EXPLANATORY MEMORANDUM TO

THE INTELLECTUAL PROPERTY (EXHAUSTION OF RIGHTS) (EU EXIT) REGULATIONS 2019

2019 No. 265

1. Introduction

1.1 This explanatory memorandum has been prepared by the Intellectual Property Office, an Executive Agency of the Department for Business, Energy and Industrial Strategy, and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 This instrument modifies and amends retained EU law relating to exhaustion of intellectual property rights in order to address the failure of this law to operate effectively and other deficiencies as a result of the withdrawal of the United Kingdom (UK) from the European Union (EU).

Explanations

What did any relevant EU law do before exit day?

2.2 The law in question prevents the holder of an intellectual property right from exercising that right to stop the importation of a product where it has been lawfully placed into free circulation in the territory of the European Economic Area (EEA).

Why is it being changed?

2.3 The amendments address deficiencies in retained EU law as a result of the exit of the UK from the EU. The instrument amends or modifies retained EU law which would otherwise not operate appropriately and amends EU references which are not appropriate as a result of the exit of the UK from the EU.

What will it now do?

2.4 The purpose of the amendment is to ensure that the question of whether the product has been lawfully placed into free circulation continues to be assessed in relation to an area which includes the UK.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

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 The territorial application of this instrument includes Scotland and Northern Ireland.

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 The Minister of State for Universities, Science, Research and Innovation, Sam Gyimah has made the following statement regarding Human Rights:

"In my view the provisions of The Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2018 are compatible with the Convention rights."

6. Legislative Context

6.1 The European Union (Withdrawal) Act 2018 provides for the Secretary of State to deal with deficiencies in retained EU law arising from the withdrawal for the United Kingdom from the European Union. This includes law which continues to form part of domestic law under section 2 and 3 of that Act (namely the saving of EU derived domestic legislation and the incorporation of direct EU legislation) and under section 4 (which relates to certain enforceable EU rights).

6.2 This instrument therefore makes modifications and amendments to retained EU law to ensure that the question of whether an article has been lawfully placed on the market for the purposes of the exhaustion of intellectual property rights, continues to be assessed in relation to an area which includes the UK.

7. Policy background

What is being done and why?

7.1 Intellectual property rights give a right holder certain exclusive rights, which include the right to control distribution of the product protected by the intellectual property rights. The exhaustion of intellectial property rights refers to the loss of the right to control distribution and resale of a product after it has been legitimately put on the market in a specific territory.

7.2 At present, exhaustion occurs intellectual property rights, when a product protected by an intellectual property rightis lawfully put on the market anywhere within the EEA. This is known as a regional exhaustion framework and means that, within the EEA, rights holders cannot prevent trade in those goods after they have been put in the market there for the first time. Rights holder may prevent import and resale of products protected by their intellectual property rightfrom outside the EEA.

7.3 The current regional EEA exhaustion regime results from directly enforceable rights under the free movement of goods Articles of the Treaty on the Functioning of the EU and of the Agreement of the European Economic Area. This regime is also referred to in a number of provisions of retained EU law.

7.4 As the UK will cease to be a Member State of the EU on exit day the provisions referred to in Section 7.3 may cease to work appropriately. For example, it will not be clear whether the product has been lawfully placed on the market for the purposes of the exhaustion of intellectual property rights in relation to an area which includes the UK. This would mean that goods that have been legitimately put on the market in the EEA would no longer be able to be legitimately re-distributed or resold in the UK.

7.5 This instrument therefore makes modifications and amendments to retained EU law to ensure that the question of whether an article has been lawfully placed on the market for the purposes of the exhaustion of intellectual property rights, continues to be

assessed in relation to an area which includes the UK. For example, the instrument modifies the application of directly enforceable rights relating to exhaustion of intellectual property rights under the Treaty on the Functioning of the EU and the Agreement on the European Economic Area so that they continue to operate in domestic law from exit day as they operated before exit day. The instrument also amends EU references in retained EU law relating to the exhaustion of intellectual property rights so that they continue to include the UK.

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 Not applicable

10. Consultation outcome

10.1 The Intellectual Property Office has undertaken information gathering with stakeholders. No formal consultation has been carried.

11. Guidance

11.1 A technical notice explaining the impacts and implications of a no deal for exhaustion of intellectual property rights on business was published on 24 September 2018.

12. Impact

12.1 There is unlikely to be a significant impact on business, charities or voluntary bodies as a result of this SI being implemented.

12.2 There is unlikely to be an impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because it is unlikely to lead to additional costs or benefits to business as, in principle, it maintains the current IP exhaustion regime within the UK legislative framework. There may be some costs to businesses parallel exporting from the UK to the EEA. These potential costs are not subject to this SI being implemented but will depend on the EEA's approach to exhaustion of intellectual property rights following the UK's exit from the EU.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses. Exhaustion of intellectual property rights is relevant to anyone that owns an intellectual property right and trades within the EEA. The impacts on small business are not expected to be significant but are dependent on the future framework.

14. Monitoring & review

14.1 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Helen James at the Intellectual Property Office email: helen.james@ipo.gov.uk can be contacted with any queries regarding the instrument.

15.2 Ros Lynch, Director for IP Enforcement at the Intellectual Property Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Sam Gyimah, Minister of State for Universities, Science, Research and Innovation at the Department for Business, Energy and Industrial Strategy 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. Appropriateness statement

1.1 The Minister of State for Universities, Science, Research and Innovation, Sam Gyimah has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2018 does no more than is appropriate".

1.2 This is the case because this Instrument is limited to correcting deficiencies in retained EU law relating to the exhaustion of intellectual property rights as a result of the withdrawal of the UK from the EU. An example of these deficiencies and their correction is given in sections 7.4 and 7.5 of the main body of the explanatory memorandum.

2. Good reasons

2.1 The Minister of State for Universities, Science, Research and Innovation, Sam Gyimah 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".

2.2 These are that this Instrument is limited to correcting deficiencies in provisions of retained EU law relating to the exhaustion of intellectual property rights as a result of the withdrawal of the UK from the EU. The reasons are set out by way of example in section 7.4 of the main body of the explanatory memorandum.

3. Equalities

3.1 The Minister of State for Universities, Science, Research and Innovation, Sam Gyimah 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".

3.2 The Minister of State for Universities, Science, Research and Innovation, Sam Gyimah has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, Sam Gyimah 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. Explanations

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