HOUSE OF LORDS

Secondary Legislation Scrutiny Committee
(Sub-Committee A)

6th Report of Session 2017–19

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

Includes one Recommendation

Non-Contentious Probate (Fees) Order 2018

and one related Instrument

Payment Accounts (Amendment) (EU Exit) Regulations 2018

Includes 3 Information Paragraphs on 5 Instruments

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Secondary Legislation Scrutiny Committee (Sub-Committee A)

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

Baroness Bowles of Berkhamsted
Rt Hon. Lord Chartres
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Rt Hon. Lord Lilley
Lord Sharkey
Rt Hon. Lord Trefgarne (Chairman)
Rt Hon. Lord Walker of Gestingthorpe
Lord Wood of Anfield

Registered interests

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

Publications

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

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

Committee Staff

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Information and Contacts

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Sixth Report

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

Instruments recommended for upgrade to the affirmative procedure

Employment Rights (Amendment) (EU Exit) Regulations 2018

Laid: 31 October 2018

Sifting period ends: 21 November 2018

Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2018

Laid: 31 October 2018

Sifting period ends: 21 November 2018

1. The purpose of these draft Regulations, laid by the Department for Business, Energy and Industrial Strategy (BEIS) as proposed negatives, is to ensure that there is legal clarity and certainty in employment law in a possible 'no deal' scenario. The Employment Rights (Amendment) (EU Exit) Regulations 2018 propose to repeal powers of the Secretary of State to make secondary legislation in relation to the UK's obligations under EU Directives dealing with certain aspects of employment law such as parental leave, part-time work and fixed-term work and information and consultation of employees, as this would no longer be appropriate after the UK's exit from the EU. BEIS explains that the impact of these changes would not be material, as other powers to amend those aspects of employment law will be retained. The instrument also proposes changes to legislation in relation to European Works Councils (EWCs) which the Department says would protect arrangements for existing EWCs but no longer allow for the establishment of new EWCs in a 'no deal' situation.

2. The Trades Union Congress has raised concerns about the instrument with the Committee, which we are publishing at Appendix 1 alongside the Department's response. While we are satisfied that BEIS has addressed the concerns, we note that there are sensitivities around the proposed changes to employment law and that the Explanatory Memorandum could have been clearer on their impact. Similar sensitivities apply to the changes to employment law proposed in the Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2018. The House may therefore expect the opportunity to debate the draft Regulations and consider further their impact. **We recommend that these instruments should be subject to the affirmative resolution procedure**.

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

- Bank of England (Amendment) (EU Exit) Regulations 2018
- Control of Mercury (Amendment) (EU Exit) Regulations 2018
- Exotic Disease (Amendment) (England) (EU Exit) Regulations 2018
- Exotic Disease (Amendment etc) (EU Exit) Regulations 2018

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Non-Contentious Probate (Fees) Order 2018

Date laid: 5 November 2018

Parliamentary procedure: affirmative

Non-Contentious Probate (Amendment) Rules 2018 (SI 2018/1137)

Date laid: 5 November 2018

Parliamentary procedure: negative

The Ministry of Justice (MoJ) has laid two instruments about non-contentious probate: a negative instrument which modernises and improves the efficiency of the probate service and an affirmative instrument that would increase the fees for that probate service disproportionately to the cost of delivering the service. Whilst welcoming the first, the Committee has very serious concerns about the second.

The Rules (SI 2018/1137) enable the introduction of a more efficient and convenient on-line application process for a grant of probate leading MoJ to anticipate a reduction in the administrative cost of probate of about £1 million per year as a result of these changes (an average of £9.30 per application).

In contrast, the draft affirmative instrument increases the fees for those same applications for probate on a sliding scale which bears no relation to recovering the actual cost of providing the service. Although the scale of fees has been reduced from that set out in a previous draft instrument laid in 2017, which had a top fee of £20,000 instead of the current top fee of £6,000, this still represents a significant move away from the principle that fees for a public service should recover the cost of providing it and no more. The Government estimate that the revised fee structure will generate over £145 million in additional fee income in 2019–20, which they plan to use to pay the running costs of other parts of Her Majesty's Courts and Tribunal Services. We wonder whether the House envisaged the power being used for this degree of cross-subsidy when the Act was passed. ***This Committee's concern about the revised fee structure remains the same as it was for the draft instrument laid in 2017: "while section 180 of the Anti-social Behaviour, Crime and Policing Act 2014 permits the levying of enhanced fees, we are surprised to see it used to this extent. To charge a fee so far above the actual cost of the service arguably amounts to a "stealth tax" and, therefore, a misuse of the fee-levying power."***

That the MoJ Order seeks to increase these fees by so much at the same time as laying the Rules (SI 2018/1137) that will reduce the unit cost of an application by an average of £9.30 only serves to highlight the Committee's concerns about the disproportionate increase in the fee levels proposed by the affirmative instrument.

These instruments are drawn to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

Background

3. Probate is the process in England and Wales by which the High Court grants or confirms the authority of a personal representative[1] to administer the estate of a deceased person. Non-contentious probate business is where there is no dispute as to the applicant's right to the grant: for example, where there is no dispute as to the validity of the will. There are about 270,000 such applications made annually and, of these, about 110,000 are personal applications and 160,000 are made through solicitors or probate practitioners.

Non-Contentious Probate (Amendment) Rules 2018 (SI 2018/1137)

4. This negative instrument has been laid by the Ministry of Justice (MoJ) with an Explanatory Memorandum (EM). Following extensive piloting of an on-line application process for personal applications which gained an approval rating with users of 95%, SI 2018/1137 will enable the roll-out of the on-line application process throughout England and Wales.

5. Amongst other things, the amendments will allow on-line applications for probate to be made by an unrepresented applicant; enable all applications for probate to be verified by a statement of truth on-line (instead of an oath which has to be taken in person) and to be made without the will having to be marked (signed by the applicant). The changes also extend time limits from eight to 14 days in the caveat process (where someone else wishes to keep track of, or object to, the grant of probate), and allows caveats to function electronically. It also makes some improvements to other parts of the system, for example extending the powers of district probate registrars, allowing hearings to be conducted remotely and facilitating the issue of directions (instructions to the parties) in relation to hearings.

The effect of the changes

6. The EM to SI 2018/1137 makes it clear that the main benefits to the applicant are from increased efficiency and speed, in particular by reducing errors in the application process. It is also more convenient, for example by removing the time and expense of attending on a person authorised to administer an oath before an application can be submitted.

7. Paragraph 12.8 of the EM states that the impact of the changes on the public sector introduced by SI 2018/1137 will be to reduce the cost of administering the probate process: "The changes made by the amending instrument are … expected to realise in total over £14.6 million in public expenditure by March 2025 (of which the new personal applicant service is expected to save £7.4 million)." MoJ confirms that these amendments will facilitate savings of approximately £1 million per year in administrative costs for the Probate Service, which equates to an average £9.30 reduction in the unit cost of processing each personal application made.

8. **We welcome these innovations which not only make the process more efficient but free up the executor's time during the particularly difficult period following a death.**

1 - an executor if the deceased left a valid will, or an administrator if the estate died intestate or no executor is available.

Draft Non-Contentious Probate (Fees) Order 2018

9. This draft affirmative instrument has been laid by the MoJ under sections 92(1) and (2) and 108(6) of the Courts Act 2003, and section 180(1) of the Anti-Social Behaviour, Crime and Policing Act 2014, and is accompanied by an EM and an Impact Assessment (IA). This draft, laid on 5 November 2018 with a scale of fees rising to £6,000, replaces a previous draft laid on 24 February 2017 which included a scale of fees rising to £20,000. The previous instrument was drawn to the special attention of the House in our 28th Report of Session 2016–17.[2] The original draft of the instrument was debated in the House of Commons on 19 April 2017,[3] and remained on the Lords Business list for all of the intervening period but was not put forward for debate.

Cost of providing the Probate Service

10. Paragraph 2 of the IA states that current probate fees already achieve full recovery of the costs of running the Probate Service:

> "The current fees charged for a grant of probate are £215 if an application is made by an individual (around 40% of total applications in 2017) and £155 for where it is made by a solicitor (around 60% of all applications). A 'personal' applicant is charged a higher fee compared to those submitted via a solicitor because of the additional administrative work the Probate Service has to undertake to process these types of applications. *The existing fees reflect average administration costs* and currently generate around £50 m per annum in income for HM Court and Tribunals Service (HMCTS)." [emphasis added]

Changes proposed by this Order

11. The MoJ proposes raising the value of estate at which probate fees start to be charged from £5,000 to £50,000, which means that an additional 25,000 estates a year will not be subject to a fee (thereby reducing the Probate Service's revenue by approximately £4-5 million a year). For those who will be subject to a fee, the draft Order proposes to introduce a sliding scale of charges rising with the value of the estate, to a maximum of £6,000.

Table 1: Proposed fee bands for probate applications

Value of estate (before inheritance tax)	Proposed Fee
Up to £50,000 or exempt from requiring a grant of probate	£0
£50,000–£300,000	£250
£300,000–£500,000	£750
£500,000–£1m	£2,500
£1m–£1.6m	£4,000
£1.6m–£2m	£5,000
Above £2m	£6,000

2 28th Report, Session 2016–17 (HL Paper 131).
3 Commons Second Delegated Legislation Committee, 19 April 2017 [accessed 20 November 2018].

12. The IA states that 80% of the executors for estates that are subject to a fee will pay £750 or less (which is somewhere above three times the cost of the service) and for estates above £2 million fees will rise by £5,785 (or 27 times the actual cost). Under this revised fee structure MoJ states that no estate would pay a fee greater than 0.5% of its value.

13. Paragraph 12.2 of the EM states that it is estimated that these proposals will generate over £145 million in additional fee income in 2019–20, rising each subsequent year in line with increases in estate values.

Policy objectives

14. The Government state that the additional money generated by these fee increases will be used to subsidise other parts of HMCTS. Paragraph 7.2 of the EM says:

> "This instrument increases fees for the grant of probate for two primary reasons. First, it is right to introduce a more progressive fee scheme where those who can afford to pay more are asked to do so; second, it is necessary to fund the wider courts and tribunals system to ensure an efficient and effective service. This additional income is ring-fenced to the courts and tribunals service and therefore allows us to ensure we avoid charging court and tribunal fees in inappropriate cases and help maintain access to justice for all."

Objective 1 – cross-subsidy within the Probate Service

15. Paragraph 3.1 of the EM argues that section 180(1) of the Anti-social Behaviour, Crime and Policing Act 2014 provides an explicit power to "prescribe a fee of an amount which is intended to exceed the cost of anything in respect of which the fee is charged". This Committee wonders whether the House envisaged that power being used to this degree when the Act was passed.

16. We note, however, that in the standard guidance issued to government departments, *Managing Public Money*,[4] paragraph 6.3.6 states: "different groups of customers should not be charged different amounts for a service costing the same, eg charging firms more than individuals. Similarly, cross subsidies are not standard practice, eg charging large businesses more than small ones where the cost of supply is the same". By lifting the point at which fees become payable to estates valued at more than £50,000, fee payers would already be providing a substantial cross-subsidy to run the Probate Service for those less well off.

Objective 2 – cross-subsidy outside the Probate Service

17. The Government are proposing to generate profits from the Probate Service, estimated at £145 million per year, to be used to cross-subsidise other functions of HMCTS. MoJ argues that the enabling power in section 92 of the Courts Act 2003 gives it authority to prescribe fees to cross-subsidise other parts of HMCTS. Paragraph 6.4.5 of *Managing Public Money* says:

> "Cross-subsidies always involve a mixture of overcharging and undercharging, even if the net effect is to recover full costs for the service

4 HM Treasury, *Managing Public Money* (July 2013): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742188/Managing_Public_Money__MPM__2018.pdf [accessed 20 November 2018].

as a whole. So cross-subsidised charges are normally classified as taxes. They always call for explicit ministerial decision and parliamentary approval through either primary legislation or a s102 order."

18. Although, at a maximum of £6,000, the scale of fees proposed in this version of the draft Order is lower than the maximum of £20,000 proposed in the original draft, the underlying principle behind the charge has not changed. The statement at paragraph 7.3 of the EM that "even the highest fee in our scheme would represent no more than 0.5% of the value of the estate" also gives the fee the appearance of a tax rather than a fee linked to the actual cost of providing the service.

19. In considering the policy the House may wish to bear in mind that those with higher value estates will already be contributing to the Exchequer through Inheritance Tax and Stamp Duty of up to 12% if a property is sold. It is also worth remembering that such estates are often divided between a number of beneficiaries, many of them charities.

Conclusion

20. The proposed scale of fees does not conform with the normal requirements set out in *Managing Public Money*. The Committee therefore feels that the MoJ needs to explain its basis for taking this course rather more clearly so that the House may better understand its approach. This view is underpinned by our recollection that the Joint Committee on Statutory Instruments published a report on the previous draft of this instrument that questioned the MoJ's assumptions on the scope of the powers cited.[5]

21. The Committee takes the view that, though the scale of the individual fees has been reduced, the principle underlying the policy has not changed from the first version. **We therefore reiterate the conclusion expressed in our 28th Report of Session 2016–17: "while section 180 of the Anti-social Behaviour, Crime and Policing Act 2014 permits the levying of enhanced fees, we are surprised to see it used to this extent. To charge a fee so far above the actual cost of the service arguably amounts to a "stealth tax" and, therefore, a misuse of the fee-levying power."**

22. That the draft MoJ Order seeks to increase these fees by so much at the same time as laying the Rules (SI 2018/1137), that will reduce the unit cost of an application by an average of £9.30, only serves to highlight the Committee's concerns about the disproportionate increase in the fee levels proposed by the affirmative instrument.

Draft Payment Accounts (Amendment) (EU Exit) Regulations 2018

Date laid: 6 November 2018

Parliamentary procedure: affirmative

In line with a 2014 EU Directive, the Payment Accounts Regulations 2015 established the right of access to a basic bank account for customers legally resident in the EU. The nine largest current account providers in the UK ("the designated providers") must offer these accounts. In amending the 2015 Regulations, this instrument proposes to change the residency eligibility criteria for customers of basic bank accounts because it treats the EU as a third country. The nine designated

5 Joint Committee on Statutory Instruments 26th Report, Session 2016–17 (HL Paper 152).

providers will have discretion whether to keep open, or close, existing basic bank accounts for customers legally resident in the EU after the UK leaves it.

HM Treasury estimates that, if a UK provider exercises this discretion to close such an account, this may affect only a few hundred account-holders, and describes the overall impact on consumers as minimal. In our view, individuals who find that their designated provider chooses to close their account may well face a good deal of inconvenience (even if they are able to open such an account with another provider). The House may wish to press the Minister for reassurance that such inconvenience may not cause those affected real financial difficulty.

We draw these Regulations to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

Payment Accounts Regulations 2015

23. The Payment Accounts Regulations 2015 (SI 2015/2038: "the 2015 Regulations") transposed the 2014 Payment Accounts Directive ("the 2014 Directive")[6] into UK law. In the Explanatory Memorandum (EM) to these Regulations, HM Treasury (HMT) says that the 2015 Regulations set out the eligibility criteria for payment accounts with basic features (more commonly known as basic bank accounts in the UK, offering basic facilities for receiving money and settling bills, without overdraft facilities) and designated the nine largest current account providers in the UK who must offer these accounts.[7] They established the right of access to a payment account with basic features for customers legally resident in the EU, who did not currently hold a payment account with a UK credit institution or who were not eligible for any other payment account at the UK credit institution at which they were applying for a payment account. They required that these accounts were fee-free for services offered in sterling and that EU currency services could be charged for at a reasonable fee.

Draft Payment Accounts (Amendment) (EU Exit) Regulations 2018

24. In the EM, HMT says that these draft Regulations propose amendments to the 2015 Regulations to ensure that they continue to operate effectively in the UK once the UK has left the EU, in the event of a no-deal exit: they remove references to the EU which will no longer be appropriate and treat the EU as a third country. HMT comments that the changes for payment service providers and consumers will be minimal.

25. In particular, the Regulations propose to change the residency eligibility criteria for customers of payment accounts with basic features because they treat the EU as a third country. The nine designated providers of these accounts will have discretion whether or not to offer such accounts to customers legally resident in the EU, but they must continue to offer them to customers legally resident in the UK who meet the other established eligibility criteria. The nine designated providers will also have discretion whether to keep existing payment accounts with basic features open for customers legally resident in the EU, but the Regulations propose no change

6 Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features.

7 The nine designated banks are: Barclays; Clydesdale and Yorkshire Bank; Co-operative Bank; HSBC; Lloyds Banking Group (including Halifax and Bank of Scotland brands); Nationwide; Royal Bank of Scotland (including NatWest and Ulster Bank brands); Santander; and TSB.

to the provisions governing the closure of such accounts for customers who are legally resident in the UK.

Impact on existing UK basic bank account-holders resident in the EU

26. In the EM, HMT notes that the changes could affect existing holders of UK basic bank accounts who are resident in the EU, as UK providers will no longer be obliged to keep these accounts open. We obtained further information from HMT about this possible impact, which we are publishing at Appendix 2. We have been told that a UK citizen who is legally resident in the EU may hold a basic bank account with a UK provider, and that under this instrument a UK provider would be allowed to close their account; HMT added that, in this event, the customer should be able to get a basic bank account with an EU-based provider.

27. We also obtained further information about the statement in the EM that the Government expect that this will affect very few accounts, in the region of the low hundreds. HMT has said that it does not know the citizenship of these customers, and that it does not consider the estimated figure of the low hundreds to be a significant number because there are almost eight million basic bank accounts held at UK banking providers.

28. We note as well that, under the 2014 Directive as implemented, individuals living in one EU Member State have had the right to open a basic bank account in another Member State (for example, in anticipation of being employed and paid in that other State), through a designated bank operating in that other State. The amendments proposed by these Regulations affect only UK provision of basic bank accounts. The effect of leaving the EU on a UK customer's right to a basic bank account in an EU Member State will depend on how that State has implemented the Directive. If a Member State has specified in its local law that eligibility is based on EU residency (as the UK chose to do), a UK customer legally resident in the UK would no longer be automatically eligible for a basic bank account within the EU, once the UK has left the EU.

Conclusion

29. It may be understandable that HMT describes the impact of these changes on consumers as minimal. However, even if it is a correct estimate that only a few hundred account-holders will be affected, these individuals may well face a good deal of inconvenience if they find that their designated provider chooses to close their account, obliging them to approach another provider. **The House may wish to press the Minister for reassurance that such inconvenience may not cause those affected real financial difficulty.**

INSTRUMENTS OF INTEREST

Ship Recycling (Requirements in relation to Hazardous Materials on Ships) (Amendment etc.) Regulations 2018 (SI 2018/1122)

30. Ships have a normal life span of between 25 and 40 years. Most (especially older ships) contain hazardous materials such as asbestos and are therefore classified as "hazardous waste" under EU laws. At present, a high number of ships are recycled in Asia, in conditions which offer little protection to human health or to the environment. An EU Regulation[8] on ship recycling, coming into force on 31 December 2018, will control the installation of new hazardous material on ships and stipulate that all EU flagged ships[9] must use a recycling facility on the "European list".[10] EU flagged ships must carry a valid inventory of hazardous materials on board which will have to be surveyed by the Maritime and Coastguard Agency (MCA)[11] and certified every five years.[12] Before a ship is sent to an approval recycling facility, a final survey (with the help of the approved ship recycling facility) is needed and a ship recycling plan must be approved by the MCA and the Health and Safety Executive before a 'Ready for Recycling Certificate' can be issued to the ship owner, allowing the ship to be recycled at the chosen facility on the approved European List. These Regulations put in place measures intended to ensure the enforcement of the EU Regulation and providethat a ship owner is guilty of an offence if, in breach of the requirements of the EU Regulation, certain hazardous material are installed or used, or if there is not a valid inventory of hazardous material on board, or if the ship does not comply with duties related to the preparation of a ship for recycling. The MCA (as port state control inspector) has the power to verify whether ships calling at UK ports comply with the EU Regulation and can detain ships for offences in relation to this instrument. The MCA will operate on a full cost recovery basis so the costs for inspections will be recovered from industry.

Universal Credit and Jobseeker's Allowance (Miscellaneous Amendments) Regulations 2018 (SI 2018/1129)

Universal Credit and Jobseeker's Allowance (Miscellaneous Amendments) Regulations (Northern Ireland) 2018 (SR 2018/187)

Child Tax Credit (Amendment) Regulations 2018 (SI 2018/1130)

31. In setting out its policy on limiting Universal Credit and Child Tax Credit to a maximum of two children per household, the Government proposed certain exemptions, including that the benefits could be paid for an adopted third child. The Secondary Legislation Scrutiny Committee's 30th Report of last session[13] drew attention to the fact that this would treat families unequally, particularly those which adopted or undertook "kinship care" of two children before starting their own family, as their own baby would not then be eligible for benefit. Following an internal review and a High

8 Regulation (EU) No. 1257/2013 of the European Parliament and of the Council of 20th November 2013 on ship recycling and amending Regulation (EC) No. 1013/2006 and Directive 2009/16/EC ("the EU Regulation").
9 This applies to ships over 500 gross tonnes.
10 There are currently four UK facilities on the European list – Abel UK, Swansea Drydocks Ltd, Harland & Wolff and Dales Marine Services Ltd.
11 Or one of the classification societies recognised by the MCA.
12 The inventory for new EU flagged ships will have to be surveyed every five years and certified and the inventory for existing ships by the end of 2020.
13 30th Report, Session 2016–17 (HL Paper 148).

Court judgment that stated that the provision was lawful but irrational as it discouraged adoption, these regulations amend the law so that all adopted and kinship children care are discounted when considering the two-child limit for these benefits. [14]

32. Amongst other things, SI 2018/1129 also implements the policy change announced in a Written Ministerial Statement on 29 March 2018,[15] to allow all 18-21 year olds to be eligible for support with their housing costs. This reverses provisions made in 2017[16] which withdrew entitlement to claim housing costs for certain 18-21 year olds in Universal Credit full service areas requiring them to instead return to live with their parents when claiming benefits. DWP says that the policy change made by SI 2018/1129 means that young people on benefits will be assured that, if they secure a tenancy, they will have support towards their housing costs in the normal way. SR 2018/187 makes similar changes for Northern Ireland.

Education Administration Rules 2018 (SI 2018/1135)

33. In September, the Department for Education (DfE) laid the draft Further Education Bodies (Insolvency) Regulations 2018, in order to modify insolvency legislation to enable it to operate effectively in its application (under the Technical and Further Education Act 2017) to further education corporations and sixth form college corporations. The Secondary Legislation Scrutiny Committee published information about those Regulations in its 41st Report of this Session;[17] the Report noted that DfE also intended to lay Rules setting out insolvency procedures for a Special Administration Regime called Education Administration. The draft Regulations were considered in Grand Committee on 30 October,[18] when the Minister again referred to the forthcoming Rules. These have now been laid; DfE states that both the Regulations and the Rules should come into force at the same time, to avoid any confusion should an insolvency case occur when only part of the regime applies.

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14 See: https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-04-27/HCWS653/

15 See: https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-03-29/HCWS611/

16 Universal Credit (Housing Costs Element for claimants aged 18 to 21) (Amendment) Regulations 2017 (SI 2017/252).

17 41st Report, Session 2017–19 (HL Paper 190).

18 HL Deb, 30 October 2018, col 100GC–109GC [Grand Committee].

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

	Anti-social Behaviour, Crime and Policing Act 2014 (Amendment) Order 2018

Instruments subject to annulment

SI 2018/1122	Ship Recycling (Requirements in relation to Hazardous Materials on Ships) (Amendment etc.) Regulations 2018
SI 2018/1129	Universal Credit and Jobseeker's Allowance (Miscellaneous Amendments) Regulations 2018
SI 2018/1130	Child Tax Credit (Amendment) Regulations 2018
SI 2018/1135	Education Administration Rules 2018
SR 2018/187	Universal Credit and Jobseeker's Allowance (Miscellaneous Amendments) Regulations (Northern Ireland) 2018

APPENDIX 1: EMPLOYMENT RIGHTS (AMENDMENT) (EU EXIT) REGULATIONS 2018 AND EMPLOYMENT RIGHTS (AMENDMENT) (NORTHERN IRELAND) (EU EXIT) REGULATIONS 2018

Submission from the Trades Union Congress (TUC)

Summary of TUC response

These Regulations have been proposed by Government to amend existing employment rights legislation in the event of a "no deal" EU withdrawal.

The Regulations are presented as technical formalities which simply remove reference to EU legislation from UK laws. They are currently subject to the negative resolution procedure and in line with this process will not currently be debated in either the House of Commons or the House of Lords.

However, if enacted the Regulations would have significant implications for UK workers' rights. They also have potential to introduce new legal uncertainties.

The TUC is committed to ensuring the Government maintains a fully level playing field for workplace rights once the UK has left the EU. We are extremely concerned that these Regulations will fail to achieve this ambition. They are out of line with the Prime Minister's promise that workers' rights will retain continued parity with EU law after Brexit.

Our strong view is therefore that the Regulations should not proceed as drafted. Given the significant detriment they could bring for UK workers, they should be debated in both Houses before they have the potential to come into force.

The following brief sets out our high-level concerns with the Regulations as drafted and makes the case for them to be subject to the affirmative procedure. Full parliamentary briefing will follow in due course.

Issues of concern

Loss of updating rights

The Regulations remove powers by which Ministers can enact legislation to keep UK law in line with EU law. This means it will be harder to keep workers' rights up to the same standard as EU workers' rights as EU law develops.

The TUC does not accept that these powers should be removed and is concerned that the government is opting to use EU Withdrawal Act powers to weaken employment rights. This sends the wrong signal to people at work, suggesting the government does not intend to fully comply with its commitment to protect employment rights post-Brexit.

The TUC recognises that the government may need to make very minor changes to employment law post-Brexit to ensure the statute book operates effectively. But these regulations go beyond minor technical changes of this nature.

In our opinion the government should at most be introducing minor amendments to existing powers, rather than removing them in their entirety. Any such minor revisions should clearly provide powers meaning that post-Brexit the UK government will comply with (or at least consider if UK law should keep pace with) developments in EU law.

Dates of enforcement and risk of legal uncertainty

In its explanatory memorandum the government sets out that the Regulations will come into force in the event of no deal with the EU. However, some provisions in the Regulations are scheduled to come into force on 1 December 2018, all others on "exit day". The whole of Schedule 1 of the Regulations (amending primary employment rights legislation), along with three amendments to secondary legislation will, if enacted, come into force on 1 December 2018.

There is no explanation as to why some provisions come into force before exit day, or the implications of this in the range of scenarios which could unfold from 1 December 2018 onwards. We recognise that these regulations should be debated and scrutinised now but cannot see why they need to come into effect in advance of the UK's exit. We are also particularly concerned that there is no statement from government as to their timetable for revoking these powers should a withdrawal agreement with the EU be reached after 1 December 2018.

The early commencement dates in the legislation create considerable scope for error and legal uncertainty in relation to the timings and process for either implementation or revocation of the Regulations (depending on whether the Government reaches a deal with the EU, when this takes place, whether a transition period is agreed and what the provisions of any such transition period are). Government must provide greater clarity on the rationale behind the timings set out in these regulations, as well as clear commitments regarding the revocation of these regulations in a 'deal' scenario.

Loss of European Works Council (EWCs) rights

EWC rights are cross-border rights, which depend upon membership of the single market/European Economic Area (EEA). In the event of no deal numerous worker rights relating to European Works Councils ("EWC") will be lost. For example, UK workers would no longer be entitled to request the establishment of an EWC, union representatives would lose the right to participate in negotiations on the establishment of an EWC and workers could lose out on the numerous benefits EWCs can bring.

The opportunity for UK workers to participate in discussions with European colleagues on company-wide issues is valued by both businesses and their employees. It can include opportunities for the workforce to be included in strategic multinational decisions around jobs, investment and training. Employers and unions are concerned that if UK reps lose their place at the table, the risk to UK jobs and investment will increase.

The loss of such rights would be a concerning and detrimental no deal outcome. In this context, the TUC continues to call on the government to secure a deal which would maintain the participation of UK workers within this EU framework and it is vital that parliament is made fully aware of this consequence.

We have welcomed the government's efforts to preserve existing EWCs but believe that UK employment rights protection should also be also be offered to workers who wish to set up an EWC in the future (recognising that in a no-deal scenario future participation would be contingent upon reciprocal agreement with other EU countries). We encourage government to amend these regulations to offer some UK employment rights protection to EWC members which could aid future participation, even in a no-deal scenario. For example, regulations could

be retained to ensure reps have rights to time off to participate in meetings and undertake training.

However, as presently drafted the Regulations remove rights for UK EWC reps in their entirety and make no efforts to put future protections in place. The Regulations set out that in the event of no deal, numerous worker rights relating to and facilitating European Works Councils ("EWC") will all be lost.

Conclusion

The TUC proposes that due to the significant legal consequences of the changes to be made by the regulations and the risk of potentially defective drafting in relation to timings of enactment, in line with the requirements of Schedule 7, Part 1, para 3 (4) of the European (Withdrawal) Act 2018 the committee recommends the affirmative resolution procedure is the appropriate procedure for these Regulations, or that the Minister now exercises discretion to this effect.

November 2018

Response from the Department for Business, Energy and Industrial Strategy (BEIS)

Updating rights

The aspects of the powers being repealed by the SI would not, in absence of the SI and if left in law, be able to be used by the Government as they relate to obligations under Directives. The UK will no longer have obligations in a 'no deal' scenario and therefore these powers cannot be used. We are repealing these aspects of the powers in order to tidy up the statute book. This has no material impact on the powers themselves. The other current powers to amend legislation will be retained as now, so there will not be a policy vacuum.

In addition, a power to 'keep pace' with EU law – which may be what the TUC is seeking – in a 'no deal' scenario would be a policy change and outside the scope of the powers in the European Union (Withdrawal) Act under which we are making the SI. Amendments seeking this outcome were tabled (but failed to pass) during the passage of the Bill.

Commencement date

The three provisions which are commenced on 1 December 2018 are all updates to out of date references to EU legislation, which we are making as a matter of legislative housekeeping rather than to address issues caused by exit. These amendments are not made under powers in the EU Withdrawal Act, but under s.2(2) of the European Communities Act 1972. As such it is sensible to commence those provisions earlier, and well in advance of exit.

Also picking up on one of the other points raised by the TUC, the SI will only be needed in a 'no deal' scenario. Any changes needed to legislation are likely to be different in a scenario where there is a deal, depending on the terms of that deal. In that case we will therefore ensure that this SI (along with other 'no deal' SIs which are in a similar position) will not come into effect.

European Works Councils

The current rights are being retained. The changes are in relation to new requests to establish an EWC, which will not be possible as the EWC Directive will no longer apply to the UK in a 'no deal' scenario. Any impact on the rights of workers

to be represented on or by EWCs is as a result of leaving the EU without a deal covering EWCs, not as a result of the SI.

Making amendments to UK law to provide for additional or new protections as the TUC seems to be suggesting would be outside the scope of the powers in the European Union (Withdrawal) Act.

November 2018

APPENDIX 2: DRAFT PAYMENT ACCOUNTS (AMENDMENT) (EU EXIT) REGULATIONS 2018

Additional Information from HM Treasury

Q1: In the Explanatory Memorandum (EM), you say: "It will therefore be at the discretion of the nine providers whether to continue to offer basic bank accounts to customers resident in the EU after exit day, or keep existing basic bank accounts of EU residents open, as would currently be the case for customers who are resident in non-EU countries … It could also affect existing holders of UK basic bank accounts who are resident in the EU, as UK providers will no longer be obliged to keep these accounts open, but may choose to do so." Does this mean that UK citizens who may be resident in another EU state and who currently hold a basic bank account with a UK provider may find that the UK provider decides to close their accounts? If so, what options would be open to those UK citizens if they wished to retain the facilities previously available to them under the basic bank account with the UK provider?

A1: You are correct in saying that a UK citizen who is legally resident in the EU may hold a basic bank account with a UK provider, and that under this instrument a UK provider would be allowed to close their account. The provider is not obliged to close the account (the effect of the SI is that they are no longer obliged to offer it, but it does not prevent them offering it) but if they chose to do so they must give the customer at least two months' notice in writing. In this event, the customer should be able to get a basic bank account with an EU-based provider, as all Member States are subject to the Payment Accounts Directive, which mandates the provision of basic bank accounts (or, payment accounts with basic features). However, the exact features of basic bank accounts in other Member States, and their specific eligibility criteria, will depend on how the Member State implemented the directive. Alternatively, if they wish to continue to hold a bank account with a UK bank, then they would need to explore other accounts offered to non-UK residents by UK banks.

Q2: In the EM, you say: "Based on conversations with industry, government expects this will affect very few accounts, in the region of the low hundreds." What information does HM Treasury have about the account-holders likely to be affected? Do you know if these are UK citizens, and whether they are resident in the UK or elsewhere in the EU? How reliable is the estimate of "the low hundreds"? And does HM Treasury not regard this as a significant number of individuals who may be adversely affected by the changes proposed?

A2: The estimate of the 'low hundreds' refers to the estimated number of basic bank accounts provided by UK institutions which are held by customers living in the EU; no UK resident customers (whether UK citizens or otherwise) will be affected, as this SI ensures that UK basic bank account providers must continue to offer these to qualifying customers resident in the UK. The estimate was derived from data gathered by HM Treasury from some providers of basic bank accounts in the UK last year. HM Treasury asked these providers how many of their basic bank accounts were held by customers resident in the EU, and then a calculation was made to estimate the likely total number of projected accounts held by customers resident in the EU in March 2019, based on market share and the average monthly flow of basic bank account openings. HM Treasury does not know the citizenship of these customers. HM Treasury does not consider the estimate figure of the low hundreds to be a significant number because, to put it in context, there are almost 8 million basic bank accounts held at UK banking providers and almost 70 million current accounts held at UK banking providers.

Furthermore, the customers affected should be able to access a bank account – either a basic bank account or another type of current account – at an EU provider, or another UK provider that is continuing to offer this service.

Q3: In the EM, you say: "HM Treasury has not undertaken a consultation on the instrument, but has engaged with relevant stakeholders on its approach to Financial Services legislation". Have you received views from consumer representatives on these changes? If so, what views were expressed?

A3: HM Treasury published the draft instrument along with an explanatory policy note on 31 October and subsequently contacted consumer groups to notify them of the changes. HM Treasury has not received any queries or comments on the proposed changes by these groups, nor from any other consumer groups since publication.

12 November 2018

APPENDIX 3: APPENDIX 3: 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 19 November 2018, Members declared no interests.

Attendance:

The meeting was attended by Baroness Bowles of Berkhamsted, Lord Chartres, Lord Faulkner of Worcester, Lord Haskel, Lord Hogan-Howe, Lord Sharkey, Lord Trefgarne, and Lord Walker of Gestingthorpe.