HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

41st Report of Session 2017–19

# Proposed Negative Statutory Instruments under the European Union (Withdrawal) Act 2018

# Draft Child Support (Miscellaneous Amendment) Regulations 2018

# School Teachers' Pay and Conditions Order 2018

# Correspondence: Implementation backlog for international agreements

Includes 4 Information Paragraphs on 4 Instruments

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## *Secondary Legislation Scrutiny Committee*

The Committee's terms of reference, as amended on 11 July 2018, are set out on the website but are, broadly:

To report on draft instruments and memoranda laid before Parliament under sections 8, 9 and 23(1) of the European Withdrawal Act 2018.

And, to scrutinise –

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

## *Members*

Rt Hon. Lord Chartres
Rt Hon. Lord Cunningham of Felling
Lord Faulkner of Worcester
Baroness Finn
Lord Goddard of Stockport
Lord Haskel
Rt Hon. Lord Janvrin
Lord Kirkwood of Kirkhope
Baroness O'Loan
Lord Sherbourne of Didsbury
Rt Hon. Lord Trefgarne (Chairman)

## *Registered interests*

Information about interests of Committee Members can be found in the last Appendix to this report.

## *Publications*

The Committee's Reports are published on the internet at http://www.parliament.uk/seclegpublications

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at http://www.legislation.gov.uk/uksi

## *Committee Staff*

The staff of the Committee are Christine Salmon Percival (Clerk), Paul Bristow (Adviser), Nadine McNally (Adviser), Philipp Mende (Adviser), Jane White (Adviser), Louise Andrews (Committee Assistant) and Ben Dunleavy (Committee Assistant).

## *Information and Contacts*

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

# Forty First Report

## PROPOSED NEGATIVE STATUTORY INSTRUMENTS UNDER THE EUROPEAN UNION (WITHDRAWAL) ACT 2018

### Proposed Negative Statutory Instruments about which no recommendation to upgrade is made

Civil Jurisdiction and Judgements (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018

Special Fissile Materials (Right of Use and Consumption) (EU Exit) Regulations 2018

# INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

## Draft Child Support (Miscellaneous Amendment) Regulations 2018

***Date laid: re-laid on 12 September replacing original laid on 12 July***

***Parliamentary procedure: affirmative***

1. This instrument is a revised version of the instrument considered by this Committee in September, but its policy content has not changed. Our 39th Report[1] drew the special attention of the House to it on the ground of public policy interest and cast some doubt on the efficacy of the provisions designed to improve the current 57% payment compliance rate of Non-Resident Parents which has been roughly static for two years. We note that the Department for Work and Pensions has improved its Explanatory Memorandum in the light of our critical comments. However, the Department has also clarified that the definition of "asset" does not include high value items like a yacht or Rolls Royce "due to the complexity of tracing ownership of such an asset and determining its true value … [which] is often set by the market at the time of sale … [and] any value ascribed to these types of asset is more likely to be open to dispute." This would seem to confirm our concern that the Non-Resident Parent can find ways of avoiding payment by buying goods with their cash assets and reinforces our view that the new formula for calculating income may make little actual difference. We note that the House of Commons Work and Pensions Committee is also making inquiries along similar lines.

## School Teachers' Pay and Conditions Order 2018 (SI 2018/998)

***Date laid: 14 September 2018***

***Parliamentary procedure: negative***

*The draft Order introduces new pay and allowance ranges for school teachers, following consultation on the 28th Report from the School Teachers' Review Body (STRB). The Government have accepted the STRB's recommendation for a 3.5% uplift to the minima and maxima of the main and unqualified pay ranges, while agreeing to uplift the minima and maxima of the upper and the leading practitioner pay ranges and all allowances by 2%, and to uplift the minimum and maximum of the leadership pay range by 1.5%, lower increases than recommended by the STRB.*

*The Department for Education (DfE)'s consultation ran for six weeks from 24 July to 3 September 2018. Several consultees expressed concerns about this timing, arguing that it did not give schools adequate time to prepare. Completion of this year's pay review process was complicated by the need for coordination across Government of decisions on pay awards in the light of the lifting of the public sector pay cap. However, the scheduling of the formal consultation to coincide with school summer holidays will have presented the interested parties with significant difficulties in formulating and presenting their views. We consider that DfE's handling of the consultation prioritised its own requirements over the needs of the parties consulted. We find the Department's approach all the more disappointing in the light of the criticism which we made of its handling of consultation on the 27th Report from the STRB in 2017.*

1 39th Report, Session 2017–19 (HL Paper 183).

**We draw this Order to the special attention of the House on the ground that there appear to be inadequacies in the consultation process which relates to the instrument.**

*School Teachers' Review Body report*

2. On an annual basis, the Secretary of State for the Department for Education (DfE) formally refers matters concerning the remuneration and/or other conditions of employment of school teachers to the School Teachers' Review Body (STRB), which then reports on those matters. DfE and the national representatives of teachers and teacher employers have the opportunity to submit evidence before the report is finalised, and then published by DfE. As is explained in DfE's Explanatory Memorandum (EM) to this Order, the Secretary of State determines how and to what extent the recommendations in the report should be implemented, and then conducts a statutory consultation on the draft Order introducing new pay and allowance ranges before it is made.

3. DfE says that, in December 2017, the Secretary of State asked the STRB to consider application of the 2018 pay award for teachers, within the context of the new flexible approach to public sector pay, following the Government's decision in September 2017 to end the 1% public sector pay cap. DfE has told us that it received the STRB report on 18 May. By comparison with previous years, the announcement on teachers' pay was delayed while a cross-government process looked across pay recommendations submitted to several Departments. The announcement on teachers' pay was made on 24 July 2018,[2] in parallel with announcements on four other groups (armed forces, police, prison officers, doctors and dentists), in a cross-government announcement on public sector pay.

*STRB's 28th Report, and formal consultation*

4. On 24 July 2018, following submission of evidence from DfE and the representative bodies, the Government laid before Parliament the STRB's 28th report, and a proposed response to that report. The STRB recommended a 3.5% uplift to the minima and maxima of all pay and allowance ranges in the national pay framework, not least in order to address growing difficulties in the recruitment and retention of teachers. However, in launching a consultation on the report, the Government made it clear that, for reasons of affordability, it did not agree with the recommendation of a 3.5% uplift across the board. DfE says in the EM that, following consultation, the Secretary of State has accepted the STRB's recommendation for a 3.5% uplift to the minima and maxima of the main and unqualified pay ranges, while agreeing to uplift the minima and maxima of the upper and the leading practitioner pay ranges and all allowances by 2%, and to uplift the minimum and maximum of the leadership pay range by 1.5%.[3]

5. In section 10 of the EM, DfE gives a good deal of information about the consultation process, which ran for six weeks from 24 July to 3 September 2018. DfE sets out the contact with, and representations from the teaching unions, including the Association of School and College Leaders, the National Education Union, Voice, the National Association of Headteachers, and

2 See HLWS899: https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2018–07-24/HLWS899/.

3 Details of the five pay ranges for teachers can be seen at: https://getintoteaching.education.gov.uk/funding- and-salary/teacher-salaries.

the National Association of Teachers of Wales, as well as from the National Employers' Organisation for School Teachers, the National Governors Association, the National Association of Schoolmasters Union of Women Teachers and the Welsh Government. DfE notes that almost all consultees disagreed with the Government's decision not to implement all the STRB's recommendations, and that a number of them suggested that adequate reasoning had not been provided for that decision. DfE also acknowledges that several consultees expressed concerns about the timing of publication of the STRB's report and the Government's proposed response, arguing that it did not give schools adequate time to prepare.

6. DfE reiterates its explanation for the decisions taken after consultation, namely, that the only way to ensure the affordability of the pay award to the public purse is through lower uplifts to some pay ranges than was recommended by the STRB. On timing, DfE states that this was a result of the cross-government process that looked at pay recommendations submitted to Departments, in the light of the ending of the 1% cap. It adds that DfE officials are currently working with HM Treasury to ensure the timetable next year allows for earlier publication of the response.

*Conclusions*

7. We remind the House that in September 2017 we drew the School Teachers Pay and Conditions Order 2017 (SI 2017/811) to its attention,[4] commenting that DfE consulted on that Order over only three weeks in July 2017, and that the timing of the consultation attracted widespread criticism from respondents. We said that we considered it unacceptable to allow so short a period for a consultation exercise at a time of year when respondents faced so many other pressures.

8. We understand that the completion of this year's pay review process has been complicated by the need for coordination across Government of decisions on pay awards in the light of the lifting of the public sector pay cap. However, we have no doubt either that **the scheduling of the formal consultation to coincide with school summer holidays will have presented the interested parties with significant difficulties in formulating and presenting their views. DfE has held out the prospect of bringing next year's process forward; as regards this year, while taking account of the special circumstances, we nonetheless consider that the Department's handling of the formal consultation prioritised its own requirements over the needs of the parties consulted. We find the Department's approach all the more disappointing in the light of our criticism of its handling of consultation in 2017.**

4 In our 5th Report of this Session (HL Paper 20).

## CORRESPONDENCE

### Implementation backlog for international agreements

9. The Committee noted a significant increase in the number of treaties or similar international agreements that were coming before it and wrote to ask the Foreign and Commonwealth Office (FCO) the reason for the increase and what volume of treaties might be expected over the next few months. We also asked about the FCO's policy on ratifying treaties, and why a number of treaties we had seen recently were being ratified several years after they had come into effect. The response from Lord Ahmad of Wimbledon clarifies some of the policy issues around ratification but is less specific about the number of EU-related treaties to be expected. The correspondence is published at Appendix 1.

## INSTRUMENTS OF INTEREST

### Draft Electricity and Gas (Powers to Make Subordinate Legislation) (Amendment) (EU Exit) Regulations 2018

10. These draft Regulations, laid under section 8(1) of the European Union (Withdrawal) Act 2018, propose to amend regulations in relation to electricity and gas markets, with the aim of correcting deficiencies arising from the UK's exit from the EU. According to the Department for Business, Energy and Industrial Strategy (BEIS), the instrument would replace powers to make tertiary legislation that are currently held by the European Commission with powers to make regulations by statutory instrument for the Secretary of State in relation to Great Britain and for the Department for Economy in Northern Ireland. The areas affected by the proposed transfer of powers are so-called European Network Codes and Guidelines which regulate technical aspects of electricity and gas networks and markets; the integrity and transparency of wholesale energy markets (so-called REMIT Regulation), including in relation to prohibitions on market abuse and requirements for public disclosure of inside information; and safeguards which aim to ensure the security of gas supply, including templates for risk assessments and emergency plans and the indicators that are used to measure serious threats to gas supply. We sought further information from BEIS about why it proposes that some of these instruments should be subject to the affirmative resolution procedure while others would be negative instruments. We are publishing the Department's response, which we find satisfactory, at Appendix 2.

### Draft Further Education Bodies (Insolvency) Regulations 2018

11. The Department for Education (DfE) has laid these draft Regulations to modify insolvency legislation to enable it to operate effectively in its application by the Technical and Further Education Act 2017 ("the 2017 Act") to further education (FE) corporations and sixth form college corporations. In the Explanatory Memorandum to the Regulations, DfE refers to the financial difficulties that FE colleges have faced in recent years, as the background to the 2017 Act which introduced an insolvency regime for FE and sixth form colleges to address the specific characteristics of the sector. DfE says that, to implement the FE insolvency regime, as well as these draft Regulations, it intends to lay the "Further Education Administration Rules" setting out insolvency rules for a Special Administration Regime called Education Administration. We put questions to DfE both about the possible outcomes if an FE or sixth form college went into the new insolvency regime, and about a report from the Institute for Fiscal Studies.[5] We are publishing the additional information received from DfE at Appendix 3.

5 The report claimed that funding per student aged 16–18 had seen "the biggest squeeze of all stages of education for young people in recent years." See: https://www.ifs.org.uk/publications/13306

### Protocol to the agreement on the international occasional carriage of passengers by coach and bus (Interbus Agreement) regarding the international regular and special regular carriage of passengers by coach and bus (Cm 9699)[6]

12. There is currently a multilateral treaty between the European Union and seven other contracting parties (the Interbus Agreement). It allows for occasional coach travel (for example, coach holidays and tours) between the parties. A Protocol to the Agreement, which was opened for signature in in Brussels on 16 July 2018, extends the Interbus Agreement to allow 'regular' (that is, scheduled) coach services to take place between the parties and 'special regular' services (for example, cross-border services taking specific passengers to school or workplaces). The Interbus Agreement requires contracting parties to apply EU standards (that is, operator licensing, technical vehicle standards, and driving hours etc). The UK is bound by the Interbus Agreement as an EU Member State but continued membership once the UK leaves the EU would require the UK to join in its own right. Whilst the Interbus Agreement largely mirrors the provision that provides for international coach travel within the EU, there are differences. For example, the Agreement does not permit "cabotage" (operation of domestic journeys in one contracting party by an operator based in another). That said, the Explanatory Memorandum accompanying the instrument suggests that "Interbus would … be a contingency option for coach travel between the UK and the EU in the event that we left the EU without a negotiated arrangement that provided for international coach travel."

### Copyright and Related Rights (Marrakesh Treaty etc.) (Amendment) Regulations 2018 (SI 2018/995)

13. These Regulations implement EU legislation in relation to the Marrakesh Treaty, an international agreement that aims to improve the access visually impaired and print disabled people have to copyright works around the world. All signatories of the Marrakesh Treaty must provide exceptions to copyright to allow for the production of accessible format copies and the transfer of such copies across borders. This instrument amends UK law to ensure existing copyright exceptions for disabled people comply with the requirements of the EU legislation that implements the Marrakesh Treaty. One of the key changes brought forward by the instrument is the removal of the UK's current "commercial availability" restrictions under which the exceptions from copyright for people with visual impairment only apply when accessible copies in a particular format are unavailable on the commercial market. The Intellectual Property Office (IPO) consulted groups representing rightsholders on this change and sought views on whether the UK should introduce a compensation scheme. The IPO explains that, as respondents to the consultation were unable to provide sufficient evidence of harm to rightsholders, the Government will not introduce such a scheme.

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6 The agreement on the international occasional carriage of passengers by coach and bus (Interbus Agreement) And Decision No 1/2011 of the Joint Committee established under the Interbus Agreement on the international occasional carriage of passengers by coach and bus of 11 November 2011 adopting its rules of procedure and adapting Annex 1 to the Agreement regarding the conditions applying to road passenger transport operators, Annex 2 to the Agreement concerning the technical standards applying to buses and coaches and the requirements concerning the social provisions referred to in Article 8 of the Agreement And The protocol to the agreement on the international occasional carriage of passengers by coach and bus (Interbus Agreement) regarding the international regular and special regular carriage of passengers by coach and bus.

## INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

### Draft instruments subject to affirmative approval

Electricity and Gas (Powers to Make Subordinate Legislation) (Amendment) (EU Exit) Regulations 2018

Further Education Bodies (Insolvency) Regulations 2018

### Instruments subject to annulment

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|---|---|
| Cm 9690 | Euro-Mediterranean Aviation Agreement between the European Union and its Member States, of the one part, and the Government of the State of Israel, of the other part |
| Cm 9691 | Common Aviation Area Agreement between the European Union and its Member States, of the one part, and the Republic of Moldova |
| Cm 9699 | Agreement on the international occasional carriage of passengers by coach and bus (Interbus Agreement), together with an amendment and further and Protocol |
| SI 2018/960 | Prison and Young Offender Institution (Amendment) (No. 2) Rules 2018 |
| SI 2018/961 | Magistrates’ Courts Warrants (Specification of Provisions) (Amendment) Order 2018 |
| SI 2018/964 | Rural Development Programme (Transfer) (England) Regulations 2018 |
| SI 2018/966 | Simple Pressure Vessels, Electrical Equipment and Pressure Equipment (Miscellaneous Amendments) (Northern Ireland) Regulations 2018 |
| SI 2018/967 | Electricity (Individual Exemptions from the Requirement for a Generation Licence) (England and Wales) Order 2018 |
| SI 2018/970 | Police, Fire and Crime Commissioner for North Yorkshire (Fire and Rescue Authority) Order 2018 |
| SI 2018/974 | Marketing of Ornamental Plant Propagating Material (Amendment) (England and Wales) Regulations 2018 |
| SI 2018/975 | Civil Procedure (Amendment No. 3) Rules 2018 |
| SI 2018/980 | Scotland Act 2016, Wales Act 2017 and Onshore Petroleum (Consequential, Transitional and Saving Provisions and Model Clauses) Regulations 2018 |
| SI 2018/982 | Riot Compensation (Amendment) Regulation 2018 |
| SI 2018/984 | Road Vehicles (Approval) (Amendment) Regulations 2018 |
| SI 2018/985 | Income-related Benefits (Subsidy to Authorities) Amendment Order 2018 |
| SI 2018/988 | Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations |

| | |
|---|---|
| SI 2018/989 | Social Security (Claims and Payments) (Social Fund Maternity Grant) (Amendment) Regulations 2018 |
| SI 2018/993 | Adoption and Children Act Register (Search and Inspection) (Amendment) Regulations 2018 |
| SI 2018/995 | Copyright and Related Rights (Marrakesh Treaty etc.) (Amendment) Regulations 2018 |
| SI 2018/997 | Police and Firefighters' Pensions (Amendment) Regulations 2018 |
| SI 2018/999 | Immigration and Nationality (Fees) (Amendment) (EU Exit) (No. 2) Regulations 2018 |

# APPENDIX 1: CORRESPONDENCE ON THE IMPLEMENTATION BACKLOG FOR INTERNATIONAL AGREEMENTS

## Letter from Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee, to Lord Ahmad of Wimbledon, Minister of State for the Commonwealth and the UN at the Foreign and Commonwealth Office

I am writing as Chairman of the Secondary Legislation Scrutiny Committee which this week considered, amongst other items, the *Agreement Establishing the Inter-American Investment Corporation* (Cm 9659). The Committee noted with concern that, although the initial Agreement was signed in 2015 and the merger took effect in January 2016, the paperwork for ratification was only laid before Parliament on 20 July 2018. Their concerns were aggravated by the fact that the first payment under the Agreement was made in March 2018, and although this is being held in an escrow account, it anticipates Parliament's agreement to the treaty.

A number of the treaties that have come before us recently appear to have the same issue, for example: the *Economic Partnership Agreement with the South African Development Corporation* (Cm 9663) has been in operation since 10 October 2016 although the paperwork was only laid for ratification on 18 July 2018 and, on the following day, the *Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States* (Cm 9665) was laid, which has been in "provisional" operation since 14 May 2012.

The Explanatory Memorandum to the most recent Agreement (Cm 9659) claimed that the delay in ratification was due to "pressure of other parliamentary business". Following further inquiry, we were told that "EU Exit has significantly increased pressure on the drafting/advisory capacity of OGD legal advisers". Although that may well be the case in the current circumstances of Brexit, that does not explain a delay since 2012.

**We would be grateful if you could explain why these treaties have not been presented for ratification more promptly.** Please could you also set out, more generally, the FCO's policy approach to the ratification of all such treaties and agreements and the appropriate timetable.

Our second concern is that, having seen very few treaties or similar documents in the previous three years, the volume has significantly increased in 2018. The Committee would be grateful if you could give an indication of the following:

- whether there is a backlog of treaties etc requiring ratification and, if so, its extent, and
- how long it will take to resolve it.

The Committee would be grateful to receive your response to these concerns by Wednesday 26 September 2018.

**12 September 2018**

## Letter from Lord Ahmad of Wimbledon to Lord Trefgarne

Thank you for your letter of 12 September, in which you asked about the FCO role in the process of ratifying international agreements. Once the lead department has reached the stage at which it is ready to move to the ratification of an agreement, it contacts the FCO's Treaty Section, which provides advice and assistance on the relevant procedures and manages the authorising and production of any necessary instruments. Where required, Treaty Section will also arrange for an agreement to be published and laid before Parliament as a Command Paper (with an explanatory memorandum) under the Constitutional Reform and Governance Act 2010 (CRaG).

You also asked about the recent increase in volume of Treaties and whether this indicates a backlog of Treaties requiring ratification. As you noted, 2018 has seen a relative uptick in activity on international agreements after a lull during the previous few years. The fall-off of such work during 2017 was due, in part, to the period of pre-election purdah and dissolution of Parliament which reduced the time available for Parliamentary scrutiny of international agreements. The FCO Treaty Section are aware of 32 non-EU Exit-related agreements which are at various stages of the treaty process. The point at which these will require the attention of Parliament is dependent on a number of factors including, in many cases, the speed with which the other party or parties to the agreements progress with their own domestic procedures. Beyond that, you will be aware that in the context of the UK's withdrawal from the European Union the Government is planning to conclude new international agreements with third countries, where necessary, to replicate provisions of existing EU agreements, to apply either after the implementation period or in the event of no deal. This is likely to result in an increased number of agreements being laid before Parliament under the Constitutional Reform and Governance Act in the period from November onwards. Officials from the FCO and the Department for Exiting the European Union will engage with your Committee and others in Parliament over the coming weeks to discuss how best to approach this work together.

I address below the agreements you specifically highlighted in your letter.

Work on the Agreement establishing the Inter-American Investment Corporation (IIC) is led by the Department for International Development (DfID). I understand that officials at DfID wrote to the Adviser to the Committee in July to explain the position regarding timing of the submission of that Agreement to Parliament. As DfID explained, the Inter-American Development Bank (IADB) decided to merge its private sector operations into a single entity, now the IIC. The UK opted to join the IIC by capital asset transfer from the IADB. The transfer of the UK's assets could not take place until certain provisions of the Agreement had been implemented in UK law and the IIC Agreement had cleared the CRaG process (because, as you observe in your letter, to do otherwise would have anticipated Parliament's agreement to the ratification of the IIC Agreement). Neither could the UK's funds remain with the IADB as this would have distorted the UK's shareholding in the IADB. So to avoid both outcomes, the UK funds are, for the moment, being held in an escrow account. The alternative of repatriating the UK's funds was carefully considered, however as the policy intention was for the UK to join the IIC as soon as possible, putting the funds into escrow was the most administratively efficient option.

You also asked why the Agreement was not laid before Parliament until July this year. DfID approved the proposal that the UK should join the IIC in 2015. The merger with the IADB's private sector business took place in January 2016. Following that merger, DfID then decided that it should keep the effectiveness of the IIC under review for 12 months before initiating the membership process. Consequently, negotiations on the treaty documentation and related work, such as ensuring that elements of the agreement would be implemented in UK law, did not commence until January 2017. The significant increase in pressure on the capacity of legal advisers caused by work on EU exit then meant that DfID was not able to lay the agreement before Parliament as quickly as it had hoped.

In relation to the Economic Partnership Agreements, which are led by the Department for International Trade (DIT), the Government's steps to ratify each such agreement are part of its preparations to leave the EU in an orderly fashion and to ensure that Parliament is provided with all possible opportunity to scrutinise the agreements ahead of 29 March 2019. The Comprehensive Economic and Trade Agreement (CETA), the Ecuador accession protocol and the three Economic Partnership Agreements (EPAs) (i.e. with Ghana; the South African Development Corporation; and the interim framework agreement between the Eastern and Southern Africa States) were the only identified agreements requiring ratification. DIT have confirmed that there are no further trade agreements that have already been signed and concluded, that require UK ratification before the UK leaves the EU (Council Decisions earlier in the year mean that the EU-Japan and EU-Singapore agreements have been put forward as EU-only agreements, meaning that the EU Member States will not ratify them separately).

Your letter raises the provisional application of two of these trade agreements. To clarify, provisional application of EU trade agreements has been the standard practice for all EU trade agreements which have been presented as "mixed competence" or "shared competence" agreements (i.e. agreements which require ratification by all EU Member States). This means that the provisions of such an agreement falling within EU competence can be given effect after the agreement has been signed and concluded by the Council and the European Parliament and after parliamentary scrutiny of the proposals for signature conclusion and provisional application is reviewed in each Member State. This avoids the need to wait until the last of the 28 Member States has completed its ratification procedures before the agreement can take any effect and is the most practical means of allowing for ratification by all 28 Member States whose processes move at different speeds. It should also be noted that the UK is not alone in not yet having ratified the EPA agreements. For instance, according to the EU Treaties Database, as of 24 September 2018 only eight EU countries (Czech Republic, Estonia, Spain, Hungary, Croatia, Lithuania, Latvia, Portugal) had ratified the South African Development Corporation EPA agreement and notified the EU accordingly.

I hope you and the Committee find these explanations of assistance. If you have further queries specifically regarding the above-mentioned treaties, I would be grateful if they could be direct to DfID and DIT respectively, as the best placed to provide any additional detail.

**28 September 2018**

# APPENDIX 2: DRAFT ELECTRICITY AND GAS (POWERS TO MAKE SUBORDINATE LEGISLATION) (AMENDMENT) (EU EXIT) REGULATIONS 2018

## Additional information obtained from BEIS

*Q1: The Explanatory Memorandum (EM) states that the instrument transfers powers to make regulations to "authorities" in the UK and then specifies that these authorities are the Secretary of State/Department for Economy (in relation to Northern Ireland), depending on the nature of the regulations. Does the instrument confer regulation making powers to any other authority?*

A1: No, the instrument transfers powers only to the Secretary of State and in some instances to the Department for the Economy in relation to Northern Ireland.

*Q2: The EM specifies that regulations made in relation to the European Network Codes and Guidelines will be subject to the affirmative procedure. The EM explains that these regulations will be highly technical and tertiary in nature. In contrast, regulations that will amend REMIT and the Security of Gas Supply Regulation will be subject to the negative procedure. The EM says that the REMIT regulations, for example, will include amendments to the definition of insider trading and market manipulation. It appears that while the REMIT and Security of Gas Supply Regulations potentially touch on very significant issues, they only require the negative procedure, whereas the highly technical nature of the Network Codes and Guidelines regulations requires the affirmative procedure. Why have these respective Parliamentary procedures be chosen?*

A2: Whilst European Network Codes and Guidelines are technical pieces of legislation, the power to amend them is still more substantial than a narrow power to update templates under the Security of Gas Supply Regulation or technical definitions and transaction reporting requirements under REMIT. European Network Codes and Guidelines have been used to make significant changes to EU energy policy in the past, for example formalising arrangements for coordinated trading of electricity over interconnectors. In the Department's view it is therefore appropriate that a broader power to amend these albeit technical instruments be subject to the democratic scrutiny that the affirmative procedure provides.

By contrast the powers relating to REMIT and the Gas Security of Supply Regulation permit only narrow amendments to very limited provisions of these regulations. In particular, the power in Article 6 of REMIT to amend definitions of insider trading and market manipulation is not a general one; by virtue of Article 6(1)(a) and (b) amendments may only be made for the purposes of ensuring coherence with other relevant financial services and energy legislation or taking into account future developments on wholesale energy markets. In the Department's view the negative procedure is therefore more appropriate.

**September 2018**

# APPENDIX 3: DRAFT FURTHER EDUCATION BODIES (INSOLVENCY) REGULATIONS 2018

## Additional information from the Department for Education

### *Introduction*

After consultation on policy proposals during 2016, it was announced in October of that year that the Government would bring forward legislation to introduce a further education insolvency regime. This was part of a wider programme of initiatives aimed at underpinning the long-term health of the FE sector by supporting effective decision making and the financial resilience of further education institutions and sixth form colleges.

The main legislation setting out the purpose and objectives of the regime is included in the Technical and Further Education Act 2017 ('the Act'). It provides for the application of insolvency law to FE and sixth form college corporations as if they were companies, and also protects learners through the introduction of a special administration regime, which has the objective of minimising or avoiding disruption to the studies of existing students at colleges that enter into insolvency. It also reflects the interests of creditors and taxpayers by removing uncertainty about the legal position on insolvency in the FE sector and ensures that in future financially failing colleges are not indefinitely propped up by Government.

The Statutory Instruments that are being brought forward this Autumn complete the legislative package needed to bring the FE insolvency regime into force. This meets a commitment to have the regime in place to coincide with the completion of the restructuring programme that followed Area Reviews of FE provision across England and the end of the Restructuring Facility that supported the implementation of that programme.

The insolvency regime is the final part of the financial resilience jigsaw and is there to manage the future risk of a college becoming insolvent when all else has failed. It provides assurance that there will be an orderly procedure and student protection in the unlikely event that a FE or sixth form college becomes insolvent. In exceptional cases that do occur, students can be protected and the Government will be able to maintain provision where it is needed. The interests of students will be put ahead of creditors.

### *Potential outcomes of an Education Administration*

The Committee have expressed an interest in the possible outcomes for an individual FE or Sixth Form College in the rare event that such a college becomes insolvent and enters into Education Administration; including the implications for existing students at the college.

The purpose of a special administration regime, of any type, is to ensure continuity of provision for a particular user group, should the provider become insolvent (e.g. customers of energy suppliers do not experience a disruption in energy supply if their supplier becomes insolvent and goes into an energy special administration).

Education Administration is a new special administration regime for the FE sector, where the special objective is designed to protect learner provision for existing students at an insolvent college. Unlike in an ordinary administration, where the administrator's duty, in seeking to rescue the company, is to act in the best interests of the creditors as a whole, the priority objective of the education administration is to avoid or minimise disruption to the studies of existing students of the college as a whole.

The primary legislation for the FE insolvency regime includes a summary of the possible outcomes of an Education Administration, which include complete closure of the college and a takeover of the college. Section 16 of the Act sets out the special objective of an Education Administration and how that might be achieved.

It is clear from subsection (1) of this objective that the needs of the existing students of the affected FE body are paramount. Subsection (2) sets out that the Education Administrator has a number of ways in which he or she could meet those needs. The method chosen will depend on the exact situation of the individual college, but we would expect an Education Administrator to first consider whether it was possible for the insolvent FE body to be rescued as a going concern. This would be most likely through restructuring the college; either through a merger with, or takeover by, another FE body or FE college group; or by internal restructuring perhaps through a change of leadership and management and adoption of a new business model. A takeover or merger arrangement would result in a new FE college or the insolvent college becoming part of a wider college group to strengthen its overall financial position and rescue it from closure. The existing students would continue their studies within the new arrangement, and in practice would be unlikely to notice much practical difference so long as the process was well managed.

If this was not possible, for example if local market conditions indicated oversupply in the area and the individual insolvent college did not have a viable future, then the most likely outcome would be closure of the college–but the legislation ensures that the college does not close until the needs of the existing student body have been provided for. Again, the exact outcome would vary from case to case, including the point in the academic year at which the insolvency occurred; so we would expect the Education Administrator to, for example, allow existing students to complete examinations rather than disrupt an exam timetable to better manage restructuring of the college. The Education Administrator would have the flexibility to explore agreeing a transfer of existing students to another institution to continue their studies or undertake a similar course. Alternatively, the college could be kept open long enough to 'teach out' existing students before being closed down. The actual outcome depends on the specifics of the individual case but the primary objective is to manage the situation with the least disruption to existing learners.

The Act also provides a flexible funding power to the Secretary of State to ensure that an Education Administration is properly funded in order to achieve the special objective of learner protection–either through grant or loan as is appropriate to the individual case.

These provisions are all already set out in the primary legislation. The secondary legislation that is being introduced through the FE Bodies (Insolvency) Regulations 2018, together with a bespoke set of insolvency rules which will govern how an Education Administration will operate, provides for detailed application of existing insolvency legislation in order to make the new FE insolvency regime work effectively.

*Institute for Fiscal Studies (IFS) report on education spending 17/09/2018*

*16 to 19 funding*

The Committee have also expressed an interest in the IFS's report on funding for 16-18 year olds in further education and asked about DfE's policy on 16-18 education funding.

Overall, the Government plans to invest nearly £7 billion this academic year (2018/19), to ensure there is a place in education or training for every 16 to 19-year old who wants one (including apprenticeships).

The national base rate for 16-19 funding–which applies to school sixth forms and colleges–has been protected at existing rates until 2020. The Government continues to provide extra funding in addition to this base rate e.g. disadvantage funding (around £500m per year in total), and the uplift for large academic programmes.

The Government has announced extra support for key priorities and will provide additional funding to support institutions to grow participation in level 3 maths - an extra £600 for every additional student–with two payments of £600 if for example they are studying a maths A level over two years. This will first be paid next year, 2019/20.

Since the academic year 2013/14 all types of providers have been funded for 600 planned hours per year per full-time student. There is enough funding for study programmes covering 3 A levels or a substantial technical qualification plus further hours for other things like an AS level or, if required, the continued study of English or maths.

The Government's commitment to the 16 to 19 sector has contributed to the current record high proportion of 16 to 17-year olds who are participating in education or apprenticeships, the highest since consistent records began. While performance must be kept under close review, this is not a sector which is failing.

The Government is also transforming technical education in this country through the introduction of new T Levels. As the Chancellor announced last year, there will be an extra half a billion pounds a year invested in England's technical education system once T Levels are fully rolled out. This extra funding is already flowing to colleges–and other providers too - with nearly £60 million already allocated to them to invest in their capacity to organise extended industry placements for young people. These placements will be a key element of T Levels.

*Adult funding*

The Department for Education was allocated £1.5 billion for the Adult Education Budget (AEB) for each year of the Spending Review period, as set out in the 2015 Spending Review.

The principal purpose of the AEB is to engage adults and provide the skills and learning they need to equip them for work, an apprenticeship or further learning. It enables more tailored programmes of learning to be made available, which do not need to include a qualification, to help those furthest from learning and in the workplace. The AEB also funds colleges and training providers to help adult learners to overcome barriers which prevent them from taking part in learning. This includes Learner Support to support learners with a specific financial hardship and Learning Support to meet the additional needs of learners with learning difficulties and/or disabilities.

For the 2018/19 academic year, we will be supporting those in work on low incomes to access the AEB through the introduction of a new one-year pilot which will allow providers to fully fund those on low wages. This will directly support social mobility by enabling those that have been motivated to move out of unemployment and are low paid/skilled, to further progress.

We are also giving colleges the opportunity to earn an additional 3% on top of their AEB allocation in 2018 to 19 for over-delivery to support growth in adult skills participation.

From 2019/20 academic year, approximately 50% of the AEB will be devolved to 6 Mayoral Combined Authorities (MCAs) (Tees Valley, Liverpool City Region, West Midlands, Greater Manchester, Cambridgeshire & Peterborough, West of England) and delegated to the Greater London Authority (GLA). North of Tyne and Sheffield City Region are in scope for devolution for 2020/21.

Devolution of the AEB will give MCAs and the GLA direct control over adult education provision for their residents for the first time; this is a significant step that will give local areas the opportunity to better meet local economic needs.

**28 September 2018**

# APPENDIX 4: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 9 October 2018, Members declared the following interests:

## Civil Jurisdiction and Judgements (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018

Lord Kirkwood of Kirkhope

*Member of the Law of Society of Scotland*

## Protocol to the agreement on the international occasional carriage of passengers by coach and bus (Interbus Agreement) regarding the international regular and special regular carriage of passengers by coach and bus (Cm 9699)

Baroness O'Loan

*Close relative drives coaches*

## Attendance:

The meeting was attended by Lord Cunningham of Felling, Baroness Finn, Lord Goddard of Stockport, Lord Haskel, Lord Kirkwood of Kirkhope, Baroness O'Loan, Lord Sherbourne of Didsbury and Lord Trefgarne.