EXPLANATORY MEMORANDUM TO

THE PROTOCOL 1 TO THE EEA AGREEMENT (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 6

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Exiting the European Union 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 This instrument makes limited technical legal amendments to Protocol 1 to the EEA Agreement[1], a mechanism by which EU law is currently applied to and in the EEA EFTA states. On exit day, Protocol 1 will migrate onto the domestic statute book and become part of the new body of domestic law known as 'retained direct EU legislation' (RDEUL). To make sure that Protocol 1 functions properly after exit, this instrument makes a number of amendments to it to make clear that Protocol 1 only applies to the EU law, incorporated into the EEA Annexes, that forms part of RDEUL; that any obligation owed to or any right conferred on EU Member States, their public entities, undertakings or individuals, is also owed to or conferred on EEA EFTA states, their competent authorities, public entities, undertakings or individuals; and that certain redundant provisions are removed.

Explanations

What did any relevant EU law do before exit day?

2.2 EU law does not automatically apply to or in the EEA EFTA States; the EEA's Joint Committee must actively approve EU made law first. Once the Joint Committee has formally agreed to adopt an EU law, it then has to be incorporated into an Annex to the EEA Agreement (the EEA Annexes). Only then is that EU law applicable to and in the EEA EFTA States.

2.3 EU law is drafted in order to take effect in EU Member States and territories.

2.4 In order to be understood in the context of the EEA EFTA States, EU law adopted by the EEA is subject to the 'interpretative glosses' set out in Protocol 1 to the EEA Agreement. In this way, Protocol 1 sets out how EU law incorporated into the EEA Annexes shall apply to and in the EEA. For example, Protocol 1 provides that references in EU law (which is listed in the EEA Annexes) to 'nationals of EU Member States' shall be understood to include 'nationals of EEA EFTA States'. Protocol 1 is necessary to avoid redrafting each and every piece of EU law that is incorporated into the EEA Annexes; instead, thanks to the interpretative glosses, they can be adopted in their originally drafted format.

[1] http://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol1.pdf

2.5 Essentially, Protocol 1 means that the EU law incorporated into the EEA Annexes applies in the same way to EEA EFTA States as it does to EU Member States, subject to specific adaptations provided for in the EEA Annexes.

Why is it being changed?

2.6 Once Protocol 1 is incorporated into domestic law, it will need amending to work properly. This statutory instrument makes the following amendments:

2.7 Firstly, Protocol 1 is amended so that it only applies to the EU law, incorporated within the EEA Annexes, which forms part of RDEUL.

2.8 Secondly, paragraphs 2, 3, 4, 5, 6 and 10 in Protocol 1 will become redundant after the UK leaves the EU and have therefore been removed.

2.9 Paragraph 2, which concerns how EU committee procedures should be dealt with in an EEA context, will have no legal effect and will be obsolete.

2.10 Paragraph 3 relates to the procedures the EEA should use to adapt or amend EU tertiary legislation. Because RDEUL cannot apply to the EEA this paragraph will be obsolete.

2.11 Paragraphs 4, 5 and 6 place obligations on the EEA EFTA States, the Commission and the EFTA Surveillance Authority and Standing Committee. Because RDEUL will not apply to the EEA EFTA States, the Commission, the EFTA Surveillance Authority or Standing Committee, these paragraphs will be obsolete.

2.12 Paragraph 10 relates to official languages. We are making provision in a separate SI (The European Institutions, Privileges and Immunities (Amendment etc.) (EU Exit) Regulations 2018) for a general interpretative gloss so that any reference in RDEUL to an official language of the EU is to be read as a reference to the English language. As such, this paragraph will be obsolete.

2.13 Paragraph 7 is amended to make clear that if any obligation is owed to or any right conferred on EU Member States, their public entities, undertakings or individuals, the same obligation is owed or right is conferred on EEA EFTA states, their competent authorities, public entities, undertakings or individuals.

2.14 Paragraphs 1, 8 and 9 are amended to make provision for the fact that, after exit, the EEA Agreement itself will not form part of RDEUL.

What will it now do?

2.15 The amendments to Protocol 1 clarify that Protocol 1, as it forms part of domestic law, only applies to the EU law, incorporated into the EEA Annexes, which forms part of RDEUL.

2.16 This means that Protocol 1 will no longer impose obligations on or within EEA EFTA states, the Commission, EEA Surveillance Authority or Joint Committee given that RDEUL cannot enforce obligations on any third party outside of the UK.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument was laid for sifting on the 11th December 2018. This instrument was considered by the House of Commons European Statutory Instruments Committee

(ESIC)[2] and the House of Lords Secondary Legislation Scrutiny Committee (SLSC)[3] on 18th December 2018. Neither committee recommended that this instrument be upgraded to the affirmative procedure. The sifting period ended on 10th January 2019.

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 UK.

4.2 The territorial application of this instrument is the UK.

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 On 23 June 2016, the EU referendum took place and the people of the UK voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU law.

6.2 However, following the UK's exit from the EU, the supremacy of EU law in UK law will come to an end. The EU Withdrawal Act (EUWA) achieves this legal severance through the repeal of the European Communities Act 1972 ("ECA 1972") on the day the UK leaves the EU.

6.3 In order to ensure that the domestic legal system continues to function correctly outside the EU, the EUWA converts EU direct legislation as it stands at the moment of exit into domestic law and preserves laws made in the UK to implement EU obligations. Importantly the EUWA also confers temporary powers to make secondary legislation to enable corrections to be made to laws that would otherwise no longer operate appropriately once the UK has left the EU. The use of the correcting power at section 8(1) of the EUWA in these regulations is an exercise of such a power.

6.4 The UK is only a party to the EEA Agreement in its capacity as a EU Member State. Therefore, when the UK leaves the EU the EEA Agreement will cease to operate in respect of the UK.

6.5 Section 3 of the EUWA incorporates direct EU law, so far as operable immediately before exit day, into domestic law on exit day. This new body of law is called 'retained direct EU legislation' (RDEUL). The intention of the EUWA is to retain (with limited exception) all direct EU law so that, post-exit, Parliament will be able to decide which elements of that legislation to keep, amend or repeal.

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[2] https://publications.parliament.uk/pa/cm201719/cmselect/cmesic/1796/1796.pdf
[3] https://publications.parliament.uk/pa/ld201719/ldselect/ldseclegb/257/257.pdf

6.6 Specifically, Sections 3(2)(c) and (2)(b) of the EUWA contain a specific provision to incorporate Protocol 1 of and the Annexes to the EEA Agreement (the EEA Annexes) into domestic law. As such, on exit day, Protocol 1 and the EEA Annexes will also become part of RDEUL.

6.7 On exit day, to ensure that the statute book functions coherently and effectively, using the power at section 8(1) of EUWA, these regulations will make a number of amendments to Protocol 1 to make clear that it only applies to the EU law, incorporated into the EEA Annexes, which forms part of RDEUL; and that any obligation owed to or right conferred on EU Member States, their public entities, undertakings or individuals, is also owed or conferred on EEA EFTA states, their competent authorities, public entities, undertakings or individuals. For reasons of clarity, certain redundant provisions are also removed.

7. Policy background

What is being done and why?

7.1 As with all RDEUL that will be incorporated into the UK statute book, it is necessary to make sure that on exit day Protocol 1 continues to function properly. This statutory instrument makes provision in order that it will.

7.2 In particular, it provides that:

7.3 Protocol 1 will only apply to the EU law, incorporated into the EEA Annexes, which forms part of RDEUL.

7.4 Any obligation owed to or right conferred on EU Member States, their public entities, undertakings or individuals, is also owed or conferred on EEA EFTA states, their competent authorities, public entities, undertakings or individuals. The RDEUL version of Protocol 1 will not impose obligations on EEA EFTA states, their competent authorities, public entities or individuals.

7.5 Redundant paragraphs in Protocol 1 are removed. For example, Protocol 1 provides for review and reporting requirements for EEA EFTA states. On exit day these provisions will be obsolete since the UK will no longer be an EEA EFTA state and RDEUL cannot apply to the EEA EFTA states.

7.6 These amendments are outlined in more detail in sections 2.7 - 2.11 of this Explanatory Memorandum.

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

8.1 This instrument is being made using the power at section 8(1) of the EUWA 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 instrument is not consolidating any other provisions.

10. Consultation outcome

10.1 No public consultation was required as the Regulations make only limited technical changes to legislation with no impact on businesses, charities or voluntary bodies.

10.2 The Welsh Government has been consulted with regard to these Regulations as per the Intergovernmental Agreement on the EUWA[4]. In line with requirements, the Parliamentary Under-Secretary of State at the Department for Exiting the European Union, Mr Chris Heaton-Harris MP wrote to Mr Mark Drakeford, AM, the Cabinet Secretary for Finance in the Welsh Government seeking agreement from the Welsh Government to use the Section 8 power in the EUWA to amend Protocol 1 to the EEA Agreement, as it forms part of domestic law by virtue of section 3 of the EUWA. Consent from the Welsh Government was given in a letter to Mr Chris Heaton-Harris from Mr. Mark Drakeford dated the 27 November, 2018.

10.3 The Scottish Government has been consulted with regard to these Regulations as per the Intergovernmental Agreement on the EUWA. In line with requirements, the Parliamentary Under-Secretary of State at the Department for Exiting the European Union, Mr Chris Heaton-Harris MP wrote to Mr Michael Russell, MSP, the Cabinet Secretary for Government Business and Constitutional Relations for the Scottish Government seeking agreement from the Scottish Government to use the Section 8 power in the EUWA to amend Protocol 1 to the EEA Agreement, as it forms part of domestic law by virtue of section 3 of the EUWA. The Scottish Government must consult its Parliament with regard to any EU exit Regulations; this consultation took place on 4 December, 2018[5]. Formal Ministerial consent was then given by the Scottish Government in a letter to Mr Chris Heaton-Harris from Mr Humza Yousaf dated the 4 December, 2018.

10.4 In the absence of a Northern Irish Executive, the Northern Irish Civil Service has been consulted at an official level. Officials in the Northern Irish Civil Service have indicated that they are content for these Regulations to be laid.

11. Guidance

11.1 No guidance is required as the Regulations make only limited technical legal amendments to legislation with no impact on business, charities or voluntary bodies.

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 Impact Assessment has not been prepared for this instrument because this SI makes only limited technical legal amendments and removes redundant legislation.

13. Regulating small business

13.1 The legislation will not, in itself, affect the activities that are undertaken by small businesses.

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf

[5] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11825

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 Andrew Quigley at the Department for Exiting the European Union, email: andrew.quigley@dexeu.gov.uk, can be contacted with any queries regarding the instrument.

15.2 James Gerard at the Department for Exiting the European Union can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Parliamentary Under-Secretary of State at the Department for Exiting the European Union, Mr Chris Heaton-Harris MP 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 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
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 Parliamentary Under-Secretary of State at the Department for Exiting the European Union, Mr Chris Heaton-Harris MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Protocol 1 to the EEA Agreement (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)".

1.2 This is the case because: these Regulations use the deficiencies power as set out in Section 8 of the EUWA. These powers are clearly defined and time-limited. They can only be used to address any failure of retained EU law to operate effectively or any other deficiency in retained EU law. In this instance, the powers will be used to amend Protocol 1, as it forms part of domestic law, functions effectively following the UK's exit from the European Union.

2. Appropriateness statement

2.1 The Parliamentary Under-Secretary of State at the Department for Exiting the European Union, Mr Chris Heaton-Harris MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Protocol 1 to the EEA Agreement (Amendment) (EU Exit) Regulations 2018 do no more than is appropriate".

2.2 This is the case because: these regulations make limited technical legal amendments to ensure that Protocol 1, as it forms part of domestic law, functions effectively following the UK's exit from the European Union. These Regulations do not change any of the rights conferred on or obligations imposed, in the UK, in relation to EEA EFTA states, their competent authorities, public entities, undertakings or individuals.

3. Good reasons

3.1 The Parliamentary Under-Secretary of State at the Department for Exiting the European Union, Mr Chris Heaton-Harris MP 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 exit from the European Union and, therefore, the EEA, the RDEUL version of Protocol 1 should be amended so that it only applies to domestic legislation, so that it does place obligations on the EEA EFTA states, the EFTA Surveillance Authority and Joint Committee or the European Commission and so that redundant parts of Protocol 1 are removed from the statute book to minimise confusion.

4. Equalities

4.1 The Parliamentary Under-secretary of State for Exiting the European Union, Mr Chris Heaton-Harris MP 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 Exiting the European Union, Mr Chris Heaton-Harris MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the instrument, I, the Parliamentary Under-Secretary of State for Exiting the European Union, Mr Chris Heaton-Harris MP 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.