Lewis Macdonald MSP
Convenor
Health and Sport Committee
Scottish Parliament
Edinburgh
EH99 1SP

1st September 2018

Dear Lewis

THE TOBACCO PRODUCTS AND NICOTINE INHALING PRODUCTS (AMENDMENT) (EU EXIT) REGULATIONS 2018

EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, Mike Russell wrote to the Conveners of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

I attach a notification which sets out the details of the SI which the UK Government proposes to make and the reasons why I am content that Scottish devolved matters are to be included in this SI. This is one of the first in a series of such notifications that myself and Ministerial colleagues will be sending to Parliamentary committees over the coming weeks.

The policy rationale for the proposed changes which this SI will make is to contribute to the continuation of an effective regulatory regime for tobacco control, provision in which is helping reduce levels of smoking and reduce the numbers of people in Scotland who die each year as a result of smoking.

Please note that the date on which the UK Government proposes to lay these Regulations is 10 October 2018. I realise that with the October recess starting on 6 October I am asking for approval within a shorter timescale than the 28 days outlined in our protocol.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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www.gov.scot
Please be assured that I’m asking for early approval on this matter as an exception, driven wholly by the UK Government’s accelerated timescale. The UK Government is very keen to lay this SI as early as possible to ensure sufficient lead-in time for stakeholders.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you.

Yours sincerely,

Joe Fitzpatrick

JOE FITZPATRICK
NOTIFICATION TO THE SCOTTISH PARLIAMENT

THE TOBACCO PRODUCTS AND NICOTINE INHALING PRODUCTS (AMENDMENT) (EU EXIT) REGULATIONS 2018

A brief explanation of law that the proposals amend

These Regulations amend the UK-wide Tobacco Advertising and Promotion Act 2002 ("the 2002 Act") which controls the advertising or promotion of tobacco products across the UK. The 2002 Act prohibits tobacco advertising, free distribution of tobacco products and sponsorship which could have the effect of promoting tobacco products. These Regulations also amend the UK-wide Tobacco Advertising and Promotion (Brandsharing) Regulations 2004 ("the 2004 Regulations") which detail the prohibition of brandsharing (using tobacco product branding on non-tobacco products and vice versa). These Regulations also amend the UK-wide Standardised Packaging of Tobacco Products Regulations 2015 ("the 2015 Regulations") which introduced standardised packaging for cigarettes and hand rolling tobacco. These Regulations also amend the UK-wide Tobacco and Related Products Regulations 2016 ("the 2016 Regulations") which include provision on text and picture warnings on packaging, other requirements in relation to tobacco products and a ban on cross-border advertising of electronic cigarettes among member States (and also revoke Commission Implementing Regulation (EU) 2016/779 regarding the procedures for determining whether a tobacco product has a characteristic flavour; Commission Implementing Decision (EU) 2015/2183 establishing a format for the notification of electronic cigarettes; and Commission Implementing Decision EU 2016/786 laying down procedure for operating an independent advisory panel in determining whether tobacco products have a characterising flavour).

These Regulations also make amendments to the Nicotine Inhaling Products (Age of Sale and Proxy Purchasing) Regulations 2015 ("the NIP Regulations").

Summary of the proposals and how these correct deficiencies

Leaving the EU will leave deficiencies in tobacco and nicotine inhaling products legislation where it refers to activities in respect of an EEA State or member States on the premise that the UK is such a State. For example some exclusions to offences in the 2002 Act apply to things done other than in an EEA State which, left unchanged, would following UK exit from the EU include the UK which is not the policy intention. These Regulations fix such deficiencies by making reference instead to activity outside the UK.

Another example of a deficiency is in existing provision in the 2015 Regulations dealing with "cross-border" sales which is intended to apply to sales to consumers in the UK and which is achieved through reference to a member State which the UK will no longer be following exit from the EU. The provision is therefore amended to refer specifically to sales to consumers in the UK.

The UK Government position is that leaving the EU on a 'no deal' basis means the UK will no longer be able to use EU picture warnings and information messages on packaging reflected in the 2016 Regulations. These Regulations amend the 2016 Regulations to substitute the picture library of images used on cigarette packs across the EU with a different picture library for use on all packs of cigarettes sold in the UK in future. These Regulations also insert powers into the 2016 Regulations to allow (by Regulations made by the Secretary of State) modification of text warnings, picture libraries and technical specifications on...
packaging. The proposed amendments to the 2016 Regulations will also insert powers to decrease maximum emission levels, modify the methods for measuring additives and set maximum levels for additives and flavours. The vast majority of the 2016 Regulations fall within reserved matters and the same applies to the amendments to them made by these Regulations, including to the extent these Regulations insert Regulation-making powers. Any power to make Regulations which will apply in Scotland will be subject to a requirement on the Secretary of State to consult the Scottish Ministers before making the Regulations.

Revocation of the Commission Implementation Decisions and Commission Implementing Regulation mentioned above is being effected as it is considered that they will have no practical effect in the event on a 'no-deal' UK exit from the EU.

An explanation of why the change is considered necessary

These changes are drafted on the basis of no deal being reached between the UK and the EU regarding tobacco control. The changes would contribute to continuation of an effective regulatory regime for tobacco control, including prohibitions and offences (and exceptions) in circumstances where the UK will no longer be a member of the EU.

Scottish Government categorisation of significance of proposals

Provision in these Regulations to the extent falling within devolved competence are considered by the Scottish Government to be within category A because they are minor and largely technical in detail.

Impact on devolved areas

In the context of tobacco legislation whether particular provisions are reserved or devolved is not straightforward. These Regulations make various amendments to tobacco legislation, including to provision in that legislation the subject matter of which is devolved in whole or in part. These Regulations are therefore considered to impact on a devolved area.

Summary of stakeholder engagement/consultation

There is to be UK-wide stakeholder engagement and consultation on these Regulations in late September 2018. The Regulations are not expected to impact adversely on stakeholders as the aim is to contribute to the continuation of the current regulatory regime.

A note of other impact assessments (if available)

The UK Department of Health and Social Care has not carried out an impact assessment in relation to these Regulations as they aimed and preserving the effect of the current regulatory regime.

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

The Scottish Ministers believe that the changes proposed in these Regulations are necessary so far as falling within devolved competence to secure continuation of an effective tobacco-control regulatory regime. In the current circumstances where there is existing UK-wide legislation and there is a need to prepare for a “no-deal” exit from the EU, the Scottish Ministers consider that it is appropriate for the fixing legislation be made on a UK-wide basis by the UK Government.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

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Intended laying date (if known) of SI/SIs

10 October 2018.

If the Scottish Parliament will not have 28 days to scrutinise Scottish Ministers’ proposal to consent, why not?

Scottish Ministers’ require to consent to these Regulations being laid by the UK Government on 10 October, being the proposed laying date for these Regulations in the UK Parliament. The Scottish Parliament recess which begins on 6 October means that the Scottish Parliament will only have 24 days to reach a view to allow Scottish Ministers to respond to the UK Government before 10 October.

Information about any time dependency associated with the proposal

See above.

Any significant financial implications

These Regulations are not expected to have any financial implications for stakeholders in Scotland.