



HOUSE OF LORDS

Secondary Legislation Scrutiny Committee
(Sub-Committee A)

8th Report of Session 2017–19

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

Includes 1 Information Paragraph on 1 Instrument

Includes 2 Information Paragraphs on 2 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	Lord Haskel	Rt Hon. Lord Trefgarne (Chairman)
Rt Hon. Lord Chartres	Lord Hogan-Howe	Rt Hon. Lord Walker of Gestingthorpe
Lord Faulkner of Worcester	Rt Hon. Lord Lilley	Lord Wood of Anfield
Baroness Finn	Lord Sharkey	

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

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.

Eighth Report

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

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

Aquatic Animal Health and Alien Species in Aquaculture (Amendment) (Northern Ireland) (EU Exit) Regulations 2018

1. The Department for Environment, Food and Rural Affairs has laid these Regulations as a Proposed Negative instrument. The purpose is to ensure that there is a workable legal framework in relation to aquatic animal health and alien and locally absent species in aquaculture after the UK's withdrawal from the EU. The proposals apply to Northern Ireland only. Apart from technical changes, the Regulations confer directly on the competent authority in Northern Ireland a legislative function in relation to the establishment of appropriate buffer zones to prevent the introduction of exotic diseases to aquatic species in Northern Ireland. **While, in line with the Committee's policy remit, we do not express a definitive view on what is essentially a legal issue, it is arguable that the effect of conferring legislative functions in this way is to trigger the requirement under Schedule 7, Part 1, paragraphs 1(1) and 1(2) (d) of the EU (Withdrawal) Act 2018 for the affirmative resolution procedure to apply to this instrument.**
 - Common Agricultural Policy and Agriculture and Horticulture Development Board (Amendment etc.) (EU Exit) Regulations 2018
 - Criminal Justice (Amendment etc.) (EU Exit) Regulations 2018
 - European Structural and Investment Funds Common Provisions Rules etc (Amendment etc) (EU Exit) Regulations 2018
 - Fertilisers (Amendment) (Northern Ireland) (EU Exit) Regulations 2018
 - Leghold Trap and Pelt Imports (Amendment etc.) (EU Exit) Regulations 2018
 - Official Controls (Animals, Feed and Food) (Amendment) (Northern Ireland) (EU Exit) Regulations 2018
 - Organic Products (Amendment) (EU Exit) Regulations 2018
 - Rights of Passengers in Bus and Coach Transport (Amendment etc.) (EU Exit) Regulations 2018

INSTRUMENTS OF INTEREST

Draft Insolvency (Amendment) (EU Exit) Regulations 2018

2. These draft Regulations, laid by the Department for Business, Energy and Industrial Strategy (BEIS), seek to address deficiencies in EU retained legislation on cross-border insolvencies. BEIS says that under the EU Insolvency Regulation (EU 2015/848) (the “EUIR”) and in a ‘no deal’ scenario, there would be a unilateral obligation on the UK to recognise insolvency orders from EU Member States, without any reciprocal recognition for UK insolvency proceedings in those Member States. Furthermore, while the EUIR would prevent insolvency proceedings that competed with proceedings in a Member State being opened in the UK, proceedings in the UK would not benefit from the same protection in Member States. According to BEIS, the draft Regulations therefore propose, amongst other changes, to remove all requirements of the EUIR except the “jurisdiction test”, which determines the jurisdiction for opening insolvency proceedings. BEIS explains that the requirement will sit alongside the UK’s pre-existing jurisdictional tests and ensure that UK courts will have jurisdiction to open insolvency proceedings if the debtor’s centre of main interests is in the UK, if the debtor has an “establishment” in the UK, or if a test set out in existing domestic insolvency law is met. BEIS has published a Technical Notice¹ and written to insolvency professionals² to provide guidance on these changes. In the Explanatory Memorandum, BEIS also states that the UK’s insolvency sector currently relies on the EUIR to act as a restructuring hub for Europe and that this status would be damaged in a ‘no deal’ scenario, but that, as the size of the cross-border restructuring sector is not known, the impact cannot be measured accurately. We asked the Department for further information about the significance of the UK insolvency sector, its engagement with stakeholders and the risks of a ‘no deal’ scenario, which we are publishing at Appendix 1.

Draft Services of Lawyers and Lawyer’s Practice (Revocation etc.) (EU Exit) Regulations 2019

3. EU law currently enables lawyers from one EU or European Free Trade Association (EFTA) state to practise and establish in another “host” state under their home state professional title (that is, without having to requalify and join the host state’s legal profession). That right will fall if the UK leaves the EU without a deal (UK-qualified lawyers practising abroad will be similarly affected). In a ‘no deal’ situation this instrument will realign the position of EU and EFTA lawyers in the UK with other “third country” lawyers; to continue practising they would need to transfer to the domestic legal professions either by taking tests under the Qualified Lawyer Transfer Scheme, managed by the Solicitors Regulation Authority, or the Bar Transfer Test, managed by the Bar Standards Board, both of which involve fees. The instrument includes a transitional provision until 31 December 2020, to give the 700 or so EU and EFTA lawyers affected the time to make the necessary changes to their practice or business structure to comply with the new regulatory framework.

1 Department for Business, Energy and Industrial Strategy and Ministry of Justice, *Handling civil legal cases that involve EU countries if there’s no Brexit deal* (September 2018): <https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexite-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexite-deal> [accessed 4 December 2018].

2 The Insolvency Service, *Letter to Insolvency Practitioners* (November 2018): https://content.govdelivery.com/attachments/UKIS/2018/11/20/file_attachments/1110327/Dear%20IP%202083%20Special%20Edition%20November%202018.pdf [accessed 4 December 2018].

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Blood Safety and Quality (Amendment) (EU Exit) Regulations 2019

Insolvency (Amendment) (EU Exit) Regulations 2018

Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2019

Ship and Port Security (Amendment etc.) (EU Exit) Regulations 2018

Instruments subject to annulment

Cm 9736 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Turkey on the Establishment, Functioning and Activities of Cultural Centres

SI 2018/1191 Police (Amendment) Regulations 2018

SI 2018/1207 Local Authorities (Capital Finance and Accounting) (England) (Amendment) Regulations 2018

SI 2018/1210 Armed Forces (Aliens) (Amendment) Regulations 2018

APPENDIX 1: DRAFT INSOLVENCY (AMENDMENT) (EU EXIT) REGULATIONS 2018

Further information from the Department for Business, Energy and Industrial Strategy

Q1: Paragraph 12.4 of the Explanatory Memorandum (EM) talks about additional costs of £2.7 million. Is that per year? How many UK insolvency cases are there per year that have an EU cross-border element and would be affected? Would it be possible to see the breakdown of how the £2.7 million has been calculated?

A1: The figure of £2.7 million is per year, and reflects the total cost due to applications to EU courts to have orders recognised in cross-border insolvency cases.

The number of insolvency cases involving other member states was derived from confidential survey data which asked Insolvency Practitioners for information on the proportion of current cases involving other member states. The result of this was an estimate of around 1,445 cases per year that would require applications to court to deal with matters in member states, for example recovery of assets for the benefit of creditors or recognition or UK insolvency proceedings.

The estimated figure for cases per year was then combined with the per application cost of £1,890 (2017 prices), which had been estimated from an EU impact assessment for the EU Insolvency Regulation (EUIR) (regulation 2015/848) in 2012.

Q2: Paragraph 12.5 suggests that the UK insolvency sector is a restructuring hub for Europe but also says that the current size of the cross-border restructuring sector is not known. Is there any further information available on the size of the UK insolvency sector (number of people employed, contribution to the UK economy etc) and on the importance of the UK insolvency sector as Europe's restructuring hub?

A2: As the EM suggests, the value of the UK insolvency sector's cross-border insolvency work is difficult to quantify exactly. However, case reports identify that many of the largest and most complicated European cross-border insolvencies are dealt with in the UK and by UK courts. The jurisdiction rules in the EUIR enable EU businesses to commence insolvency or rescue proceedings in the UK if its head office function is based here, rather than restricting proceedings to the place of its registered office. The UK has one of the best insolvency and restructuring regimes in the world according to the World Bank rankings, and has a high rate of return in comparison with other countries such as France or Germany. It is therefore an attractive jurisdiction for insolvency proceedings benefitting creditors, lenders and investors. This is evidenced by the fact that large, high profile restructurings are often centred in the UK (such as the Nortel case in 2009). Regarding the size of the insolvency sector in the UK, a paper published by R3, the restructuring professionals' trade body, on the impact of Brexit (published December 2016) stated that there are approximately 12,000 professionals working in the industry. In 2013–2014 almost 230,000 jobs and almost 41% of insolvent businesses were saved thanks to the rescue and restructuring sector.

Q3: Paragraph 10.1 mentions discussions with stakeholders. Did stakeholders raise concerns about the proposals or about the impact of a 'no deal'?

A3: We have encouraged views from the insolvency and restructuring sector and very much welcome their input. In order to avoid prejudicing the negotiations with the EU in this area, we have only been able to carry out limited engagement on the detail of the SI. Our discussions with a small group of senior industry experts were focussed on specific policy areas, such as the jurisdictional tests. During these discussions, a general consensus was achieved that the proposed solutions were the best available within the limits imposed by the EU (Withdrawal) Act powers. Some stakeholders suggested that they would in future like to see wider changes to the UK insolvency regime following EU exit in order to ensure that the UK regime remains competitive internationally.

Representatives from the UK insolvency and legal services sectors also remain all but unanimous in their concern regarding the impact that exiting the EU without a deal will have. The Withdrawal Agreement allows for the continuation of the current regime whilst negotiations on a future deal on civil and judicial cooperation matters (including insolvency) continue; once the Agreement is ratified we expect that this SI will be modified appropriately under the planned EU (Withdrawal Agreement) Bill—for example, the point at which the provisions to repeal the EUIR come into force will change. Although we will not be able to unilaterally continue the current system of cooperation with the EU in a “no deal” scenario where the Withdrawal Agreement is rejected, the SI as currently drafted will provide as smooth a transition for insolvency cases commenced before exit day as possible.

APPENDIX 2: 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 3 December 2018, Members declared the following interests:

Common Agricultural Policy and Agriculture and Horticulture Development Board (Amendment etc.) (EU Exit) Regulations 2018

Lord Walker of Gestingthorpe

Gestingthorpe Farming Company Limited (arable farming in north Essex)

Attendance:

The meeting was attended by Baroness Bowles of Berkhamsted, Lord Chartres, Lord Haskel, Lord Faulkner of Worcester, Baroness Finn, Lord Lilley, Lord Sharkey, Lord Trefgarne, Lord Walker of Gestingthorpe and Lord Wood of Anfield.