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Convener, Finance and Constitution Committee  
Scottish Parliament  
Edinburgh  
EH99 1SP

28 November 2018

Dear Bruce

## **PROTOCOL 1 TO THE EEA AGREEMENT (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, I wrote to you and the Convener of the Delegated Powers & Law Reform Committee 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 technical SI which the UK Government propose to make and the reasons why I am content to include Scottish devolved matters 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.



**MICHAEL RUSSELL**

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## NOTIFICATION TO THE SCOTTISH PARLIAMENT

### The Protocol 1 to the EEA Agreement (Amendment) (EU Exit) Regulations 2018

#### A brief explanation of law that the proposals amend

The proposed Regulations make limited technical legal amendments to Protocol 1 to the EEA Agreement<sup>1</sup>, by which EU law is currently applied to and in the EEA EFTA states.

EU law does not automatically apply to or in the EEA EFTA States; the EEA Joint Committee must actively approve EU made law first. Once the EEA Joint Committee has formally agreed to adopt an EU law, it then has to be incorporated into an Annex to the EEA Agreement (the EEA Annexes). Only then is that EU law applicable to and in the EEA EFTA States.

EU law is drafted in order to take effect in EU Member States and territories. To be understood in the context of the EEA EFTA States, EU law adopted by the EEA is subject to 'interpretative glosses' set out in Protocol 1. In this way, Protocol 1 sets out how EU law incorporated into the EEA Annexes applies to and in the EEA, e.g. Protocol 1 provides that references in EU law (which is listed in the EEA Annexes) to '*nationals of EU Member States*' are understood to include '*nationals of EEA EFTA States*'. Protocol 1 is necessary to avoid redrafting every piece of EU law incorporated into the EEA Annexes; instead, thanks to the interpretative glosses, they can be adopted in their originally drafted format.

Essentially, Protocol 1 means the EU law incorporated into the EEA Annexes applies in the same way to EEA EFTA States as it does to EU Member States, subject to specific adaptations in the EEA Annexes.

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

On exit day, Protocol 1 will become part of the body of domestic law known as 'retained direct EU legislation'. To make sure Protocol 1 functions properly after exit, the proposed Regulations would amend it to make clear Protocol 1 only applies to the EU law incorporated into the EEA Annexes that forms part of retained direct EU legislation; that any obligation owed to or any right conferred on EU Member States, their public entities, undertakings or individuals, is also owed to or conferred on EEA EFTA states, their competent authorities, public entities, undertakings or individuals; and that redundant provisions are removed.

The amendments to Protocol 1 clarify that Protocol 1, as it forms part of domestic law, only applies to the EU law, incorporated into the EEA Annexes, which forms part of 'retained direct EU legislation'. This means Protocol 1 will no longer impose obligations on or within EEA EFTA states, the Commission, EEA Surveillance Authority or Joint Committee - as retained direct EU legislation cannot enforce obligations on a third party outside of the UK.

When Protocol 1 is incorporated into domestic law, it will need amended to work properly. This instrument makes the following amendments:-

<sup>1</sup> [http://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols to the Agreement/protocol1.pdf](http://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol1.pdf)

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- Protocol 1 is amended so it only applies to the EU law in the EEA Annexes which forms part of retained direct EU legislation
- paragraphs 2, 3, 4, 5, 6 and 10 in Protocol 1 become redundant after the UK leaves the EU and are therefore removed:-
  - paragraph 2, which concerns how EU committee procedures should be dealt with in an EEA context, will have no legal effect and will be obsolete.
  - Paragraph 3 relates to the procedures the EEA should use to adapt or amend EU tertiary legislation. As retained direct EU legislation cannot apply to the EEA this paragraph will be obsolete.
  - Paragraphs 4, 5 and 6 place obligations on the EEA EFTA States, the Commission and the EFTA Surveillance Authority and Standing Committee. As retained direct EU legislation will not apply to the EEA EFTA States, the Commission, the EFTA Surveillance Authority or Standing Committee, these paragraphs will be obsolete.
  - Paragraph 10 relates to official languages. Provision is being made in a separate SI (the European Institutions, Privileges and Immunities (Amendment etc.) (EU Exit) Regulations 2018) for a general interpretative gloss so any reference in retained direct EU legislation to an official language of the EU is to be read as a reference to the English language. As such, this paragraph will be obsolete.
- Paragraph 7 is amended to make clear that if any obligation is owed to or any right conferred on EU Member States, their public entities, undertakings or individuals, the same obligation is owed or right is conferred on EEA EFTA states, their competent authorities, public entities, undertakings or individuals.
- Paragraphs 1, 8 and 9 are amended to make provision for the fact that, after exit, the EEA Agreement itself will not form part of retained direct EU legislation.

### **An explanation of why the change is considered necessary**

The UK is a party to the EEA Agreement in its capacity as an EU Member State. Therefore, when the UK leaves the EU, the EEA Agreement will cease to operate in respect of the UK.

Section 3 of the European Union (Withdrawal) Act 2018 incorporates direct EU law, so far as operable immediately before exit day, into domestic law on exit day. This new body of law is called 'retained direct EU legislation'. The intention of the 2018 Act is to retain (with limited exceptions) direct EU law so that, post-exit, the UK legislatures will be able to decide which elements of that legislation to keep, amend or repeal.

Specifically, section 3(2)(c) and (2)(b) of the 2018 Act contains a specific provision to incorporate Protocol 1 of and the Annexes to the EEA Agreement ("the EEA Annexes") into domestic law. As such, on exit day, Protocol 1 and the EEA Annexes will also become part of retained direct EU legislation.

On exit day, to ensure that the statute book functions coherently and effectively, using the power at section 8(1) of the 2018 Act, these regulations will make a number of amendments

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to Protocol 1 to make clear that it only applies to the EU law, incorporated into the EEA Annexes, which forms part of retained direct EU legislation; and that any obligation owed to or right conferred on EU Member States, their public entities, undertakings or individuals, is also owed or conferred on EEA EFTA states, their competent authorities, public entities, undertakings or individuals. For reasons of clarity, certain redundant provisions are also removed.

As with all retained direct EU legislation to be incorporated into the UK statute book, it is necessary to make sure that on exit day Protocol 1 continues to function properly. This SI makes provision in order that it will. In particular, it provides that any obligation owed to or right conferred on EU Member States, their public entities, undertakings or individuals, is also owed or conferred on EEA EFTA states, their competent authorities, public entities, undertakings or individuals. The retained direct EU legislation version of Protocol 1 will not impose obligations on EEA EFTA states, their competent authorities, public entities or individuals.

Redundant paragraphs in Protocol 1 are removed, e.g. Protocol 1 provides for review and reporting requirements for EEA EFTA states. On exit day these provisions will be obsolete since the UK will no longer be an EEA EFTA state and retained direct EU legislation cannot apply to the EEA EFTA states.

### **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.

### **Impact on devolved areas**

Protocol 1 includes an effect in some devolved areas.

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 still have to extend to Scotland so far as they concerned reserved areas.

We believe separate sets of regulations with provisions restricting the application of the Protocol between reserved or devolved matters would introduce unnecessary complexity in an already technical area.

### **Summary of stakeholder engagement/consultation**

No public consultation has been undertaken as the Regulations make only limited technical changes to legislation with no impact on businesses, charities or voluntary bodies. The Welsh Government have been consulted for their consent as have the Northern Irish Civil Service, as well as the Scottish Government.

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The Parliamentary Under-Secretary of State at the Department for Exiting the European Union, Chris Heaton-Harris MP wrote to the Cabinet Secretary for Government Business and Constitutional Relations seeking agreement from the Scottish Government to use the section 8 power in the EU (Withdrawal) Act 2018 to amend Protocol 1 to the EEA Agreement as it forms part of domestic law by virtue of section 3 of that Act.

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

An Impact Assessment has not been prepared for this instrument because this SI makes only limited technical legal amendments and removes redundant legislation.

There is no, or no significant, impact on business, charities or voluntary bodies. There is no, or no significant, impact on the public sector.

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

As noted, Protocol 1 relates to some devolved matters. DEXEU 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 individuals.

Working with the UK Government takes 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 regulations make limited technical legal amendments to ensure that Protocol 1, as it forms part of domestic law, functions effectively following the UK's exit from the EU. These Regulations do not change any of the rights conferred on or obligations imposed, in the UK, in relation to EEA EFTA states, their competent authorities, public entities, undertakings or individuals.

DEXEU have consulted with the Devolved Administrations and addressed concerns raised by requesting the consent of the Scottish Parliament. We 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**

The UK SI is intended to be laid by 10 December 2018 and to be laid by UK Ministers for sifting shortly.

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

A further draft of the SI was provided by DEXEU on 25 November 2018. UK Ministers wish to proceed with their original timetable linked to a number of other related technical SIs. Given the technical nature of these proposals, and the timescales UK Ministers wish to proceed on, we considered it best to notify as soon as possible.

### **Information about any time dependency associated with the proposal**

n/a

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

n/a

**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.

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