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Consent notifications considered by the Justice Committee, 15 September 2020



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Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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Introduction

1. At its meeting on 15 September, Members considers two SI notifications (**see Annexes A and B**) from the Scottish Government. These were:
 - The Law Enforcement and Security (Separation Issues etc.) (EU Exit) Regulations 2020; and
 - The European Institutions and Consular Protection (Amendment etc.) (EU Exit) (Amendment) Regulations 2020.
2. The Official Report for this session can be found on the Committee's [webpage](#).

Background

3. The European Union (Withdrawal) Act 2018 (the 2018 Act) sets out the process for the UK and Scottish parliaments to consider regulations to convert non-domestic EU law into UK law.
4. The process by which the UK leaves the EU requires consideration to be given as to whether the current body of law within the UK needs to be amended to reflect the fact that the UK will no longer be a member of the EU after exit day. At present, there are many references in regulations, for example, to EU bodies and the EU itself that will no longer be applicable after the UK has left the EU
5. Some of the necessary changes to the statute book will be done through Scottish Statutory Instruments (SSIs) in the usual way. However, a number will be done through Statutory Instruments (SIs) passed in the UK Parliament with the consent of the Scottish Parliament based on the recommendation of the Scottish Government (SI notifications). Consent will be sought as these SIs will make changes to devolved powers and/or executive competences. Such changes should be broadly technical in nature. Protocols governing arrangements for both of these processes have been agreed to with the Scottish Government

Consideration by the Justice Committee

6. The Committee considered the SI notifications at its meeting on 15 September 2020. Members had no comments or questions on the notifications.
7. The Justice Committee is content for the Scottish Government to give its consent for the UK Ministers to lay a Statutory Instrument in the UK Parliament on the:
 - The Law Enforcement and Security (Separation Issues etc.) (EU Exit) Regulations 2020; and
 - The European Institutions and Consular Protection (Amendment etc.) (EU Exit) (Amendment) Regulations 2020.

Annex A

The Law Enforcement and Security (Separation Issues etc.) (EU Exit) Regulations 2020

A brief explanation of law that the proposals amend

The proposed Regulations make amendments to address failures of retained EU law to operate effectively and to make savings and transitional provision in respect of certain law enforcement matters and procedures which have begun but will not be completed before the end of the Transition Period.

The proposed Regulations make technical amendments to the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 (SI 2019/742) (“the Law Enforcement Regulations”) as well as the Criminal Justice (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/780) (“the Criminal Justice Regulations”). To clarify, none of the provisions in the Criminal Justice Regulations which are being amended by the proposed Regulations extend to Scotland. The Law Enforcement Regulations were approved by the UK Parliament in March 2019 to come into force on “exit day”. They were made with the consent of Scottish Ministers following notification to and approval of the Scottish Parliament. The notification was considered by the Justice Committee at its meeting on 23 October 2018 when it recommended approval to the proposed consent.

http://www.parliament.scot/S5_JusticeCommittee/General%20Documents/EU_Justice_-_Notification_to_Scottish_Parliament_-_HO_SI_-_1_October_201....pdf

As set out in the notification relating to the Law Enforcement Regulations the area of law being amended is retained EU law in the area of Law Enforcement and Criminal Justice Cooperation (often referred to as “Internal Security”). The Law Enforcement Regulations make provision in these areas for the situation where no negotiated agreement was reached with the EU.

The purpose of the proposed Regulations is to provide technical fixes to UK legislation to deliver a functioning statute book at the end of the Transition Period, regardless of the outcome of negotiations in the area of Law Enforcement and Criminal Justice Cooperation, that reflects the Withdrawal Agreement reached between the UK and the EU and the EEA EFTA Separation Agreement reached between the UK and Norway, Iceland and Liechtenstein (“the Agreements”). Title V of the Withdrawal Agreement makes provision in respect of ongoing judicial cooperation proceedings in criminal matters relating to certain EU instruments for law enforcement (such as alerts, expertise and judicial advice) and information exchange (such as data and intelligence sharing).

Similar provisions are made in the EEA EFTA Agreement. These provisions are referred to as “other separation issues”. Scotland’s participation in these measures

has been via the UK, as the competent member state, and the legislation covers a complex mix of reserved and devolved matters. The proposed Regulations make necessary, technical amendments to the Law Enforcement Regulations to update them in light of the Agreements. The separation provisions of the Agreements will take effect at the end of the Transition Period irrespective of the outcome of the UK-EU and UK-EEA EFTA negotiations in the area of Law Enforcement and Criminal Justice Cooperation.

The proposed Regulations also fix a number of deficiencies in retained EU law in this area which would otherwise arise at the end of the Transition Period. Subsequent to the making of the Law Enforcement Regulations, further retained EU law has come into force and a further deficiency in existing retained EU law has been identified. The proposed Regulations therefore make the necessary amendments to prevent deficiencies arising at the end of the Transition Period.

Summary of the proposals and how these correct deficiencies

The proposed Regulations are being brought forward by the UK Government under powers in the European Union (Withdrawal) Act 2018 (as well as powers under the Extradition Act 2003 and the European Union (Withdrawal Agreement) Act 2020 (“the 2020 Act”). The purpose of the proposed Regulations is to provide an operable legal framework for the separation provisions in the Agreements. The 2020 Act implements the terms of the Agreements into domestic law but further amendments to UK law are required by the proposed Regulations to ensure that the separation provisions are given full effect in the domestic legal system.

The proposed Regulations also address deficiencies in relation to retained EU law which have come into force since the Law Enforcement Regulations and the Criminal Justice Regulations were made, namely: Eurojust and the Schengen Information System (SIS II) Regulations (which came into force in December 2019), the EU Surrender Agreement with Norway and Iceland (which came into force in November 2019), along with EU Regulations in relation to asset freezing and confiscation (which will come into force in December 2020).

Additionally, the proposed Regulations will make changes regarding Prüm (e.g. transitional data provisions) to reflect the UK’s connection to Prüm, and will list Italy as a “participating country” for relevant parts of the Crime (International Co-operation) Act 2003 (reflecting that Italy has brought the European Convention on Mutual Assistance in Criminal Matters into force).

The provisions will revoke retained EU law, insert or modify transitional and savings provisions to ensure the EU legal framework continues to apply to ongoing cases and procedures and to ensure continued protection measures for law enforcement data stocks accrued prior to the end of the Transition Period under the Law Enforcement and Criminal Justice measures. Drafting which is no longer effective is also removed.

Specifically, provisions are made in respect of deficiencies and for transitional and savings measures arising in the following areas:

- Mutual Legal Assistance (MLA)
- Cross-border Surveillance
- Rights in criminal proceedings
- Asset Freezing orders
- Asset Confiscation orders
- Criminal records exchange (ECRIS)
- Information and intelligence exchange

- European Investigation Orders (EIO)
- Joint Investigation Teams (JITs)
- Eurojust and Europol
- Passenger Name Record Data
- Schengen law enforcement co-operation agreement
- Financial Intelligence Units (FIUs)
- Prüm – exchange of DNA data
- Swedish Initiative
- Schengen Information System (SIS II)
- Asset recovery offices;
- Passenger Name Records (PNR)
- Schengen convention – MLA, extradition/surrender and police cooperation
- (in relation to EEA EFTA states), and
- General provision on data and information protection (in so far as it applies to the Law Enforcement and Criminal Justice co-operation measures).

An explanation of why the change is considered necessary

The proposed Regulations are necessary to ensure that the UK has a functioning legal framework that gives full effect to the Agreements and ensures a smooth transition to retained EU law at the end of the Transition Period. These changes are made to ensure the law is clear and accessible to operational partners. They provide continuity of law, requiring the continued application of particular EU Law Enforcement and Criminal Justice measures in the UK in respect of cases and procedure which are ongoing at the end of the Transition Period.

Scottish Government categorisation of significance of proposals

Category A - requiring the lowest level of scrutiny – on the basis that the proposed changes –

- Are Technical in nature;
- ensure continuity of law;
- involve no significant policy decision for Ministers to make – there being an “obvious” policy answer
- update references which are no longer appropriate following exit from the EU

Impact on devolved areas

Criminal justice, criminal law and policing are within devolved competence of the Scottish Parliament. The changes affect the scope of the tools and measures available to tackle crime. This impact will be across the UK and is not specific to Scotland.

Summary of engagement/consultation

Relevant officials in the Crown Office and Procurator Fiscal Service and Police Scotland have been consulted about the proposed Regulations to confirm the appropriateness of the significance and impact of the proposed changes from an operational perspective.

A note of other impact assessments, (if available)

The UK Government has prepared an impact assessment which will be provided when the proposed Regulations are laid.

Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation

The proposed Regulations relate to a complex mix of reserved and devolved matters. The Scottish Ministers believe the changes in the proposed Regulations are necessary to ensure the continued effective operation of Law Enforcement and Criminal Justice law. The measures are technical in nature and are necessary to give full effect to the Agreements, to fix deficiencies and to make provision in respect of the continuation of certain Law Enforcement and Criminal Justice measures and procedures which are ongoing at the end of the Transition Period. There is very limited, if any, policy choice in this area as the transitional provisions of the proposed Regulations implement the Agreements which have been entered into. The UK Government has consulted the Scottish Government about the proposed SI; and officials have worked with UKG to ensure the drafting delivers for our interests and respects the devolution settlement.

It is a pragmatic and consistent approach to continue to legislate in this area by amending the Law Enforcement Regulations on a UK-wide basis. It is a continuation of the approach taken in relation to the Law Enforcement Regulations which were made on a UK basis with the consent of the Scottish Ministers. It ensures a cohesive approach to criminal justice across the UK given the movement of criminals around the UK and the shared objectives of the UK Government and the Scottish Government in this policy area.

In respect of the provisions fixing retained EU law and updating references in domestic legislation, the policy is the same across the UK and it makes pragmatic sense for the changes to be done at a UK level.

In relation to participation in EU agencies such as Eurojust and Europol and in the EU Law Enforcement and Criminal Justice measures relating to judicial and police co-operation, and information and intelligence sharing, participation is required at UK level making it appropriate for the proposals to be taken forward at UK level.

Intended laying date (if known) of instruments likely to arise

The SI is subject to affirmative procedure and will be laid in the Autumn. We would welcome a view from the committee as soon as possible, however the Scottish Parliament will have 28 days for consideration if needed under the agreed protocol to consider the proposal to consent to the SI.

If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?

N/A

Information about any time dependency associated with the proposal

The proposed Regulations will need to come into force prior to the end of the Transition Period.

Scottish Government

Annex B

The European Institutions and Consular Protection (Amendment etc.) (EU Exit) (Amendment) Regulations 2020

Background

In 2018, the Scottish Parliament considered a Scottish Government SI Notification on the European Institutions and Consular Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1391) (“the 2018 Regulations”). The 2018 Regulations amend and revoke the EU legislation that governs the functioning of the institutions of the European Union.

By way of background, the Treaty on the Functioning of the European Union (“TFEU”) includes various Protocols which set out rules governing institutions and bodies of the EU. Specifically, provision is made regarding privileges and immunities for persons involved with the Court of Justice of the European Union (“CJEU”) and the European Union itself. This includes privileges and immunities for Members of the European Parliament (MEPs) and officials and other servants of the European Union. For short these persons are described below as “EU personnel”.

In terms of devolved matters, the relevant provisions relate to immunity of EU personnel from legal proceedings in respect of acts performed in an official capacity and are set out in:

- Protocol (No 3) of the TFEU on the statute of the Court of Justice of the European Union. Protocol (No 3) makes provision for the roles of judges and Advocates-General; and
- Protocol (No 7) of the TFEU on the privileges and immunities of the European Union. Protocol (No 7) sets out the privileges and immunities granted to the EU and to a range of other EU institutions and officials.

According to the Explanatory Note for the 2018 Regulations:

“Part 2 makes repeals and savings of relevant directly effective treaty rights preserved under section 4(1) of the EUWA. In particular, Part 2 ensures that those rights, which will become redundant as result of the UK’s withdrawal from the EU, cease to apply on exit day.

Part 2 also provides for the saving of various immunities provided under the Treaty on the Functioning of the European Union in respect of actions taken by the relevant persons in an official capacity prior to exit day. Regulation 3 revokes, amongst other provisions, provisions relating to the rights of EU citizens to receive (and obligations of Member States to provide) consular or diplomatic protection in the territory of third countries in which the Member State of which they are nationals is not represented.

Part 3 makes amendments and revocations in respect of three EU regulations preserved under section 3 of the Act which will become redundant on and after exit day so as to ensure that they continue to apply to direct retained EU law in their amended form after exit day.

In particular, regulations 9 and 10 amend EU regulations relating to references to the official languages of the European Union while regulation 11 amends the EU regulation relating to the rules on the interpretation of time periods in EU law.”

The notification was considered by the Justice Committee at its meeting on 4 December 2018 when it recommended approval to the proposed consent. The 2018 Regulations were laid in the UK Parliament on 21 December 2018 to come into force on “exit day”. They were made with the consent of the Scottish Ministers.

What does this notification actually do?

The new SI notification proposes making minor changes to the 2018 Regulations principally to change when they come into force (to change this date to the end of the implementation period, 31 December 2020) and to take account of the relevant separation provisions that have now been agreed in the Withdrawal Agreement with the EU. The need for these changes has arisen since the 2018 Regulations were made. According to the Scottish Government, the changes are necessary because:

“Privileges and immunities are being removed for persons such as Members of the European Parliament, because it would be inappropriate for those individuals to continue receiving those privileges and immunities once the UK has left the EU and its institutions. The 2018 Regulations dealt with this. The current proposal is to make technical fixes to those regulations to amend dates and remove redundant provisions.”

The Scottish Government states that these changes are minor and technical hence the **category A** status.

In terms of devolved coverage, the Scottish Government states:

“Privileges and immunities apply across the UK and across devolved and reserved legislation.

Criminal law and policing are within devolved competence. The impact of the removal of these immunities in respect of devolved areas will be limited to in the activities of relevant individuals in those devolved areas for which they will no longer enjoy immunity, namely immunity from legal proceedings as described above.

The specific measure in these regulations are entirely technical in nature and have very limited impact.”

A draft of the instrument itself has not been provided by the Scottish Government.

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