29 October 2018

Dear Gordon,

THE PROVISION OF SERVICES (AMENDMENT ETC.) (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 & Law 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 above SI which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in this SI.

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

I look forward to hearing from you within 28 days from the date of this letter.

DEREK MACKAY
NOTIFICATION TO THE SCOTTISH PARLIAMENT

The Provision of Services (Amendment etc.) (EU Exit) Regulations 2018

A brief explanation of law that the proposals amend

The Provision of Services Regulations 2009¹ (“the Regulations”) implemented the Services Directive 2006/123/EC² in the UK, and established the legal framework for the UK’s membership of the EU single market in services.

The aim of the Directive was to develop the single market in the services sector by breaking down barriers to cross-border trade within the EU, making it easier for service providers to set up business or offer their services in other EU Member States.

In particular, the Directive requires Member States to:

- Set up Points of Single Contact through which providers will be able to find the information and complete the formalities necessary to doing business in their State (one has been established to cover the UK)
- Facilitate greater co-operation between regulatory and authorisation bodies across the EU thereby reducing burdens on business
- Engender consumer confidence in cross-border service provision through access to information and the high quality of services
- Abolish restrictive legislation and practices that hinder service providers from setting up in or providing services across national borders

The Directive covers services which are performed for an economic consideration, such as most regulated professions, business-related services, leisure services, information services etc. A range of specific services are excluded, such as those relating to transport, finance, gambling, post, electricity, gas, water, waste and social services provided by the state. If the Directive comes into conflict with another EU act then the other EU act prevails (including those concerning procurement and the recognition of professional qualifications).

A major requirement of the Directive is that service providers must be able to transact electronically with regulators by completing all their transactions online. This means an application form and any fee payments must be able to be processed electronically by the regulator.

Insofar as services are devolved and within scope, they are affected by the Regulations. To that extent, the Regulations were made by UK Ministers using section 57(1) of the Scotland Act 1998.

Before making the Regulations in 2009, a screening exercise was undertaken to check whether existing devolved legislative requirements and administrative practices were compliant with the Directive resulted in a number of amendments to other legislation,

principally through the Criminal Justice and Licensing (Scotland) Act 2010 to amend a requirement in schedule 2 (control of sex shops) of the Civic Government (Scotland) Act 1982 that applicants for a licence must be a UK resident, to a requirement that they must be a citizen of an EU Member State.

An exercise to review the Regulations in respect of their effect on devolved matters and to review other devolved provisions to which the Services Directive applies has been undertaken in 2018.

**Other relevant legislation**

- It is proposed also to revoke in the SI Commission Decision 2009/739/EC setting out practical arrangements for information exchange between Member States under Chapter IV of the Services Directive.

- Other legislation identified in the 2009 screening exercise will be considered for amendment separately, in particular current restrictions at paragraphs 9(3)(e) and (f) of schedule 2 of the Civic Government (Scotland) Act 1982 to deal with not permitting granting a licence for a sex shop or sexual entertainment venue to a person who is not resident, or a body corporate not incorporated, in an EU Member State and references to EU laboratories and laboratories approved in other Member States in schedule 2, paragraph 10 of the Transmissible Spongiform Encephalopathies (Scotland) Regulations 2010.

**Summary of the proposals and how these correct deficiencies**

In the event of no deal with the EU, once the UK is no longer a Member State of the EU, service providers in the UK will no longer have access to the single market in services and it will not be possible for the UK to continue to offer single market based access to the UK services market to service providers based in the EU/EEA.

EU/EEA service providers providing services in the UK will be required to be treated the same as any other third country provider, and be subject the restrictions removed by the Directive.

The Regulations, as retained in UK law after Exit Day, will therefore not operate effectively and require to be amended to reflect the fact that the UK will no longer be a member state of the EU.

As service providers, regulators and customers in Scotland and across the UK benefit from and are used to working under the Regulations, the UK and Scottish Governments are agreed that the mechanics of the Regulations (see above) are beneficial and should be retained - with their application limited to the UK.

In line with this, the proposed UK Statutory Instrument (SI) would amend the Regulations, reducing their scope of application for recipients of service from:

- an individual who is a national of an EEA state or who otherwise benefits from rights conferred by EU acts, or

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- a legal person (as referred to in Article 54 of the Treaty on the Functioning of the EU) who is established in an EEA state,

To:
(a) an individual who is a national of the United Kingdom, or
(b) a business undertaking established in the United Kingdom.

The instrument similarly reduces application to providers of a service from:

- an individual who is a national of, and is established in, an EEA state, or
- a legal person (as referred to in Article 54) who is established in an EEA state.

To a provider of a service who is—

(a) established in the United Kingdom, and
(b) either —
(i) an individual who is a national of the United Kingdom, or
(ii) a business undertaking.

A “business undertaking” means any entity, whether or not a legal person, that is not an individual and includes a body corporate, a corporation sole and a partnership or other unincorporated association, engaged in activities for the purpose of trading for profit, incorporated or formed under the law of any part of the United Kingdom.

In addition, the SI changes references to the EU/EEA to refer the UK and removes provisions which can only function if the scope of the regulations extends to EU/EEA nationals and businesses.

An explanation of why the change is considered necessary

Once the UK leaves the EU, unless another trade deal that encompasses services is in place, the trade in services between the UK and the EU/EEA will carried out under World Trade Organisation (WTO) rules - the General Agreement on Trade in Services (GATS).

The World Trade Organization (WTO) is a global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world’s trading nations and ratified in their parliaments. The goal is to ensure that trade flows as smoothly, predictably and freely as possible. The UK has membership of the WTO via its membership of the EU but is also a member in its own right.

As a member of the WTO, the UK has signed up to rules-based international trade and the concepts that underpin these rules, such as the most favoured nation rule (broadly treating all countries with which you do not have a trade deal the same) and processes for settling trade disputes.

The UK is currently party to the EU’s WTO schedules. The UK is currently in the process of updating its schedules with the WTO, setting out terms for trading partners who wish to export services to the UK.

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The UK Government White Paper ("The future relationship between the United Kingdom and the European Union") published in July 2018, based on the Chequers agreement, essentially excludes services – and therefore proposes that our relationship with the EU/EEA for trade in services will be under GATS rather than under the terms of a bilateral trade agreement.

GATS forbids preferential access to markets unless under a trade deal.

As set out above, the Regulations as they stand would confer preferential access to the UK services market to EEA/EU individuals and businesses after Exit without a trade deal being in place, putting Scotland and the rest of the UK in contravention of GATS. This would open the UK to potential dispute resolution action by other WTO members. According to the WTO website, there have been 28 disputes citing GATS since 1995.

This SI is a mechanism as a contingency for no deal between the UK and the EU to ensure compliance with GATS.

Scottish Government categorisation of significance of proposals

This proposal has been assessed as being category A on the basis that the proposals have the following characteristics that are associated with Category A:

- Minor and technical in detail;
- Ensuring continuity of law;
- Proposals necessary for continuity where there may be a minor policy change, but limited policy choice and an “obvious” policy answer;
- Updating references which are no longer appropriate once the UK has left the EU, such as provisions which refer to “member states other than the United Kingdom” or to “other EEA states”.

Impact on devolved areas

The Directive applies to Scottish regulators, and their devolved responsibilities in terms of licensing regimes. For example, the regulation of the Scottish legal profession is devolved under the Scotland Act 1998. As a result, the application of the Directive to such licensing regimes would be a devolved issue.

As the Regulations relate to both reserved and devolved matters, if the Scottish Government made separate devolved provision, the amendments made by the UK Government would have to extend to Scotland so far as they concerned the provision of services in reserved areas.

As with the introduction of the Regulations, we believe that trying to proceed by two separate sets of regulations with provisions in each case restricting the application of the regulations to reserved or devolved matters would introduce unnecessary complexity for service providers.

In 2008, professional and regulatory bodies likely to be affected by the Directive were informed of the implications of the Directive. A seminar for them was organised in April 2008. A seminar for local authorities was held by Scottish Government and CoSLA in February 2009.
while a seminar for other regulatory bodies was planned for that April. Officials from BERR gave a presentation at these events.

The main Scottish issues were whether there should be a separate Scottish Point of Single Contact and National Liaison Point. It was agreed that single UK points would be more appropriate.

Scottish Regulators will be required to apply third country rules to EU country service providers. In practice most regulators do not distinguish between service providers based on country of origin.

**Summary of stakeholder engagement/consultation**

The Department for Business, Energy and Industrial Strategy have been engaging with Competent Authorities across the UK to outline the 'no-deal' policy approach to remove preferential access to EEA states and to test what possible impacts could be caused from this change.

Findings of this engagement activity showed that, by and large, Competent Authorities do not currently discriminate against service providers based on nationality. Therefore, access to the UK services market currently places very few barriers against third country service providers, if any. As a result, Competent Authorities would have to undertake limited action to adapt their licensing and authorisation schemes to a 'no-deal' scenario.

**A note of other impact assessments, (if available)**

In their October 2016 Report to the Scottish Parliament ("Long-term Economic Implications of Brexit"), the Fraser of Allander Institute noted that “Over the long term (i.e. 10+ years), most economists predict that the decision to leave the EU will have a negative impact on trade, labour mobility and investment.” Loss of access to the EU single market in services is therefore likely to have a negative impact on Scottish service exporters who will become subject to third country rules in EU countries.

However, this SI does not extend to the activity of UK based service providers in the EU - the impact of this SI will largely accrue to EU-based service providers who export to the UK and who will become subject to the UK’s third country rules.

In July 2018, in their Euro Area Policies Report (IMF Country Report No. 18/224) the IMF stated that “The strength of euro area-U.K. integration implies that there would be no Brexit winners. First, the U.K. is among the top three main trading partners of the euro area. Second, the gross trade exposure masks complex supply chain linkages. Third, cross-border capital flows between the U.K. and the euro area are large. Finally, migration flows are considerable for some countries. Higher barriers to trade, capital flows and people movements following Brexit could disrupt these links, reducing trade, investment and labor mobility. All empirical studies so far concur that economic costs on both sides would be considerable.”
Summary of reasons for Scottish Ministers proposing to consent to UK Ministers legislation

The main provisions of the Directive are implemented by the Provision of Services Regulations 2009 which were made by a Minister in the Department for Business, Innovation and Skills (BIS) and came into effect on 28 December 2009. It was agreed that the Regulations should extend to devolved matters in Scotland, since the Directive is one where there is limited discretion as to what is implemented and there were no policy differences between Scotland and the rest of the UK in relation to how the provisions of the Directive should be implemented.

There is little scope under the powers in the European Union (Withdrawal) Act 2018 for policy enhancements in amending the Regulations, and no powers are returned to the UK as a result of the amendment.

BEIS and the Scottish Government agree that amendments to the Regulations are only technical fixes and a joint approach would improve ease of use of amended legislation for businesses and consumers alike, similar to the joint approach taken in 2009 when the Regulations were first made.

Failure to correct deficiencies would leave Scotland and the UK in breach of GATS rules on preferential access to markets. Given the requirement to be compatible with WTO obligations, there is little or no room for manoeuvre.

Working with the UK Government will ensure that the simplest route to correcting deficiencies is taken.

The Scottish Government believe that using a UK-wide SI to resolve these legislative deficiencies is not prejudicial to Scottish interests. We would only work with the UK Government on legislation which is directly applicable or where a composite approach has been taken in the past.

The SI is still in final drafting stages, but BEIS have consulted with the Devolved Administrations throughout the process and addressed concerns raised by each Administration. However, I will write to the Committee at the earliest available opportunity with the Scottish Government’s assessment of whether the SI as laid by the UK Government matches the policy intention set out in this notification.

Intended laying date (if known) of instruments likely to arise
By 12th December 2018, or earlier if possible.

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
n/a

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?
n/a

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Any significant financial implications?
There are no financial implications for the Scottish Government as a result of this SI. We do not believe that there will be significant financial implications for stakeholders as a result of this SI.