**EXPLANATORY MEMORANDUM TO**

**THE CULTURAL TESTS (FILMS, TELEVISION PROGRAMMES AND VIDEO GAMES (AMENDMENT) (EU EXIT) REGULATIONS 2018**

**2018 No. 1105**

## 1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport and is laid before Parliament by Act.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

## 2. Purpose of the instrument

*What did any relevant EU law do before exit day?*

2.1 The cultural tests for dramas, animation and documentary programmes, video games and films are domestic legislation that do not implement or relate to EU obligations. They fall within the definition of "retained EU law" under section 6(7) of the European Union (Withdrawal) Act 2018 because they contain references to the European Economic Area (EEA).These tests are the means by which government assesses whether films, television programmes and video games are culturally British, in order to determine their eligibility for tax relief on production costs. The inclusion of UK nationals within the current definitions of qualifying production personnel under these tests relies upon the fact that the UK is an EEA state, which it will cease to be after exit day.

*Why is it being changed?*

2.2 The amendments contained in this instrument are necessary to ensure that films, television programmes and video games can continue to qualify as culturally British under the statutory cultural tests, which are a gateway to tax relief on UK production costs. The amendments avoid the absurd situation that, unless the references to "EEA state" are amended, then British directors, actors and other production personnel would not be eligible to score points under various sections of the test, whereas nationals or residents of any EEA state would. Not addressing this deficient policy result would undermine the central objective behind the cultural tests and the wider creative sector tax reliefs: to encourage audio-visual production activity in the UK.

*What will it now do?*

2.3 After the amendments made by this instrument, the statutory cultural tests will continue to operate after the UK's withdrawal from the EU as before: UK nationals and residents involved in productions will continue to score points in the same way as nationals or residents of EEA states.

## 3. Matters of special interest to Parliament

***Matters of special interest to the Joint Committee on Statutory Instruments***

3.1 This instrument was considered by the Sifting Committees on 11 September 2018 and cleared to proceed by way of negative resolution procedure. The Minister has considered the decision of the Sifting Committees and has approved and signed the instrument.

***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)***

3.2 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 whole of the United Kingdom.

4.2 The territorial application of this instrument is the whole of the United Kingdom.

## 5. European Convention on Human Rights

5.1 The Minister of State for the Department for Digital, Culture, Media and Sport has made the following statement regarding Human Rights:

"In my view the provisions of The Cultural Tests (Films, Television Programmes and Video Games) (Amendment) (EU Exit) Regulations 2018 are compatible with the Convention rights."

## 6. Legislative Context

6.1 The Corporation Tax Act 2009 provides for tax reliefs for British films, television programmes and video games. One of the requirements that must be satisfied in order to qualify for such tax relief is that the film, television programme or video game must be certified by the Secretary of State as a "British" production in accordance with points based assessments known as the cultural tests. The cultural tests for dramas, animation and documentary programmes are set out in the Cultural Test (Television Programmes) Regulations 2013 (SI No. 1831) (as amended); for video games in the Cultural Test (Video Games) Regulations 2014 (SI No. 1958); and for films in Schedule 1 to the Films Act 1985. This legislation also sets out the information and the evidence that must be submitted in connection with an application for certification as a British film, television programme or video game.

## 7. Policy background

***What is being done and why?***

7.1 This SI amends EEA references in the statutory cultural tests for films, television programmes and video games. The cultural tests are used to assess whether films, television programmes and video games are culturally British. Only those productions which are certified as culturally British by the Secretary of State are eligible for tax relief on production costs, in accordance with the Corporation Tax Act 2009. The cultural tests award points on a number of criteria, including the location of production, its language, and the residency or nationality of personnel involved in

production. Certain categories award points for EEA-related elements as well as for British elements. The inclusion of UK nationals within the definitions of qualifying production personnel relies upon the fact that the UK is an EEA state - personnel are defined in the legislation (as set out in 4.1, above) as "ordinary residents or nationals of an EEA state". As the UK will cease to be an EEA state once it leaves the European Union, such references need amending to include "the UK *or* an EEA" state - otherwise a British director would not score points under the test, but a French or a Norwegian one would. Other, similar, references to "the UK or *another* EEA state" need changing to reference "the UK *or* an EEA state" to reflect the UK no longer being an EEA state once it leaves the European Union.

7.2 The amendments made by this instrument do not amount to a change in policy, but are necessary to avoid an absurd result and to ensure that films, television programmes and video games are all still assessed under the cultural tests in the same way after the UK's withdrawal from the European Union.

7.3 This provision provided, in a previous version of the cultural test for films, for countries with an association agreement with the EU under Article 217 of the Treaty on the Functioning of the European Union, and provided for the relevant film-makers to be treated as if they were ordinary residents of an EU state, and to then be treated as if they were residents of an EU state for the purpose of the cultural test. This provision has no effect because it relates to a former version of the cultural tests for films and because there are no such agreements under Article 217 TFEU that provide for film-maker residency recognition – other than the EEA Agreement. Repeal of the provision has no current effect but is necessary to prevent a country being treated as if it were an EEA state if it were to enter into a qualifying association agreement with the EU in the future.

## 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 the European Union (Withdrawal) Act 2018 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 There are no plans for consolidation.

## 10. Consultation outcome

10.1 As there is no policy change and no questions relating to how to correct the deficiencies, no public consultation was undertaken. The British Film Institute, as operators of the film certification process on behalf of the Department for Digital, Culture, Media and Sport, were consulted and agreed that the corrective action being undertaken is both necessary and proportionate.

## 11. Guidance

11.1 The purpose of the instrument is only to maintain the status quo following the departure of the United Kingdom from the European Union so the guidance, available

via the British Film Institute on their website (http://www.bfi.org.uk), will support the continued operation of the cultural tests.

## 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 A full impact assessment has not been prepared for this instrument because the instrument will maintain the *status quo*. However, a *de minimis* assessment has been carried out and has concluded that there would be no impact on businesses or the public sector.

## 13. Regulating small business

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

13.2 The effect of this instrument is to maintain the *status quo*, therefore no specific action to minimise the impact on small businesses is required.

## 14. Monitoring & review

14.1 The approach to monitoring of this legislation is that a review provision is unnecessary on the basis that monitoring of these measures will be carried out by the British Film Institute's Research and Statistics Unit on a quarterly basis and via HMRC's annual monitoring reports.

14.2 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

## 15. Contact

15.1 James Butler at the Department for Digital, Culture, Media and Sport. Telephone: 0207 211 6307 or email: james.butler@culture.gov.uk can answer any queries regarding the instrument.

15.2 Simon Blake at the Department for Digital, Culture, Media and Sport can confirm that this explanatory memorandum meets the required standard.

15.3 Margot James, Minister for Digital and the Creative Industries at the Department for Digital, Culture, Media and Sport, can confirm that this explanatory memorandum meets the required standard.

# Annex A

## 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.<br><br>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<br>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. |

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|---|---|---|---|
| | | 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:<br>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,<br>b) containing information about the relevant authority's response to—<br>(i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and<br>(ii) any other representations made to the relevant authority about the published draft instrument, and,<br>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

1.1 The Minister of State for the Department for Digital, Culture, Media and Sport has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Cultural Tests (Films, Television Programmes and Video Games) (Amendment) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure).

This is the case because the instrument does not amount to a policy change but operates to maintain the *status quo*. This is further detailed in paragraph 7 of the explanatory memorandum."

### 2. Appropriateness statement

2.1 The Minister of State for the Department for Digital, Culture, Media and Sport has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the provisions of The Cultural Tests (Films, Television Programmes and Video Games (Amendment) (EU Exit) Regulations 2018 do no more than what is appropriate, within the meaning of the European Union (Withdrawal) Act 2018, as detailed in paragraph 7 of the explanatory memorandum."

### 3. Good reasons

3.1 The Minister of State for the Department for Digital, Culture, Media and Sport has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These reasons are detailed in paragraph 7 of the explanatory memorandum."

### 4. Equalities

4.1 The Minister of State for the Department for Digital, Culture, Media and Sport has made the following statements:

"This instrument does not amend, repeal or revoke any part of the Equality Acts 2006 or 2010 or subordinate legislation made under those Acts."

4.2 The Minister of State for the Department for Digital, Culture, Media and Sport has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In making this statement, I 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 paragraph 2 of the main body of this explanatory memorandum.

Margot James MP

Minister for Digital and the Creative Industries