EXPLANATORY MEMORANDUM TO

THE EXPORT OF OBJECTS OF CULTURAL INTEREST (CONTROL) (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2018

2018 No. 1186

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

2.1 The instrument is being made using the powers in the European Union (Withdrawal) Act 2018 to remedy deficiencies in retained EU law arising from the withdrawal of the United Kingdom from the EU. It does so by revoking Regulation (EC) No 116/2009 and Regulation (EU) No 1081/2012 on the export of cultural goods ("the EU Regulations"). The instrument is also being made under the Export Control Act 2002 to amend definitions in the Export of Objects of Cultural Interest (Control) Order 2003 ("the 2003 Order").

Explanations

What did any relevant EU law do before exit day?

2.2 Regulation (EC) No 116/2009 ensures uniform controls at the EU's external borders by requiring a licence to export certain cultural goods outside the EU; and imposes a duty on the competent authority empowered by the Member State to issue such licences. In carrying out this function, competent authorities are required to cooperate and provide mutual assistance. In particular, when considering whether to issue an EU licence, the UK's competent authority (the Arts Council of England) must check whether any exportation of the cultural object from another Member State on or after 1 January 1993 was lawful and definitive. The resulting system of mutual assistance requires and assists each Member State to support the enforcement of the domestic laws of other Member States for the protection of culturally significant objects.

2.3 Regulation (EU) No 1081/2012 sets out the details of the licensing process, such as the requirements for applicants and the format of the printed licence.

Why is it being changed?

2.4 The purpose of the EU Regulations is to ensure that objects of cultural interest that are not authorised to leave the national territory of an EU Member State cannot leave the multi-national customs territory of the EU and to ensure uniform controls at the EU's external borders. The multi-national export control exists only to ensure compliance with the national export controls of Member States. This is necessary due to the absence of internal frontiers within the EU customs territory, at which Member States could otherwise ensure compliance with their own controls.

2.5 If the UK leaves the EU without a deal, it would no longer be a part of the EU customs territory and as such its national export controls will be enforceable at the UK's external border. There will be no need for a secondary control at the external frontier of the customs territory. This is because the UK national territory will be fully aligned with its customs territory. Any cultural objects located in the UK will, from exit day, be outside the EU customs territory. The EU licensing system will therefore have no practical application and become redundant.

2.6 In addition, following withdrawal, the UK competent authority would remain under a duty to cooperate and seek mutual assistance from EU27 Member States. However, the competent authorities of EU27 Member States would no longer be under a reciprocal obligation to respond to requests of assistance from the UK nor to seek assistance from the UK. Therefore the reciprocal arrangements would no longer exist. There would be a one-sided obligation on the UK.

What will it now do?

2.7 The above deficiencies will be remedied by revoking the EU Regulations, in their status as retained EU law in the UK from exit day. The export of cultural goods will continue to be controlled by UK licences issued under the 2003 Order.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The instrument was laid for sifting by the Committees on the UK's exit from the European Union pursuant to Schedule 7 to the European Union (Withdrawal) Act 2018. This statutory instrument was laid for sifting on 2 October 2018 as a proposed negative resolution procedure instrument. The sifting committees agreed with the government that this statutory instrument should be subject to negative resolution procedure, and the sift was finished on 16 October 2018.

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 United Kingdom.

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

5. European Convention on Human Rights

5.1 Michael Ellis MP, Parliamentary Under Secretary of State at the Department for Digital, Culture, Media and Sport, has made the following statement regarding Human Rights:

"In my view the provisions of The Export of Objects of Cultural Interest (Control) (Amendment etc.) (EU Exit) Regulations 2018 are compatible with the Convention rights."

6. Legislative Context

6.1 The UK currently operates a dual system of export control; domestic legislation (the 2003 Order made under the 2002 Act) provides an opportunity for the UK to retain objects of cultural interest of outstanding national importance that would otherwise be exported, while the EU Regulations aim to prevent items moved illegally within the EU customs territory from being exported outside the customs union and ensures uniform controls at the EU's external borders.

6.2 The 2003 Order prohibits the export of cultural objects from the UK except under the authority of a licence granted by the Secretary of State. Objects under certain age or value thresholds, or for which an EU licence has been obtained, can be exported under an Open General Export Licence without applying for an individual licence. As any export outside the EU generally requires an EU licence, UK licences are usually required only for exports from the UK to EU countries.

6.3 For exports out of the EU, the EU Regulations provide for a system of EU licences. The EU system arose from the abolition of internal frontiers in the EU customs territory on 1st January 1993. The EU Regulations enable a Member State to prevent objects of cultural interest from leaving the EU through another Member State. This is achieved through the requirement for a licence which ensures that all the relevant national export controls have been complied with before such objects can leave the EU customs territory. The licensing process involves the scrutiny of whether any previous export from another Member State was legal and definitive by seeking assistance from the competent authorities of other Member States.

7. Policy background

What is being done and why?

7.1 In summary, following withdrawal of the United Kingdom from the European Union, the EU Regulations will be deficient in that the system of EU licences will be redundant and the reciprocal arrangements under the system will no longer exist. This instrument therefore revokes the EU Regulations. The policy of protecting objects of cultural interest will now be achieved by the system of licences under the 2003 Order.

7.2 On exit day the EU Regulations will become retained EU law by virtue of section 3(1) of the European Union (Withdrawal) Act 2018. They would fail to operate effectively as the duties and powers conferred on Member States would no longer apply to the UK because the UK would no longer be a member of the EU. This would need to be rectified by making provision under section 8 of that Act to make clear that the duties and powers continue to be conferred on the UK. However, even if such provision was made the EU Regulations would remain deficient for the following reasons (which assume that the EU Regulations have been rectified as mentioned above).

7.3 Many Member States have a national export control on objects of cultural interest. The purpose of the EU Regulations is to ensure that items not authorised to leave the national territory of an EU member state cannot leave the multi-national customs territory of the EU.

7.4 This is done by requiring an EU licence for the movement of an object out of the customs territory, which licence can be acquired only if all previous exports of the object in question from EU member states on or after 1 January 1993 complied with applicable national export controls. The purpose of the multi-national control is

primarily to ensure compliance with the national controls of the member states: it can therefore be considered a "compliance-only" control.

7.5 This is a unique two-layered system that only comes about because the national territory of a Member State does not align with its customs territory (as it is part of a much larger EU customs territory). It is only because the national export control is not enforceable at the national border that the multi-national "compliance-only" control becomes necessary at the customs border.

7.6 Following withdrawal without a deal, the UK would no longer be a part of the EU customs union/territory. The UK's customs territory would therefore align with its national territory. As such the existing national export control will be enforceable at the UK's external border, and there will be no need for a secondary "compliance-only" control at customs. Any objects located in the UK on exit day would automatically be removed from EU customs union. The licensing system under the EU Regulations would therefore have no practical application and become redundant, and retaining it alongside the domestic licensing regime would create unnecessary complexity.

7.7 In addition, the requirements imposed by the EU Regulations reflect a reciprocal arrangement, and confer duties on the competent authorities of Member States to cooperate and seek assistance from other Member States. Following withdrawal, the relevant body in the UK (assuming the EU Regulations would be amended to refer directly to the body that is currently the UK's competent authority) would remain subject to these duties whereas the competent authorities of the EU27 Member States would no longer be under a reciprocal obligation to respond to requests of assistance from the UK nor to seek assistance from the UK. Therefore the reciprocal arrangements under the EU Regulations would no longer exist, and there would be a one-sided obligation on the UK.

7.8 The two deficiencies in the EU Regulations identified above can be remedied by revoking the EU Regulations and thereby removing the UK from a licensing system that would be largely redundant and would result in a one-sided obligation. This is clearly an appropriate remedy to these deficiencies.

7.9 Following the revocation of the EU Regulations, objects of cultural interest will continue to be protected by the licensing system under the 2003 Order. Further information will follow in the New Year about whether and how the UK export licensing system will have regard to legal and definitive dispatch from other countries.

7.10 EU licences issued before exit day will continue to be valid at UK borders on or after exit day under the savings provisions in the European Union (Withdrawal) Act 2018 and the Interpretation Act 1978. The enforcement mechanisms in the 2003 Order will also continue to apply to such licences.

7.11 This instrument also updates two definitions in the 2003 Order. The definition of 'the Commissioners' is updated to refer to the Commissioners of Her Majesty's Revenue and Customs. The definition of 'EU Licence' is amended to make clear that the export licence is – under the EU Regulations – issued by the competent authority of the United Kingdom.

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 (in particular under section 8(2)(a) and (c)) 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.

8.2 Alongside the European Union (Withdrawal) Act 2018 powers the instrument is also being made under powers in the Export Control Act 2002 to amend two definitions in the 2003 Order.

9. Consolidation

9.1 This instrument does not make any consolidation of earlier instruments.

10. Consultation outcome

10.1 There is no statutory duty to carry out consultation on export licensing for objects of cultural interest. Furthermore, this instrument has minimal impact on business, charities or voluntary bodies. Finally, this instrument is technical in nature: by revoking the EU Regulations it removes a reciprocal arrangement that would no longer exist and rectifies a clear redundancy in retained EU law. No consultation has therefore been carried out.

11. Guidance

11.1 Statutory guidance given under section 9 of the Export Control Act 2002 will be updated to reflect the revocation of the EU Regulations and the revised role of, and any consequential changes to, the licensing system under the 2003 Order. A copy of the updated guidance will be laid before Parliament and will be made available online by Arts Council England. Further information will follow in the New Year about whether and how the UK export licensing system will have regard to legal and definitive dispatch from other countries.

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 An internal De-Minimis Assessment was carried out which concluded that the impact to business was minimal. The Equivalent Annual Cost to Business was calculated as £0.001m principally from familiarisation costs.

13. Regulating small business

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

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

14. Monitoring & review

14.1 The UK export licensing system for cultural objects is monitored by the Reviewing Committee on Export of Works of Art and Objects of Cultural Interest, and the Advisory Council on the Export of Works of Art and Objects of Cultural Interest.

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

14.3 To the extent this instrument is made under the Export Control Act 2002, no review clause is required because the instrument does not make or amend any regulatory provision for the purpose of the Small Business, Enterprise and Employment Act 2015.

15. Contact

15.1 William Wallis at the Department for Digital, Culture, Media, and Sport, Telephone: 020 7211 2167 or email: William.Wallis@Culture.gov.uk can be contacted with any queries regarding the instrument.

15.2 Helen Whitehouse, Deputy Director for Museums and Cultural Property at the Department for Digital, Culture, Media, and Sport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Michael Ellis MP, Parliamentary Under Secretary of State at the Department for Digital, Culture, Media and Sport 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 2018 Act

1. Sifting statement(s)

1.1 The Parliamentary Under Secretary of State for Arts, Heritage and Tourism, Michael Ellis MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Export of Objects of Cultural Interest (Control) (Amendment etc.) (EU Exit) Regulations 2018 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 instrument does not contain regulations under the 2018 Act that contain provisions falling within paragraph 1(2) of Schedule 7 to the 2018 Act. The instrument is therefore subject to the negative resolution procedure under paragraph 1(3) of that Schedule.

1.3 In any event, the negative resolution procedure is the appropriate level of Parliamentary scrutiny for the instrument, assessed on its own merits. The instrument is technical in nature: by revoking the EU Regulations it rectifies a clear redundancy in retained EU law; and there will no significant impact on the private or voluntary sector.

2. Appropriateness statement

2.1 The Parliamentary Under Secretary of State for Arts, Heritage and Tourism, Michael Ellis MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Export of Objects of Cultural Interest (Control) (Amendment etc.) (EU Exit) Regulations 2018 do no more than is appropriate".

2.2 This is the case because to do any less than is done in this instrument would result in failures and deficiencies persisting in retained EU law. These failures and deficiencies are described in sections 2 and 7 of the Explanatory Memorandum. The practical result of these failures and deficiency would include the UK unnecessarily imposing two parallel similar licensing regimes, thereby giving rise to administrative burden upon businesses, confusion among exporters about their duties, and could even extend to legal uncertainty for exporters.

3. Good reasons

3.1 The Parliamentary Under Secretary of State for Arts, Heritage and Tourism, Michael Ellis 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 Sections 2 and 7 of this Memorandum explain the deficiencies in retained EU law arising from withdrawal and the reasons why this instrument revokes the EU

Regulations. In brief, retaining a redundant system would impose administrative burdens on individuals and businesses, create confusion among exporters about their legal obligations and could even create legal uncertainty for exporters of objects of cultural interest.

4. Equalities

4.1 The Parliamentary Under Secretary of State for Arts, Heritage and Tourism, Michael Ellis 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 Parliamentary Under Secretary of State for Arts, Heritage and Tourism, Michael Ellis has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the instrument, I, Michael Ellis 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."

4.3 Parliamentary Under Secretary of State for Arts, Heritage and Tourism, Michael Ellis has had due regard to whether and how this instrument impacts on his Public Sector Equality Duty. He has been advised that the instrument does not make any provisions that impact on the duty to: (a) eliminate unlawful behaviour like discrimination, harassment and victimisation and any other conduct that is prohibited by or under the Equality Act 2010; (b) advance equality of opportunity between groups of people who share or don't share any particular 'protected characteristic'; or (c) foster good relations between groups of people who share or don't share any given 'protected characteristic'.

5. Explanations

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