



The Scottish Parliament
Pàrlamaid na h-Alba

ECONOMY, ENERGY AND FAIR WORK COMMITTEE

AGENDA

7th Meeting, 2019 (Session 5)

Tuesday 26 February 2019

The Committee will meet at 9.45 am in the David Livingstone Room (CR6).

1. **Decision on taking business in private:** The Committee will decide whether to take items 9 and 10 in private.

2. **Subordinate legislation:** The Committee will take evidence on the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft] from—

Jamie Hepburn, Minister for Business, Fair Work and Skills, and Victoria Morton, Lawyer, Legal Directorate - Constitutional & Civil Law, Scottish Government;

Alex Reid, Head of Policy Development, and David Farr, Policy Manager: Corporate Insolvency, Accountant in Bankruptcy.

3. **Subordinate legislation:** Jamie Hepburn (Minister for Business, Fair Work and Skills) to move —S5M-15528—That the Economy, Energy and Fair Work Committee recommends that the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft] be approved.

4. **Construction and Scotland's Economy:** The Committee will take evidence from—

Robin Crawford, Chair of the Review of Scottish Public Sector Procurement in Construction;

Gillian Cameron, Programme Manager, Supplier Development Programme;

Alan Wilson, National Executive Officer, SEC Group Scotland;

Jeanette MacIntyre, Managing Director, Indeglas Ltd.

5. **Subordinate legislation:** The Committee will take evidence on the INSPIRE (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft] from—

Kate Forbes, Minister for Public Finance and Digital Economy, and Shona Nicol, Head of Geographic Information Science And Analysis (GI-SAT), Scottish Government.

6. **Subordinate legislation:** Kate Forbes (Minister for Public Finance and Digital Economy) to move—S5M15750—That the Economy, Energy and Fair Work Committee recommends that the INSPIRE (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft] be approved.

7. **Construction and Scotland's Economy:** The Committee will take evidence from—

Fiona Harper, Director, BSE Skills Ltd;

Ian Hughes, Partnerships Director – Scotland, Construction Industry Training Board;

Fiona Stewart, Head of National Training Programmes, Skills Development Scotland;

Professor Sean Smith, Director of Sustainable Construction, Napier University;

Maureen Douglas, HR Director, Forster Group.

8. **European Union (Withdrawal) Act 2018:** The Committee will consider whether the following instrument has been laid under the appropriate procedure and given the appropriate categorisation—

The Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019 [draft]

9. **Construction and Scotland's Economy:** The Committee will consider the evidence heard at today's meeting.

10. **Work programme:** The Committee will consider its work programme.

Alison Walker
Clerk to the Economy, Energy and Fair Work Committee
Room T3.40 The Scottish Parliament Edinburgh
Tel: 0131 348 5207
Email: Alison.Walker@parliament.scot

The papers for this meeting are as follows—

Agenda Item 2

SSI Cover Note EEFW/S5/19/7/1

PRIVATE PAPER EEFW/S5/19/7/2
(P)

[Insolvency \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2019 \[draft\]](#) EEFW/S5/19/7/3

Agenda Item 4

PRIVATE PAPER EEFW/S5/19/7/4
(P)

[Written Submission: Supplier Development Programme](#) EEFW/S5/19/7/5

[Written Submission: Specialist Engineering Contractors' Group \(Scotland\)](#) EEFW/S5/19/7/6

Agenda Item 5

SSI Cover Note EEFW/S5/19/7/7

PRIVATE PAPER EEFW/S5/19/7/8
(P)

Agenda Item 7

PRIVATE PAPER EEFW/S5/19/7/9
(P)

[Written Submission: BSE Skills](#) EEFW/S5/19/7/10

[Written Submission: Construction Industry Training Board](#) EEFW/S5/19/7/11

[Written Submission: Skills Development Scotland](#) EEFW/S5/19/7/12

Agenda Item 8

Cover Note EEFW/S5/19/7/13

PRIVATE PAPER EEFW/S5/19/7/14
(P)

Agenda Item 10

PRIVATE PAPER EEFW/S5/19/7/15
(P)

Economy, Energy and Fair Work Committee

7th Meeting, 2019 (Session 5), 26 February 2019

Cover Note – Affirmative Instrument

Introduction

- This paper sets out details of the affirmative instrument for consideration under Standing Orders Rule 10.6.1.
- [Insolvency \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2019 \[draft\]](#)

Action

- **Following evidence from the Minister, the Committee will be asked whether to agree to the motion below and to report its decision to the Parliament—**

Motion S5M-15528: Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft]:

That the Economy, Energy and Fair Work Committee recommends that the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft] be approved.

- **The Committee is also invited to delegate responsibility for the drafting and publication of a short, factual report to the Convener and Clerk.**

Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft]

2. **Purpose of the instrument:** The purpose of the instrument is to ensure that devolved aspects of corporate and personal insolvency relating to jurisdiction, cooperation, and the recognition and enforcement of cross-border insolvency proceedings function appropriately after the UK's exit from the EU without a deal. It will also protect the existing powers of floating charge holders with pre-September 2003 charges to appoint a receiver.
3. **Procedure:** The Committee agreed that the instrument was laid under the appropriate procedure at its meeting on 22 January 2019.
4. **Categorisation:** On the significance of the proposed changes, the Scottish Ministers categorise the instrument as Low under the Brexit SSI Protocol. This is on the basis that it is minor and technical in nature, ensuring continuity of law with no policy change.
5. **Policy Note:** Further details on the purpose of the instrument can be found in the policy note attached.
6. **Deadline for EEFW Committee to consider:** 28 February 2019.
7. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 22 January 2019 and agreed that no points arose. The Delegated Powers and Law Reform Committee also agreed to recommend to the Committee that the affirmative procedure is the appropriate scrutiny procedure and that the instrument could appropriately be categorised as Low in terms of its significance under the [SSI Protocol](#).

POLICY NOTE

THE INSOLVENCY (EU EXIT) (SCOTLAND) (AMENDMENT) REGULATIONS 2019

SSI 2019/XXX

The above instrument was made in exercise of the powers conferred by paragraph 1(1) and (3) of Schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018. The instrument is subject to the affirmative procedure.

Purpose of the instrument. The purpose of the instrument is to ensure that devolved aspects of corporate and personal insolvency relating to jurisdiction, cooperation, and the recognition and enforcement of cross-border insolvency proceedings function appropriately after the UK's exit from the EU without a deal.

It will also protect the existing powers of floating charge holders with pre-September 2003 charges to appoint a receiver.

Policy Objectives

The Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 ("the Regulations") deal with two discrete policy areas relating to insolvency. They:

- protect the existing powers to appoint a receiver under section 51 of the Insolvency Act 1986 ("the Act"); and
- address deficiencies arising in relation to devolved aspects of cross-border insolvency legislation from the withdrawal of the United Kingdom from the European Union, specifically as regards the application of the EU Insolvency Regulation (EU 2015/848) (the "EUIR") in UK law following EU exit.

Explanation of the law being amended by the regulations

The Regulations will amend the following:

Primary legislation:

- Section 51 of the Act;
- The Bankruptcy and Diligence etc. (Scotland) Act 2007; and
- The Bankruptcy (Scotland) Act 2016.

Secondary legislation:

- The Bankruptcy Fees (Scotland) Regulations 2018;
- The Public Services Reform (Insolvency) (Scotland) Order 2016;
- The Bankruptcy (Scotland) Regulations 2016; and
- The Bankruptcy (Applications and Decisions) Scotland Regulations 2016

The Regulations aim to protect the existing powers to appoint a receiver contained in section 51 of the Act and to address deficiencies in devolved cross-border insolvency legislation arising from EU exit and the application of the EUIR post-exit.

Reasons for and effect of the proposed change or changes on retained EU law

The UK Government have laid a draft statutory instrument (the Insolvency (Amendment) (EU Exit) Regulations 2018) (“the UK Regulations”) in the Westminster parliament. The UK Regulations make changes to the EUIR as it will apply in domestic law from exit day.

The EUIR determines in which member State main insolvency proceedings may be opened and provides for decisions opening proceedings to be recognised in other member States. Main proceedings may only be opened in the state where the centre of the debtor’s main interests is located. Secondary proceedings may be brought in a state where the debtor has an establishment. The EUIR makes other provisions to facilitate the operation of cross-border insolvency proceedings including for co-operation between courts and insolvency practitioners.

The primary purpose of the UK Regulations is to retain the EUIR in UK law in a form that will operate effectively after EU exit. The Regulations maintain a modified version of the EUIR’s jurisdictional tests for the opening of insolvency proceedings that will apply across the UK and will sit alongside the UK’s domestic provisions on jurisdiction rules. The remainder of the EUIR, which forms the majority, relies on reciprocity between member States. In the absence of a reciprocal deal with the EU to replicate the current arrangements provided by the EUIR these provisions cannot operate properly, and so they are repealed.

The UK Regulations also amend deficiencies arising in domestic legislation from EU Exit and the modification of the EUIR. These amendments remove references to the EUIR where the relevant provisions no longer apply or update references to the revised jurisdiction test under the retained EUIR. The UK Regulations make amendments in the areas of insolvency legislation which are wholly reserved and the mixed competency area of winding up (the general legal effect being reserved and the process being devolved).

These Regulations amend deficiencies in the devolved areas of company receivership (the effect of floating charges), bankruptcy and protected trust deeds. The purpose of the Regulations is similarly to ensure that devolved Scottish insolvency legislation relating to jurisdiction, cooperation, and the recognition and enforcement of cross border insolvency proceedings functions appropriately after the UK’s exit from the EU. The Regulations will also maintain a floating charge holder’s power to appoint a receiver under the Act from exit day.

Specifically, the Regulations address deficiencies arising in devolved legislation by removing references to the EUIR where the relevant provisions no longer apply and updating references to the revised jurisdiction test provided by Article 1 of the EUIR (as it will apply in UK law from exit day). Most of the changes previously made to devolved insolvency legislation to facilitate the application of the EUIR will be revoked by the Regulations.

The Regulations contain provision saving the existing law where insolvency proceedings were opened before exit day.

Statements required by European Union (Withdrawal) Act 2018**Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate**

The Minister for Business, Fair, Work and Skills has made the following statement: "In my view the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 do no more than is appropriate".

This is the case because the Scottish Government and the UK Government agree that it would not be appropriate to keep the current EUIR provisions without reciprocity and thus continue the current system unilaterally. As such, it is appropriate to remove almost all of the provisions of the EUIR in order to prevent affected Scottish insolvency proceedings being restricted or obstructed by an unreciprocated obligation to recognise other countries' insolvency orders and judgments. The Regulations do no more than is appropriate to address deficiencies in devolved insolvency legislation arising from this approach.

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Minister for Business, Fair, Work and Skills has made the following statement: "In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

The amendments made by the Regulations will ensure that domestic provisions relating to jurisdiction, cooperation, and the recognition and enforcement of cross-border insolvency proceedings in areas of devolved insolvency legislation function appropriately after the UK's exit from the EU. The amendments will also ensure that the existing powers of floating charge holders to appoint receivers will be retained after the EU exit.

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Minister for Business, Fair, Work and Skills has made the following statement: "In my view the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 do not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts".

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Minister for Business, Fair, Work and Skills has made the following statement: "In my view the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010".

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

The guidance principles on the environment and animal welfare do not apply to the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019.

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

This is not applicable to the Insolvency (EU Exit) (Scotland) (Amendment) Regulations 2019.

An indication of how the regulations should be categorised in relation to the significance of the change proposed.

Low (i.e. instruments that are minor and technical, continuity of law with no policy change etc.)

Statement setting out the Scottish Ministers' reasons for their choice of procedure

The Scottish Ministers have chosen the affirmative procedure to apply to the Regulations. This reflects previous practice for SSIs in the area of cross-border insolvency which make changes to primary legislation (e.g. the Insolvency (Regulation (EU) 2015/848) (Miscellaneous Amendments) (Scotland) Regulations 2017).

Further information

Consultation

In order to avoid prejudicing the outcome of the exit negotiations with the EU, it has not been possible to conduct a public consultation on the changes made by this instrument.

We have, however, had informal discussions with external solicitors who have significant knowledge and experience in insolvency in relation to the impact of the changes on the power to appoint a receiver.

AiB has also engaged in discussion and exchanges with the Insolvency Service (the UK Government) regarding this instrument and its interaction with the UK Regulations.

Impact Assessments

Full impact assessments have not been prepared for this instrument because the regulations are required to assist a seamless EU Exit and the impact is thought to be minimal.

While leaving the EU without a deal will make it more difficult for insolvency practitioners to deal with cross-border insolvency matters, it is considered that in the devolved areas of receivership and personal insolvency the impacts will be minimal.

The numbers of receivership appointments are falling, as they require a floating charge holder with a pre-September 2003 floating charge to appoint a receiver. Receivership appointments with cross-border insolvency issues are fairly rare.

It is extremely rare for personal insolvency appointments to have cross-border insolvency matters.

Financial Effects

A partial Business and Regulatory Impact Assessment (BRIA) has been completed and is attached.

The impact of this policy on business is that insolvency practitioners dealing with cross-border insolvency may require to incur additional court costs to obtain court recognition. However, it is considered that as cross-border insolvency in receivership and personal insolvencies are rare, these costs will be minimal.

The Accountant in Bankruptcy on behalf of the Scottish Government

January 2019

Economy, Energy and Fair Work Committee

7th Meeting, 2019 (Session 5), 26 February 2019

Cover Note – Affirmative Instrument

Introduction

- This paper sets out details of the affirmative instrument for consideration under Standing Orders Rule 10.6.1.

[INSPIRE \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2019 \[draft\]](#)

Action

- **Following evidence from the Minister and officials, the Committee will be asked whether to agree to the motion below and to report its decision to the Parliament—**

Motion S5M-15750: INSPIRE (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft]:

That the Economy, Energy and Fair Work Committee recommends that the INSPIRE (EU Exit) (Scotland) (Amendment) Regulations 2019 [draft] be approved.

- **The Committee is also invited to delegate responsibility for the drafting and publication of a short, factual report to the Convener and Clerk.**

[INSPIRE \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2019 \[draft\]](#)

2. **Purpose of the instrument:** This instrument makes minor and technical changes to the existing INSPIRE (Scotland) Regulations 2009 so that this legislation, which governs spatial data standards, will still work properly once the UK leaves the EU.
3. **Policy Note:** Further details on the purpose of the instrument can be found in the policy note attached.
4. **Deadline for EEFW Committee to consider:** 11 March 2019.
5. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 5 February 2019 and agreed that no points arose. The Delegated Powers and Law Reform Committee also agreed to recommend to the Committee that the draft INSPIRE (EU Exit) (Scotland) (Amendment) Regulations 2019 are appropriately categorised as Low in terms of their significance under the [SSI Protocol](#).

POLICY NOTE

THE INSPIRE (EU EXIT) (SCOTLAND) (AMENDMENT) REGULATIONS 2019

S.S.I. 2019/XXX

The above instrument was made in exercise of the powers conferred by section 2(2) of the European Communities Act 1972, and paragraph 1(1) and (3) of schedule 2, and paragraph 21 of schedule 7, to the European Union (Withdrawal) Act 2018. The instrument is subject to the affirmative procedure.

Purpose of Instrument. This instrument makes minor and technical changes to the existing INSPIRE (Scotland) Regulations 2009 so that this legislation, which governs spatial data standards, will still work properly once the UK leaves the EU.

Policy Objectives

The main purpose of this instrument (“the Amending SSI”) is to correct deficiencies in the INSPIRE (Scotland) Regulations 2009 arising from EU exit. The amendments being made in Part 3 will maintain the legal operability of the INSPIRE (Scotland) Regulations after EU exit, ensuring the national spatial data infrastructure will continue to use common standards so that the interoperability of data and services is retained. This will also ensure that there is continuity in spatial data standards across the UK. In addition, the amendment in Part 2 will, before exit day, update an out-of-date reference to an EU instrument.

Explanation of the law being amended by the regulations

Directive 2007/02/EC established infrastructure for spatial information (“the INSPIRE Directive”). Member states are required to operate national spatial data infrastructures using common standards that make spatial data easy to find, use and reuse. The rationale for the Directive is to improve environmental policy making at all levels of government.

The INSPIRE (Scotland) Regulations 2009 (S.S.I. 2009/440) implement (in part) the INSPIRE Directive in relation to Scottish public authorities and Scottish third parties, taking account of further implementing rules imposed by the Commission under Regulation (EU) No 1089/2010. Separate regulations (the INSPIRE Regulations 2009, S.I. 2009/3157) were made by the UK Government which apply to all parts of the United Kingdom (“the UK Regulations”), but these do not apply to Scottish public authorities and Scottish third parties.

The UK Government recently laid the INSPIRE (Amendment) (EU Exit) Regulations 2018 (S.I. 2018/1338). The purpose of this was to address deficiencies in the UK Regulations and the other associated retained EU law that will arise as a consequence of EU exit, and to ensure the legal operability of the UK Regulations and that retained EU law after EU exit.

Reasons for and effect of the proposed change or changes on retained EU law

On exit day, references in the INSPIRE (Scotland) Regulations 2009 to provisions of the Directive will no longer be appropriate, whereas the Commission Regulation will

form part of the domestic law of the United Kingdom. The Amending SSI will amend these references so that they refer instead to equivalent provisions which will, on exit day, be inserted into the domestic law version of Commission Regulation by the INSPIRE (Amendment) (EU Exit) Regulations 2018. They will also fix some other EU references and other deficiencies in relation to coordination, monitoring and reporting which arise on withdrawal.

It is appropriate to address these deficiencies in the INSPIRE (Scotland) Regulations 2009 which will otherwise arise from the withdrawal of the United Kingdom from the EU.

The amendments broadly mirror those made by the UK Government in the INSPIRE (Amendment) (EU Exit) Regulations 2018.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

The Minister for Public Finance and Digital Economy has made the following statement:

“In my view the INSPIRE (EU Exit) (Scotland) (Amendment) Regulations 2019 do no more than is appropriate.”

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Minister for Public Finance and Digital Economy has made the following statement:

“In my view there are good reasons for the provisions in this instrument, and I consider that this is a reasonable course of action. This is because the amendments made by it: will prevent, remedy or mitigate deficiencies arising from the withdrawal of the UK from the EU; are minor and technical; and are not intended to alter the underlying purpose and effect of the INSPIRE (Scotland) Regulations 2009 or impose any new liabilities or obligations.”

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Minister for Public Finance and Digital Economy has made the following statement:

“In my view the INSPIRE (EU Exit) (Scotland) (Amendment) Regulations 2019 do not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Minister for Public Finance and Digital Economy has made the following statement:

“In my view, in the preparing the INSPIRE (EU Exit) (Scotland) (Amendment) Regulations 2019, the Scottish Ministers have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

The Minister for Public Finance and Digital Economy has made the following statement:

“In my view, in the preparing the INSPIRE (EU Exit) (Scotland) (Amendment) Regulations 2019, the Scottish Ministers have had due regard to the guidance principles on the environment and animal welfare.”

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

The Minister for Public Finance and Digital Economy has made the following statement:

“In my view, the instrument has no effect on rights and duties relating to employment and health and safety matters relating to consumer protection (so far as is within devolved competence).”

An indication of how the regulations should be categorised in relation to the significance of the change proposed

The change proposed is considered to be of low significance. The amendments made by the instrument to prevent, remedy or mitigate deficiencies arising from the withdrawal of the UK from the EU are minor and technical, and do not seek to alter the underlying purpose and effect of the INSPIRE (Scotland) Regulations 2009 or impose any new liabilities or obligations.

Statement setting out the Scottish Ministers’ reasons for their choice of procedure

It is considered that the instrument is required to be subject to affirmative procedure by virtue of paragraph 1(6), as read with paragraph 1(2)(b), of schedule 7 of the European Union (Withdrawal) Act 2018. This is because the amendments made by the instrument to regulation 13 (data-sharing between public authorities etc.) of the INSPIRE (Scotland) Regulations 2009 relate to a fee in respect of a function exercisable by a public authority in the United Kingdom.

Further information

Consultation

The UK Government has been consulted on the proposed amendments to the INSPIRE (Scotland) Regulations 2009. These amendments (to prevent, remedy or mitigate deficiencies arising from the withdrawal of the UK from the EU) do not seek to alter the underlying purpose and effect of the INSPIRE (Scotland) Regulations 2009 or impose any new liabilities or obligations. It was not therefore not considered necessary to consult other stakeholders.

Impact Assessments

Full impact assessments have not been prepared for this instrument because the amendments do not alter Scottish Government's current environmental policies and priorities and, therefore, do not have a significant impact on the environment. The impact on business, charities or voluntary bodies is expected to be nil. In particular, the amendments made by the instrument to the INSPIRE (Scotland) Regulations 2009 will not change the way a public authority or third party collects, presents, reports on and uses data and meta-data about spatial information.

Financial Effects

The Minister for Public Finance and Digital Economy confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Digital Directorate

January 2019

Economy, Energy and Fair Work Committee

7th Meeting, 2019 (Session 5), Tuesday, 26 February 2019

Subordinate legislation - EU exit

Introduction

1. This paper details subordinate legislation in relation to [Public Procurement etc. \(Scotland\) \(Amendment\) \(EU Exit\) Amendment Regulations 2019](#).
2. The Committee is invited to consider the subordinate legislation and agree whether it is content that the parliamentary procedure given to the instrument by the Scottish Government is appropriate.

Background

3. In anticipation of the UK leaving the EU, changes are required to devolved legislation by way of statutory instruments. Under the European Union (Withdrawal) Act 2018, and where the Scottish Government considered a UK-wide approach to the legislative changes would be appropriate, these have been made by UK statutory instruments (SIs) laid by the UK Government with Scottish Ministers' consent. The Scottish Parliament has considered these legislative changes – notified to them by the Scottish Government – in advance of the Scottish Government giving consent.
4. Other legislative changes are being made through Scottish statutory instruments (SSIs).
5. SSIs related to EU exit will be considered in the same way that 'domestic' SSIs are considered except that the lead committee has the opportunity, in advance of its policy consideration, to recommend to the Scottish Government that the parliamentary procedure allocated to the instrument should be changed. This process is known as the sift.
6. A [protocol](#) has been agreed between the Scottish Government and Scottish Parliament on the process for considering SSIs laid under the 2018 Act. The protocol sets out further information about the sifting process.
7. This paper supports the Committee's consideration of the sift.
8. The protocol also sets out an approach which categorises SSIs – high, medium or low – to assist committees' prioritisation in terms of scrutiny and gives the Delegated Powers and Law Reform Committee (DPLRC) a role in highlighting to a lead committee those SSIs where it disagrees with the Scottish Government about the categorisation.
9. The Committee will further consider the SSI at its meeting on 5 March.

Consideration of the parliamentary procedure – the sift

10. Scottish Ministers have discretion about whether instruments made under Schedule 2 of the 2018 Act should be subject to the affirmative or negative procedure, unless the instrument makes provision falling within one of the categories which requires the mandatory affirmative procedure to be used.

11. As set out above, the lead committee has the opportunity, in advance of its consideration, to recommend to the Scottish Government that the parliamentary procedure allocated to the instrument should be changed. Thus, the lead committee can recommend that an instrument laid under the negative procedure should be revoked and laid as an affirmative instrument and vice versa. The protocol states this “enables committees to recommend a change where they consider that the matter is of such significance that it requires active Parliamentary approval (or conversely is not so significant that it requires Parliamentary time to be allocated to its approval)”.

12. The DPLRC also considers the parliamentary procedure allocated to the instrument and makes a recommendation to the lead committee where it agrees the procedure should be changed. The DPLRC considered the instrument at its meeting on 19 February and recommended that the affirmative procedure is the appropriate scrutiny procedure for the draft Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019.

No recommendation to change the parliamentary procedure

13. Where a lead committee agrees with the parliamentary procedure, the instrument is thereafter considered and disposed of in the same way as a ‘domestic’ SSI.

Recommendation to change the parliamentary procedure

14. Where a lead committee recommends the parliamentary procedure should be changed, it must report to the Parliament. The Scottish Government is expected to meet that recommendation as soon as possible.

15. A change of procedure does not, however, affect the timetable for Parliamentary consideration and the SSI should be considered under the procedure recommended by the lead committee.

For decision

16. The Committee is invited to agree whether it is content the parliamentary procedure (affirmative procedure) given to the instrument by the Scottish Government is appropriate.

Consideration of the SSI

17. As set out above, the process for consideration of an SSI related to EU exit following the sift is the same as for a ‘domestic’ SSI. The Scottish

Government has decided the affirmative parliamentary procedure is appropriate for this SSI.

18. The Scottish Government has given the SSI the high categorisation. The Committee may consider this categorisation to be appropriate given that the SSI amends the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019, which are categorised as “high”.

The Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019

19. This instrument amends the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019, which are also currently being considered by the Committee.

20. The Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 were laid in draft on 21 January and the Committee agreed to consult stakeholders on 29 January.

21. The Regulations provide an alternative ‘fix’ to deficiencies in retained EU legislation relating to the treatment of the UK’s international obligations in the field of public procurement. Further details on the purpose of the instrument can be found in the policy note (attached).

22. The SSI was laid on 7 February and the lead committee must report by 27 March.

POLICY NOTE

The Public Procurement etc. (Scotland) (Amendment) (EU Exit) Amendment Regulations 2019

SSI 2019/XXX

The above instrument was made in exercise of the powers conferred by paragraph 1(1) and (3) of Schedule 2 and paragraph 21(b) of Schedule 7 to the European Union (Withdrawal) Act 2018. The instrument is subject to affirmative procedure.

Purpose of the instrument

This instrument amends the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019, laid in draft on 29 January 2019. It provides an alternative 'fix' to deficiencies in retained EU legislation relating to the treatment of the UK's international obligations in the field of public procurement.

Policy Objectives

1. This instrument is drafted to ensure that procurement legislation in Scotland is compatible with the UK's international agreements. This approach is at the request of the UK Government, which will lay a similar second instrument with effect in England, Wales and Northern Ireland, and is to provide sufficient time for the Trade Bill, or another primary legislative vehicle which would enable the UK's new obligations to be implemented, to receive Royal Assent.

Explanation of the law being amended by the regulations

2. This instrument amends the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019 ("the first SSI") before that instrument comes into force.
3. The first SSI principally amends the Public Contracts (Scotland) Regulations 2015; the Utilities Contracts (Scotland) Regulations 2016; and the Concession Contracts (Scotland) Regulations 2016.
4. **These regulations implement the requirements of Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors; and Directive 2014/23/EU on the award of concession contracts, respectively. They also implement the requirements of Directive 89/665/EEC and Directive 92/13/EEC, as amended, on remedies and review procedures for public procurement and on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.**

5. These EU procurement Directives govern the procedures for the award of contracts worth more than specified financial thresholds, subject to certain exclusions from their scope. The legal framework is based on the principles of transparency, non-discrimination, equal treatment and proportionality. The EU is a member of the World Trade Organisation's Government Procurement Agreement ("the GPA"), and is party to a number of international agreements with countries outside the EU that contain procurement provisions. The EU procurement Directives reflect the obligations arising from these agreements, as well as the EEA Agreement.

Reasons for and effect of the proposed change or changes on retained EU law

Effect of the proposed changes: The GPA

6. Because the EU is a signatory to the GPA, the procurement Directives require contracting authorities to afford equal treatment to bidders from other countries which are also signatories to the GPA. This is currently reflected in domestic legislation. The first SSI would remove this requirement eight months after a 'no-deal' exit from the EU.
7. That approach mirrored the approach being taken by the UK Government in its equivalent first SI applicable to England, Wales and Northern Ireland, which was laid on 13 December 2018. The UK Government asked that the Scottish regulations took that approach in anticipation of the UK's accession to the GPA on or shortly after exit, and in order to support the UK's swift accession to the GPA. Whilst it guarantees that bidders from countries which are party to the GPA will be able to bid for public contracts in the UK on an equal footing with bidders from the UK, if the UK were to fail to accede to the GPA, however, bidders from the UK would not, as a matter of international law, be guaranteed reciprocal treatment when bidding for public contracts in other countries which are party to the GPA.
8. That approach was predicated on the progress made by the UK in applying to accede to the GPA, and a planning assumption that once the UK acceded to the GPA, powers contained in clause 1 of the Trade Bill could be used to implement the UK's separate accession within that eight month period.
9. The amendments proposed by this SSI would extend that eight month period to 18 months.

Effect of the proposed changes: other international agreements

10. The first SSI would remove immediately on exit from the EU the duty on contracting authorities in Scotland, which currently exists in domestic legislation, to afford equal treatment to bidders from countries which are signatories to other relevant international agreements with which the EU has an agreement covering public procurement.
11. That approach also mirrored the approach being taken by the UK Government in its equivalent draft first SI applicable to England, Wales and Northern Ireland.
12. The UK Government is in the process of attempting to negotiate the 'roll-over' of the EU's international agreements so that they continue to apply to the UK after exit from the EU. The approach in the first SSI was predicated on a planning assumption that as the UK negotiated these agreements, powers contained in clause 2 of the Trade Bill could be used to implement these new agreements.
13. The amendments proposed by this SSI would delay the removal of these duties by eighteen months, thereby extending the duties of equal treatment and non-discrimination to bidders from other countries with which the EU has a relevant agreement for that period. Whilst this guarantees that bidders from countries which have such an agreement with the EU will be able to bid for public contracts in the UK on an equal footing with bidders from the UK, as with the GPA, were the UK to fail to negotiate the 'roll-over' of these agreements within that period, then bidders from the UK would not, as a matter of international law, be guaranteed reciprocal treatment when bidding for public contracts in those countries.

Reasons for the proposed changes

14. These changes are made following the request of the UK Government, and are consistent with changes we have now been advised that the UK Government will make shortly to the procurement legislation applicable in England, Wales and Northern Ireland.
15. This is because in the current political climate, it is no longer safe to assume that the Trade Bill will receive Royal Assent in sufficient time for the powers contained in clause 1 and clause 2 to be exercised in order to implement the UK's new agreements. This means that both the UK and Scottish regulations risk being in breach of the UK's international obligations in respect of public procurement after exit from the EU.
16. In order for the UK's accession to the GPA, and for the 'roll-over' of the EU's trade agreements, to be ratified, the provisions arising from these agreements must be implemented in domestic legislation. There is also an obligation on the Scottish Ministers to ensure that Scottish legislation is compatible with the UK's international obligations.

17. The approach set out in this SSI, of extending the obligations arising from existing EU agreements for 18 months is, in effect, a contingency measure which allows for domestic legislation to comply in practice with the UK's international obligations (as the UK's obligations under these agreements should in theory be the same as the EU's).
18. The 18 month period is designed to allow sufficient time either for the passage of the Trade Bill, or alternatively for new primary legislation addressing this issue to be brought forward, as the UK's own obligations will still need to be implemented within this 18 month period using powers derived from the Trade Bill or other primary legislation.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

The Cabinet Secretary for Finance, Economy and Fair Work has made the following statement "In my view the Public Procurement etc. (Scotland) (Amendment) (EU Exit) (Amendment) Regulations 2019 does no more than is appropriate. This is the case because it does no more than prevent, remedy or mitigate deficiencies in retained EU law arising from the withdrawal of the UK from the EU which are discussed in the policy note".

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Cabinet Secretary for Finance, Economy and Fair Work has made the following statement "In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These reasons are set out in the policy note".

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Cabinet Secretary for Finance, Economy and Fair Work has made the following statement "In my view the Public Procurement etc. (Scotland) (Amendment) (EU Exit) (Amendment) Regulations 2019 does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts".

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Cabinet Secretary for Finance, Economy and Fair Work has made the following statement "In my view the Public Procurement etc. (Scotland)

(Amendment) (EU Exit) (Amendment) Regulations 2019 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010”.

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

This heading is not applicable

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

This heading is not applicable

An indication of how the regulations should be categorised in relation to the significance of the change proposed

High – this instrument amends the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019, which are categorised as high.

Statement setting out the Scottish Ministers’ reasons for their choice of procedure

This SSI is laid subject to affirmative procedure as it amends the Public Procurement etc. (Scotland) (Amendment) (EU Exit) Regulations 2019, which are subject to affirmative procedure.

Further information

Consultation

There has been no public consultation on how to rectify the deficiencies arising from withdrawal. The changes made are intended to maintain the current legislative and policy framework in so far as this is possible after exit and are within the extent permitted by the European Union (Withdrawal) Act 2018 to correct deficiencies.

Discussions on the content of this instrument have been held with the UK Government and the other devolved administrations. The amendments to legislation set out in this instrument are consistent with amendments which the UK Government is proposing to make to its equivalent legislation.

Impact Assessments

Full impact assessments have not been prepared for this instrument because the framework and principles underlying the legislation have not been substantially amended. Modifications contained in this instrument have been made to ensure the legislation functions effectively, once the UK withdraws from the EU.

Financial Effects

The Cabinet Secretary for Finance, Economy and Fair Work confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government
Scottish Procurement and Commercial Directorate

7 February 2019