

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee (Sub-Committee A)

18th Report of Session 2017–19

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

Drawn to the special attention of the House:

Draft Common Agricultural Policy (Financing, Management and Monitoring) (Miscellaneous Amendments) (EU Exit) Regulations 2019 and four related instruments

Includes information paragraphs on:

Draft Challenges to Validity of EU
Instruments (EU Exit) Regulations
2019

Draft Health Services (Cross-Border
Health Care and Miscellaneous
Amendments) (Northern Ireland)
(EU Exit) Regulations 2019

Draft National Health Service (Cross-
Border Healthcare and Miscellaneous
Amendments etc.) (EU Exit)
Regulations 2019

Draft Social Security Coordination
(Reciprocal Healthcare) (Amendment
etc) (EU Exit) Regulations 2019

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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), Helen Gahir (Adviser), Nadine McNally (Adviser), Philipp Mende (Adviser), Jane White (Adviser), Louise Andrews (Committee Assistant), Ben Dunleavy (Committee Assistant) and Paul Bristow (Specialist Adviser)

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.

Eighteenth Report

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

Instruments recommended for upgrade to the affirmative procedure

Food and Farming (Amendment) (EU Exit) Regulations 2019

Date laid: 12 February 2019

Sifting period ends: 28 February 2019

1. This proposed negative instrument makes a range of amendments to retained EU legislation on wine and spirit drinks. It also proposes a number of corrections to previously laid EU exit instruments on genetically modified organisms and direct payments under the Common Agricultural Policy which are unrelated to the main substance of the instrument. While the Department for Environment, Food and Rural Affairs states that the amendments are minor and do not change policy, two of the proposals appear to be more significant.
2. First, the instrument proposes to transfer from the European Commission to the Secretary of State a new duty in relation to applications for the protection of geographic indications (GIs) of spirit drinks and wines. GIs are used to identify a product whose quality, reputation or other characteristic is linked to its geographical origin. The proposed changes would mean that, after EU exit, applications for GIs in the spirit drink and wine sectors would be submitted to and decided by the Secretary of State rather than the European Commission, as would objections to the Secretary of State's decisions. This is a substantial new responsibility for the Secretary of State. Second, the instrument proposes amendments in relation to the protection of GIs of spirit drinks. Under the current arrangements, an annex to the relevant EU regulation lists all the spirit drinks GIs that are protected across the EU.¹ This instrument proposes to replace the current annex with a shorter list, so that only UK spirit drinks GIs would be automatically protected in UK law after EU exit. The Department told us that, in contrast, UK GIs in relation to spirit drinks will continue to be recognised by the EU as third-country GIs after exit, including in a 'no deal' scenario.
3. We consider that the proposed amendments go beyond what is required to maintain the operability of the law after EU exit: they confer a significant new duty on the Secretary of State and could have a considerable commercial and economic impact. The House may welcome the opportunity to debate these issues. In addition, we do not consider it good practice to include in this proposed negative instrument corrections to other instruments which are not related to the main substance of the draft Regulations. **We therefore recommend an upgrade of the instrument to the affirmative procedure.**

1 [Regulation \(EC\) No. 110/2008.](#)

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

Bilateral Investment Agreements (Transitional Arrangements and Framework for Managing Financial Responsibility) (Revocation) (EU Exit) Regulations 2019

Date laid: 11 February 2019

Sifting period ends: 27 February 2019

4. This instrument proposes to revoke two EU Regulations on exit day.² The Department for International Trade explains that without the revocation, the UK would remain bound inappropriately by the requirements of the two EU Regulations after exit, including having to seek authorisation from the European Commission before negotiating changes to existing bilateral investment agreements or concluding new agreements, and sharing financial responsibility for disputes between the EU and/or Member States and investors.
5. The Committee considers the negative procedure to be appropriate for this instrument. The Committee notes, however, that Part 2 of the Explanatory Memorandum includes an ‘urgency statement’ suggesting that the Minister will make use of the ‘urgent procedure’ to ensure that the instrument can come into force on exit day. Under the urgent procedure, Ministers can make statutory instruments (SIs) that come into immediate effect after having been made by the Minister. ‘Made affirmatives’ then require both Houses to approve them within 28 days to remain in force. Paragraph 5 to Schedule 7 of the European Union (Withdrawal) Act 2018 provides for the use of the urgent procedure in relation to secondary legislation laid under the Act. The Department told us that it would make use of the urgent procedure if the sifting Committees recommend an upgrade of the instrument to the affirmative procedure to “ensure that the SI will come into effect on Exit Day, as it is unlikely the necessary debates could be scheduled before then if the affirmative procedure were used”.
6. **We agree that the negative procedure is appropriate for this instrument. The House may wish to be aware, however, that the Government have made clear that with limited time available now to debate secondary legislation before EU exit, they intend to use the urgent procedure, if they consider this necessary, to ensure that EU exit-related instruments can come into force on exit day.**
 - Animal Health, Plant Health, Seeds and Seed Potatoes (Amendment) (EU Exit) Regulations 2019
 - Aquatic Animal Health and Alien Species in Aquaculture (Amendment etc.) (EU Exit) Regulations 2019
 - Environment (Miscellaneous Amendments and Revocations) (EU Exit) Regulations 2019
 - Criminal Procedure (Amendment) (EU Exit) Regulations 2019

² These are: [Regulation \(EU\) No 1219/2012](#) on transitional arrangements for bilateral investment agreements between Member States and third countries, and [Regulation \(EU\) 912/2014](#) on a framework for managing financial responsibility for investor-state dispute settlement (ISDS) claims in relation to bilateral investment agreements.

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Agriculture (Legislative Functions) (EU Exit) Regulations 2019

Draft Agriculture (Legislative Functions) (EU Exit) (No.2) Regulations 2019

Draft Common Agricultural Policy (Financing, Management and Monitoring) (Miscellaneous Amendments) (EU Exit) Regulations 2019

Draft Common Agricultural Policy (Financing, Management and Monitoring Supplementary Provisions) (Miscellaneous Amendments) (EU Exit) Regulations 2019

Draft Common Organisation of the Markets in Agricultural Products and Common Agricultural Policy (Miscellaneous Amendments) (EU Exit) Regulations 2019

Date laid: 13 January 2019

Parliamentary procedure: affirmative

The draft Common Agricultural Policy (Financing, Management and Monitoring) (Miscellaneous Amendments) (EU Exit) Regulations 2019, and the draft Common Agricultural Policy (Financing, Management and Monitoring Supplementary Provisions) (Miscellaneous Amendments) (EU Exit) Regulations 2019 propose to correct retained EU Common Agricultural Policy “Horizontal” (cross-cutting) regulations, in order to create an agricultural legislative framework that enables current agricultural support measures to continue to function effectively in the UK after EU exit. Making sure that regimes and rules established for the agricultural and fishing sectors continue to be workable after EU exit is equally the objective of the other sets of Regulations listed above.

The Department for Environment, Food and Rural Affairs has laid these instruments with the aim of achieving a smooth transition for the agricultural sector from the regime operated within the EU to a standalone UK framework. Given the importance of the agricultural sector, the House may be interested to see the steps being taken through these instruments to prepare for this transition.

These five sets of draft Regulations 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.

7. The Department for Environment, Food and Rural Affairs (Defra) has laid these five sets of draft Regulations. Defra has provided a shared Explanatory Memorandum (EM) for the draft Common Agricultural Policy (Financing, Management and Monitoring) (Miscellaneous Amendments) (EU Exit) Regulations 2019 (“the CAP FMM Regulations”) and the draft Common Agricultural Policy (Financing, Management and Monitoring Supplementary Provisions) (Miscellaneous Amendments) (EU Exit) Regulations 2019 (“the CAP FMM Supplementary Regulations”). In this EM, the Department says that some of the changes made by the instruments are closely linked to the other three sets of Regulations listed above, as well as to the draft Common Agricultural Policy and Agriculture and Horticulture Development Board (Amendment etc.) (EU Exit) Regulations 2019 - an instrument which the

Sub-Committee has already cleared from scrutiny.³ We set out below the main purposes of all six sets of Regulations mentioned by Defra.

8. Defra says of the CAP FMM Regulations and the CAP FMM Supplementary Regulations that they will correct retained EU CAP “Horizontal” (cross-cutting) regulations, in order to create an agricultural legislative framework that enables current agricultural support measures to continue to function effectively in the UK after EU exit. These include Direct Payments to farmers, support under Rural Development Programme schemes,⁴ and market support in the agricultural sector, as created by retained EU legislation.⁵ The Regulations will ensure payments to Common Agricultural Policy (CAP) scheme beneficiaries continue in the UK following EU exit, and within a suitable financial framework.
9. In amending provisions of EU legislation, both the draft Agriculture (Legislative Functions) (EU Exit) Regulations 2019 and the draft Agriculture (Legislative Functions) (EU Exit) (No.2) Regulations 2019 provide that legislative functions that have been carried out by the European Commission (“the Commission”) to date will in future be exercised by public authorities in the UK. These functions relate to the CAP; the European Maritime and Fisheries Fund; and the Common Organisation of Agricultural Markets. The purpose of the Regulations is to allow for the continued use of these legislative functions at a national level after the UK leaves the EU.
10. In the EM to the draft Agriculture (Legislative Functions) (EU Exit) Regulations 2019, Defra explains that the EU Regulations being amended confer various legislative functions on the Commission, and that these include specifying forms to be used; setting financial limits or prices; defining scheme eligibility criteria; amending technical annexes to reflect advances in scientific and technical knowledge; establishing key dates; and defining programme or scheme periods. A similar explanation is given in the EM to the draft Agriculture (Legislative Functions) (EU Exit) (No.2) Regulations 2019.
11. As regards the draft Common Organisation of the Markets in Agricultural Products and Common Agricultural Policy (Miscellaneous Amendments) (EU Exit) Regulations 2019, Defra states in the accompanying EM that the instrument will ensure that certain provisions - relating to the reserved policy areas of regulation of anti-competitive practices, regulation of international trade, import and export controls, and intellectual property law - will continue to operate effectively as domestic law after EU exit. It also confers legislative functions held by the Commission in these reserved policy areas on the Secretary of State, to enable the smooth functioning of related schemes for producers, traders, importers, and exporters of agricultural goods. Among other things, the instrument empowers the Secretary of State to make regulations in relation to checks relating to protected designations of origin and geographical indications for wine.
12. In the EM to the draft Common Agricultural Policy and Agriculture and Horticulture Development Board (Amendment etc.) (EU Exit) Regulations 2019, Defra explains that the instrument amends, or removes references

3 [15th Report](#), Session 2017-19 (HL Paper 280).

4 Defra refers to Countryside Stewardship and Environmental Stewardship as such schemes.

5 In particular, EU CAP Common Organisations of Agricultural Markets (“CMO”) legislation (CAP Pillar 1).

to EU terms from, domestic CAP-derived legislation relating to Rural Development; Direct Payments to farmers; the “Horizontal” framework for the financing, management and monitoring of the CAP; and market intervention measures under the Common Market Organisation.

13. Referring to the CAP FMM Regulations and the CAP FMM Supplementary Regulations, Defra states that, if these instruments were not in place for EU exit, the existing retained EU CAP “Horizontal” framework would contain unworkable rules on the disbursement of funding to the agricultural sector; and appropriate authorities would not have the powers to check and enforce the eligibility conditions for such funding. Making sure that regimes and rules established for the agricultural and fishing sectors continue to be workable after the UK’s exit from the EU is equally the objective of the other sets of Regulations. Defra says that the Government have pledged to commit the same cash total in funds to support farmers until the end of the current Parliament, and have also guaranteed that any CAP Pillar 2 projects where funding has been agreed before the end of 2020 will be funded for their full lifetime. These instruments will enable these funding commitments to be realised and delivered through a domestic financial framework.
14. The National Farmers Union has called for clarity on the future regulatory environment for farming and for certainty on long-term funding.⁶ Defra has laid these instruments with the aim of achieving a smooth transition from the regime operated within the EU to a standalone UK framework. **Given the importance of the agricultural sector, the House may be interested to see the steps being taken through these instruments to prepare for this transition.**

⁶ See National Farmers Union, *Agriculture Bill: NFU calls for long-term policy funding* (29 October 2018): <https://www.nfuonline.com/news/brexit-news/eu-referendum-news/agriculture-bill-nfu-calls-for-long-term-policy-f/> [accessed 25 February 2019].

INSTRUMENTS OF INTEREST

Draft Challenges to Validity of EU Instruments (EU Exit) Regulations 2019

15. The European Union (Withdrawal) Act 2018 (EUWA) makes explicit provision that “on or after exit day, there is no right in domestic law to challenge a retained EU law on the basis that, immediately before exit day, an EU instrument was invalid”. These Regulations provide clarity for cases that are in progress on exit day. Currently only the European Court of Justice (CJEU) can rule on the validity of EU law; where a domestic court is awaiting a response for the CJEU on exit day, these draft Regulations permit the domestic court to make its own ruling, so that the case does not founder. The CJEU website shows that there are only two cases pending relating to questions of validity. The Department for Exiting the European Union (DExEU) states that judges will retain the flexibility to wait for a judgment from the CJEU if they wish but that that judgment will not be binding. The Explanatory Memorandum (EM) provided by DExEU explains the detailed provisions quite clearly. Paragraph 10.5 of the EM also mentions that the Lords Constitution Committee raised issues about future declarations of invalidity from the CJEU.⁷ In response, DExEU took the view that “EUWA should take a snapshot of EU law as it stands on exit day, and that afterwards it will be for Parliament to decide whether and how to diverge”.

Draft Health Services (Cross-Border Health Care and Miscellaneous Amendments) (Northern Ireland) (EU Exit) Regulations 2019

Draft National Health Service (Cross-Border Healthcare and Miscellaneous Amendments etc.) (EU Exit) Regulations 2019

Draft Social Security Coordination (Reciprocal Healthcare) (Amendment etc) (EU Exit) Regulations 2019

16. These three instruments set out provisions for an orderly wind-down of UK reciprocal healthcare arrangements with the EU and European Economic Area in case of a ‘no deal’ Brexit. They allow for treatment in progress or authorised before exit day to be completed on either side of the Channel and allow (so far as possible acting unilaterally) for reimbursement for those treatments. The transitional elements allow for all ongoing treatment to continue for a maximum period of a year following exit, or (for pre-authorised treatments) the end of the period specified in the authorisation, whichever is the latest. Dedicated regulations deal similarly with the special situation in Northern Ireland where such arrangements are more frequent due to the land border with the Republic of Ireland.
17. The Department of Health and Social Care regards these regulations as providing temporary provision until the Healthcare (International Arrangements) Bill takes effect by allowing for the current system (including European Health Insurance Card and S1) to be continued until 31 December 2020 with individual countries, but only if a separate Memorandum of Understanding is in place with the relevant country. The Bill will also

⁷ See Letter from the Chairman of the Constitution Committee to Lord Callanan, Minister of State at the Department for Exiting the European Union, on Validity Challenges and the European Union (Withdrawal) Act 2018 (23 November 2018): <https://www.parliament.uk/documents/lords-committees/constitution/Correswithministers/letter%20from%20Lidington%20on%20post%20Brexit%20validity%20challenges.pdf> [accessed 25 February 2019].

provide a legislative framework to implement any future longer-term reciprocal healthcare arrangements with the EU, individual Member States or countries outside the EU.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Aviation Noise (Amendment) (EU Exit) Regulations 2019

Aviation Safety (Amendment etc.) (EU Exit) Regulations 2019

Challenges to Validity of EU Instruments (EU Exit) Regulations 2019

Forestry and Land Management (Scotland) Act 2018
(Consequential Provisions and Modifications) Order 2019

Genetically Modified Food and Feed (Amendment etc.) (EU Exit) Regulations 2019

Health Services (Cross-Border Health Care and Miscellaneous Amendments) (Northern Ireland) (EU Exit) Regulations 2019

National Health Service (Cross-Border Healthcare and Miscellaneous Amendments etc.) (EU Exit) Regulations 2019

Novel Food (Amendment) (EU Exit) Regulations 2019

Official Controls for Feed, Food and Animal Health and Welfare (Amendment etc.) (EU Exit) Regulations 2019

Services of Lawyers and Lawyer's Practice (Amendment) (EU Exit) Regulations 2019

Social Security Coordination (Reciprocal Healthcare) (Amendment etc) (EU Exit) Regulations 2019

State Aid (Agriculture and Fisheries) (Amendment) (EU Exit) Regulations 2019

Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2019

Animal Welfare (Amendment) (EU Exit) Regulations 2019

Instruments subject to annulment

SI 2019/180	Plant Health etc. (Fees) (England) (Amendment) Regulations 2019
SI 2019/188	Waste (Miscellaneous Amendments) (EU Exit) (No.2) Regulations 2019
SI 2019/204	Plant Breeders' Rights (Amendment etc.) (EU Exit) Regulations 2019
SI 2019/211	Marketing of Seeds and Plant Propagating Material (Amendment) (Northern Ireland) (EU Exit) Regulations 2019
SI 2019/221	Overseas Association Decision (Revocation) (EU Exit) Regulations 2019
SI 2019/329	Proscribed Organisations (Name Change) Order 2019

APPENDIX 1: 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 25 February 2019, Members declared the following interests:

Draft Common Agricultural Policy (Financing, Management and Monitoring) (Miscellaneous Amendments) (EU Exit) Regulations 2019 and four related instruments

Lord Walker of Gestingthorpe

Gestingthorpe Farming Company Limited

Attendance:

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

