit day.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 This instrument is one of a group of instruments covered by a single overarching HM Revenue and Customs impact assessment (second edition) which was published on 25 February 2019 and is available on the website at <https://www.gov.uk/government/collections/customs-vat-and-excise-regulations-leaving-the-eu-with-no-deal>

12.4 The registration for intellectual property rights is made by businesses who are requesting the protection of their own goods from unfair competition from counterfeit goods which may be produced to a lower standard, more cheaply abroad. Businesses will now have to register on a UK database in addition to the EU database if they want protection of goods coming into or leaving the UK. There will be no charge to businesses for registration.

13. Regulating small business

13.1 The legislation applies to some activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses (employing up to 50 people).

13.3 The final decision not to minimise the impact on small businesses was made on the basis that there will be no changes to existing procedures other than the extension of these, introducing equivalent rules to goods passing between the UK and the EU as currently apply to goods imported from countries outside the EU.

14. Monitoring & review

- 14.1 HMRC will keep the instrument under review to ensure that it meets the policy objectives set out above in section 7 of this EM and to ensure that burdens on businesses are carefully monitored.
- 14.2 As this instrument is made under EUWA, no review clause is required.

15. Contact

- 15.1 Catherine Osborne at HM Revenue and Customs Telephone: 03000 536971 or email: catherine.osborne@hmrc.gis.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Pamela Mulholland, Deputy Director for Customs EU Exit, at HM Revenue and Customs can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon Mel Stride Financial Secretary to the Treasury can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement(s)

- 1.1 The Financial Secretary to the Treasury, the Rt Hon Mel Stride has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Customs (Enforcement of Intellectual Property Rights) (Amendment) (EU Exit) Regulations 2019 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

- 1.2 This is the case because the amendments made by the instrument seek to preserve the protections of Intellectual Property Rights at the UK border in the way that they were previously protected at the EU border as far as possible and do not change the underlying scheme for the protection of intellectual property rights.

2. Appropriateness statement

- 2.1 The Financial Secretary to the Treasury, the Rt Hon Mel Stride, has made the following statement regarding the use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Customs (Enforcement of Intellectual Property Rights) (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate”.

- 2.2 This is the case because the amendments made by the instrument seek to preserve the protections of Intellectual Property Rights at the UK border in the way that they were previously protected at the EU border as far as possible and do not change any aspects of the existing system for the collection protection of intellectual property rights.

3. Good reasons

- 3.1 The Financial Secretary to the Treasury, Mel Stride, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 3.2 These are that, following the UK’s withdrawal from the EU, this instrument will enable the UK to continue to provide protection of intellectual property rights to the owners of the rights in the UK.

4. Equalities

- 4.1 The Financial Secretary to the Treasury, Mel Stride, has made the following statement(s):

“The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

- 4.2 The Financial Secretary to the Treasury, Mel Stride, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Mel Stride, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

5. Explanations

- 5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.