

POLICY NOTE

THE CRIMINAL JUSTICE (EU EXIT) (SCOTLAND) (AMENDMENT ETC.) REGULATIONS 2020

SSI 2020/339

The above instrument is made in exercise of the powers conferred by paragraphs 1(1) and (3) and 11G(1) of schedule 2 and paragraph 21(b) of schedule 7 of the European Union (Withdrawal) Act 2018. The instrument is subject to negative procedure.

Purpose of the instrument

The Regulations address failures of retained EU law to operate effectively and other deficiencies in retained EU law (in particular, to address reciprocal arrangements which no longer exist and EU references which are no longer appropriate) arising from the withdrawal of the UK from the European Union. They do so in relation to the following EU measures:-

- Council Framework Decision 2005/214/JHA on recognition of financial penalties
- Council Framework Decision 2009/829/JHA on recognition of supervision measures
- Council Framework Decision 2008/675/JHA on taking account of convictions
- Directive 2012/13/EU on the right to information in criminal proceedings
- Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings
- Directive 2000/31/EC on electronic commerce

Policy Objectives

When an EU member state, the UK enjoyed several reciprocal arrangements with other EU member states (EUMS) which allowed for mutual judicial cooperation in criminal matters. These measures have continued to apply during the transition or implementation period. Among these are those measures addressed in the Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 (hereafter “the Regulations”), which are:

- **Council Framework Decision 2005/214/JHA on mutual recognition of financial penalties**, which requires that Member States make arrangements to allow for fines and other financial penalties levied in one Member State to be enforceable in any other.
- **Council Framework Decision 2009/829/JHA on mutual recognition of supervision measures**, which promotes mutual recognition within the EU of judicial decisions relating to non-custodial pre-trial supervision measures which may be imposed on accused persons in criminal proceedings: i.e. bail.

At the end of the transition period, in the absence of any agreement on continuing co-operation these reciprocal arrangements (which have, in any case, been little used) will no longer exist between the UK and EU member states and will no longer be legally operable between EUMS and Scotland, or the UK generally. These Regulations will both reverse the domestic law

implementation of these Framework Decisions and remove inoperable provisions from the statute book.

- **Council Framework Decision 2008/675/JHA on taking account of convictions in the member States of the European Union in the course of new criminal proceedings.** This requires that known prior convictions in EU member states are to be taken into account in the same way as national law provides for domestic convictions to be taken into account.

The Regulations will remove the requirements put in place across a range of statutory provisions to implement the obligations under the Framework Decision to take EU convictions into account. Instead of maintaining a requirement, the amendments adjust the provisions to give Scottish courts the discretion to do so where appropriate. This will mitigate the impact on public protection of the loss of the requirement where EU derived convictions are concerned rather than reverting to reliance on the residual common law, which largely governs the treatment of non-EU foreign convictions in Scottish courts.

The specific approach for EU convictions recognises that EU nationals make up a more significant part of the population of Scotland than non-EU foreign nationals; therefore Scottish courts are more likely to be required to deal with individuals with EU convictions rather than non-EU convictions.

Provision is also made in relation to matters and procedures relating to these EU measures which are in progress at the end of the transition or implementation period, taking account of the provisions in Title V of Part 3 of the withdrawal agreement between the EU and the UK. Title V makes provision in respect of continuing judicial co-operation in criminal matters relating to certain EU measures referred to in the withdrawal agreement as “other separation issues”.

There are also EU instruments which seek to establish minimum standards in applying rights in the justice systems of the EU. Among these, those measures addressed in the Regulations are:

- **Directive 2012/13/EU on the right to information in criminal proceedings**, which requires that accused persons are provided with information about their rights.
- **Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings**, which requires interpretation and translation of the most essential parts of criminal procedure to be made available to accused persons.

These rights are secured in Scottish legislation which will continue. Minor and technical amendments are made to reflect that the UK is no longer an EU member State.

Directive 2000/31/EC on certain aspects of information society services, in particular e-commerce was implemented in relation to the offence of possessing an extreme pornographic image (section 51A of the Civic Government (Scotland) Act 1982) by S.S.I 2011/127 and S.I 2018/477. This reflects Scottish Ministers competence which is limited to implementing certain aspects of the Directive in relation to offences in devolved areas. Minor and technical amendments are made to S.S.I 2011/127 to reflect that the UK is no longer a member of the EU and bring it in line with amendments already made to the UK legislation.

A minor amendment is also proposed to the Licensing (Amendment) (EU Exit) (Scotland) Regulations 2019 which address deficiencies in Scottish licensing legislation. These Regulations include saving provision which refers to “exit day”. This reference is no longer appropriate and the reference is to be updated to refer to “IP completion day” when the Regulations will now come into force.

Explanation of the law being amended by the regulations

Part 2 of the Regulations - Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition of financial penalties

This Framework Decision was implemented in Scotland by amendments to: the Criminal Procedure (Scotland) Act 1995 made by the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) Order 2009; the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No. 1) Order 2014; and the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) (No. 2) Order 2014, to give effect to the reciprocal recognition of financial penalties between Scotland and EU member states. The Framework Decision is not directly effective and ceases to apply to the UK at end of the implementation period. The Regulations reverse the amendments made to the 1995 Act and revoke the Orders.

Section 56 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 provides Scottish Ministers with power to make subordinate legislation to implement the Framework Decision. This is now redundant and will be repealed. There is also a consequential amendment to section 81 of the 2007 Act and the revocation of paragraph 19 of the Civil Jurisdiction and Judgments Regulations 2007 and paragraph 6 of the Civil Jurisdiction and Judgments (Amendment) Regulations 2014, both of which amended section 56.

Part 2 also provides for transitional and saving provision in relation to decisions requiring payment of financial penalties received before the end of the implementation period. Provision is made in relation to decisions received in Scotland or in EU member States taking account of the terms of the withdrawal agreement with the EU.

Part 3 – Council Framework Decision 2009/829/JHA on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

The Framework Decision was implemented by the Mutual Recognition of Supervision Measures in the European Union (Scotland) Regulations 2014. The Framework Decision is not directly effective and ceases to apply in the UK at the end of the implementation period. The 2014 regulations are to be revoked. Transitional and saving provision is made for decisions on supervision measures received before the end of the implementation period in Scotland or in an EU member State, taking account of the terms of the withdrawal agreement with the EU.

Part 4 – Council Framework Decision 2008/675/JHA on taking account of convictions in the member States of the European Union in the course of new criminal proceedings

The Framework Decision was implemented in Scotland by amendments to a range of domestic legislation where provision was made in relation to the account to be taken of previous convictions. The legislation was amended to give convictions from other EU member states

parity with domestic convictions. This legislation is now being amended by the Regulations to reflect that the Framework Decision, which is not directly effective, ceases to apply in the UK at the end of the implementation period.

The policy approach is to recast the requirement to take account of the EU convictions. Instead, there is to be a discretion for courts to take account of EU convictions if it is considered appropriate to do so. Technical amendments are also required to reflect that the UK is no longer an EU member state.

Section 71(2) of the Criminal Justice and Licensing (Scotland) Act 2010 gives Scottish Ministers power to make statutory legislation to implement the obligations in the Framework Decision. This is to be repealed, as the Framework Decision will no longer apply to the UK.

Transitional provision is included in relation to criminal proceedings ongoing at the end of the implementation period again with reference to the terms of the withdrawal agreement with the EU.

Part 5 – Directive 2012/13/EU on the right to information in criminal proceedings

Section 5 of the Criminal Justice (Scotland) Act 2016 sets out the information to be given to a person in police custody. Section 5(3) requires that the person be provided with information to satisfy the requirements of Articles 3 and 4 of the Directive 2012/13/EU. This requirement is to continue but a minor modification to the provision is being made to clarify that the requirements are those placed on member States in view of the fact that the Directive will cease to apply to the UK at the end of the implementation period.

Part 6 – Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings

The Directive was implemented in Scotland by the Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulations 2014/95. These Regulations are to be retained but updated to make minor modifications to provisions to clarify that the requirements are those placed on member States in view of the fact that the Directive will cease to apply to the UK at the end of the implementation period.

Part 7 – Directive 2000/31/EC – E-commerce Directive

The Extreme Pornography (Electronic Commerce Directive) (Scotland) Regulations 2011/137 implement in part this Directive in respect of the offence of possessing an extreme pornographic image (section 51A of the Civic Government (Scotland) Act 1982). The remainder of the Directive is implemented for this offence by the UK SI, the Electronic Commerce Directive (Miscellaneous Provisions) Regulations 2018/477. Part 7 of the Order makes minor, technical amendments to the 2011 Regulations to reflect the fact that the United Kingdom will no longer be a member of the European Economic Area (EEA). These amendments are in line with the amendments made to the 2018 Regulations by the Electronic Commerce (Amendment etc.) (EU Exit) Regulations 2019/87.

Part 8 – Licensing

The Licensing (Amendment) (EU Exit) (Scotland) Regulations 2019/6 amends provision in licensing legislation to enable it to continue to operate effectively at the end of the implementation period. Regulation 7 includes saving provision which operates with reference to “exit day”. This reference is no longer appropriate and is amended to refer to “IP completion day” which is when (in accordance with paragraph 1 of schedule 5 of the European Union (Withdrawal Agreement) Act 2020) these Regulations will now come into force.

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

The Regulations will ensure that redundant legislation is removed, and that retained EU law is modified to operate effectively; thus reducing the potential for future operational confusion following the UK’s exit from the EU.

Statements required by the European Union Withdrawal Act 2018 and Additional Information required by the Protocol between the Scottish Government and the Scottish Parliament

The Regulations are made in exercise of powers in the 2018 Act both to deal with deficiencies in retained EU law (paragraphs 1(1) and (3) of Part 1 of schedule 2) and to implement Part 3 of the withdrawal agreement (paragraph 11G(1) of Part 1B of schedule 2). The Regulations also exercise the powers in paragraph 21(b) of schedule 7 in relation to transitional etc. provision

Regulations 2, 3, 4, 5, 7, 8, 10, 11, 12, 13, 14, 15 and 17 to 20 are made in exercise of the deficiencies powers

Regulations 6, 9 and 16 are made in exercise of the deficiencies powers (as expanded by paragraph 21(b) of schedule 7) and the powers to implement Part 3 of the withdrawal agreement.

The Statements set out below relate to the exercise of the deficiencies powers.

The Additional Information set out below relates, except where indicated, to the deficiencies powers and the powers to implement Part 3 of the withdrawal agreement.

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 Justice has made the following statement “In my view The Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 do no more than is appropriate. This is because the Regulations address necessary changes arising from leaving the EU”.

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 Justice 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.

This is because the amendments made by it relate to a number of reciprocal measures which will cease to apply to the UK. As the reciprocal measures will cease to exist after the end of the implementation period, this Instrument will address failures of retained EU law to operate effectively and other deficiencies in retained EU law. The Regulations will ensure that redundant legislation is removed and adjust legislation which is being retained so that it continues to operate effectively. The regulations also make minor technical adjustments to domestic legislation relating to other EU measures to reflect 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 Cabinet Secretary for Justice has made the following statement “In my view The Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 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 Cabinet Secretary for Justice has made the following statement “In my view The Criminal Justice (EU Exit) (Scotland) (Amendment etc.) Regulations 2020 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

Low significance. These amendments relate to a number of reciprocal measures which will cease to apply to the UK. The amendments address the domestic legislation associated with

these measures and include transitional and saving provision in implementation of Part 3 of the withdrawal agreement. The regulations also make minor amendments to legislation implementing EU Directives to take account of EU Exit.

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

This Statement relates only to the exercise of the deficiencies powers (paragraphs 1(1) and (3) of Part 1 of schedule 2 of the EU (Withdrawal) Act 2018) in relation to which there is a choice of procedure in terms of paragraph 1(7) of schedule 7 of that Act.

The Regulations will remove and adjust redundant reciprocal arrangements in domestic legislation regarding the Framework Decisions which no longer apply to the UK and make technical amendments to allow retained legislation to operate in the context of EU Exit.

Although amendment is made to primary legislation, the amendments are mainly technical in nature to reflect that certain obligations no longer apply to the UK and make retained EU law work effectively in that context. It is therefore considered that negative procedure is appropriate.

Further information

Consultation

There is a requirement to consult the UK Secretary of State under paragraph 4 of schedule 2 of the EU (Withdrawal) Act 2018 as the Regulations relate to reciprocal arrangements with the EU and Part 8 comes into force before IP completion day. The Minister of State for Security has been consulted as required by the 2018 Act before the Regulations were made.

Informal consultation was also carried out with the Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunal Service.

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. There is expected to be no impact on business, charities or voluntary bodies.

Financial Effects

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

Scottish Government
Safer Communities Directorate
27/10/20