EXPLANATORY MEMORANDUM TO

THE CHALLENGES TO VALIDITY OF EU INSTRUMENTS (EU EXIT) REGULATIONS 2019

2019 No. 673

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Exiting the European Union and is laid before Parliament by Act.

2. Purpose of the instrument

2.1 On exit day, the EU Withdrawal Act makes clear that there will be no right in domestic law on or after exit day to challenge any retained EU law on the basis that, immediately before exit day, an EU instrument was invalid[1]. After exit, rulings of the CJEU will no longer be binding on UK courts and so any declaration of invalidity after exit will not affect the validity of retained EU law. However, there may be instances where a UK court is waiting for a ruling on validity from the CJEU, or cases begun before exit where a ruling on validity would usually have been sought. Therefore, this instrument makes transitional provision so that where cases have begun in UK courts before the UK's exit from the EU, and where those cases require a judgment on the validity of EU law, judges in the UK courts are able to rule on the validity EU law.

Explanations

What did any relevant EU law do before exit day?

2.2 Validity challenges are legal challenges that can be brought before the CJEU by any legal or natural person to challenge the legality of acts of the institutions, bodies, offices or agencies of the European Union. The EU Withdrawal Act, without this statutory instrument, would mean that no challenge to the validity of EU law could be heard by a UK court after exit.

2.3 There are a variety of reasons why EU laws can be declared invalid by the CJEU. The grounds for invalidity are set out in Article 263 of the Treaty of the Functioning of the European Union (TFEU)[2]. The grounds for invalidity of an EU instrument include lack of competence (e.g. the EU does not have the legal power to act in that area); infringement of an essential procedural requirement; infringement of the Treaties or of any rule of law relating to their application; and, misuse of powers.

2.4 Article 264 of the TFEU[3] states that if the CJEU finds that the institutions have acted in violation of any of grounds listed above, the CJEU shall declare the legislation in question to be invalid and void the legislation. In such instances, it is as if the law in question never existed.

2.5 Currently, where the validity of an EU instrument is raised in domestic cases, domestic courts must refer the question to the CJEU. The CJEU has exclusive

[1] http://www.legislation.gov.uk/ukpga/2018/16/schedule/1/enacted
[2] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E263:EN:HTML
[3] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E264:EN:HTML

competence in this area; domestic courts cannot provide rulings on the validity of EU instruments. The CJEU considers questions put forward by domestic courts and then provides a ruling on validity.

2.6 The specific validity question being considered by the CJEU may form only a small part of the original claim in the domestic court. However, when the domestic court recognises that a question of validity is material to the outcome of the case, it is necessary to refer a question to the CJEU to determine whether or not the legal instrument in question is, in fact, valid in order to make a ruling.

Why is it being changed?

2.7 Paragraph 1 of Schedule 1 of the EU (Withdrawal) Act 2018 provides that, after the UK's departure from the EU, there will be no right in domestic law to challenge retained EU law on the basis that, immediately before exit day, an EU instrument was invalid. This reflects the fact that domestic courts have never been able to find EU law invalid.

2.8 This means that after exit, it will not be possible to challenge retained EU law on the basis that the EU law from which it derived was invalid immediately before exit. Consequently, if after exit the CJEU declares an EU law to be invalid and disapplies it across the EU27, the retained domestic version of that EU law would remain on the UK statute book.

2.9 In and of itself, this effect of the EUWA is not problematic - it is consistent with the approach taken throughout the Act, namely to take a snapshot of EU law as it stands on exit day. Afterwards it would be for Parliament to decide whether and how to diverge. The government recognised, at the time of passing the Act, that there might be specific circumstances in which this general approach might lead to situations in which some unfairness might arise[4].

2.10 For this reason the Government included in the EUWA a power to allow ministers to authorise certain cases to challenge validity of retained EU law at Schedule 1 subparagraph (2)(b) of the EUWA. The Government has concluded, following some consultation, that the power needs to be exercised to address the position of pending cases. These are cases where on exit day, a validity question has already been referred by a domestic court to the CJEU.

2.11 If there are pending cases at exit and no further regulations are made, in a 'no deal' scenario those cases will have to be decided without any ruling on validity that may mean they cannot proceed at all. Even if the CJEU were to provide a ruling on validity in pending cases, such a ruling would have no effect in the UK after exit; any rulings on validity from the CJEU will not be binding in or on the UK after exit.

2.12 Without further regulations, this would leave UK courts in a scenario where they might be unable to proceed with a ruling on a domestic case in the absence of a ruling on the validity of an EU instrument; the judgment of the CJEU would not be binding or applicable in the UK and no court in the UK would have the necessary jurisdiction in place of the CJEU to be able to provide a ruling on validity.

2.13 Clearly, this is a scenario that should be avoided. It would be highly detrimental and damaging for pending cases to be left unresolved without a mechanism in place to

[4] ECHR memo published by DExEU

deliver the necessary judgment on the validity of an EU instrument. This would be a clear impediment to the effective delivery of justice.

2.14 The Government also recognises that cases may have begun in UK courts before exit where a ruling on validity would have been ordinarily been sought. Where such rulings would have ordinarily been made, UK courts will not be able to make a reference to the CJEU as a result of the EU Withdrawal Act, but a ruling on validity may remain necessary none the less.

2.15 Without further regulations, no court in the UK would have the jurisdiction to consider the validity of an EU instrument and, as with pending cases, courts may find themselves at an impasse where a ruling on validity is not available – either domestically or from the CJEU – therefore, preventing the effective delivery of justice.

2.16 These regulations are intended to make provision to avoid both scenarios.

What will it now do?

2.17 These provisions will give UK courts the ability to provide rulings on validity both in pending cases and any domestic cases begun before exit.

2.18 Where a domestic court has already lodged a validity challenge with the CJEU, it will no longer have to wait for the CJEU's judgment. UK courts will be given the jurisdiction, in these cases, to make a ruling on validity.

2.19 If the CJEU does proceed to a judgment on the case, UK courts may take into account its judgment, but the court will not be bound by it. This gives UK courts the discretion to wait for a judgment from the CJEU, but does not mandate them to do so. It also gives UK courts the discretion to proceed directly to a ruling on validity without regard to the CJEU process should they deem it sensible to do so.

2.20 Where a case has begun before exit in the UK courts, and where a court in that case would ordinarily have sought a ruling on validity from the CJEU, the court will have the jurisdiction after exit to make a ruling on validity without making a reference.

2.21 In both instances, if a UK Court rules that an EU law was made invalidly as per the grounds set out in the TFEU on the day of exit (listed at section 2.4 of this document), then the EU law in question will be deemed to have been invalid immediately before exit day and will, therefore, not be part of retained EU law. That is to say, it will not have migrated onto the UK statute book on exit day.

2.22 Domestic courts would be obliged to give notice to a Minister of the Crown before they issued any ruling on validity. As with declarations of incompatibility in human rights cases, this notice must be served to all parties in the case. This instrument will also mean that, in any case concerning validity, any Minister of the Crown (or any person appointed by a Minister of the Crown), a Scottish Minister, a Northern Ireland Department or a Welsh Minister has the right to become joined as party to the proceedings.

2.23 In effect, UK courts will have a new, time-limited jurisdiction to make rulings on validity. This jurisdiction will exist only to ensure pending cases can be successfully concluded and to provide transitional protection for cases begun before exit day, but where a ruling on validity may be required.

2.24 The jurisdiction will end once all pending cases have been concluded and once the last domestic case begun before exit day ceases.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this includes Scotland and Northern Ireland.

3.3 The powers under which this instrument is made cover the entire United Kingdom (see paragraph 1(2) of Schedule 1 to the EUWA 2018[5]) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 The Parliamentary Under-Secretary of State at the Department for Exiting the European Union, Mr Chris Heaton-Harris MP, has made the following statement regarding Human Rights:

"In my view the provisions of The Challenges to Validity of EU Instruments (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 On 23 June 2016, the EU referendum took place and the people of the UK voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU law.

6.2 However, following the UK's exit from the EU, the supremacy of EU law will only apply to pre-exit domestic law. Section 5 of the EU Withdrawal Act (EUWA) provides that post exit domestic law will not be subject to the supremacy of EU law.

6.3 Validity challenges are enshrined in EU law as set out in Section 2.2 – 2.6 of this explanatory memorandum. When the EUWA was passed by Parliament, explicit provision was made specifying that after exit, validity challenges could not be brought in a domestic court. In essence, the EUWA makes clear that challenges to validity will no longer be a route of challenge available in the UK once the UK has left the EU.

6.4 Validity challenges are specifically referenced in the EUWA at paragraph 1 of Schedule 1. The EUWA states that '*after on or after exit day, there is no right in domestic law to challenge a retained EU law on the basis that, immediately before exit day, an EU instrument was invalid*'.

[5] http://www.legislation.gov.uk/ukpga/2018/16/schedule/1/enacted

6.5 As made clear in paragraph 1(2)(a) of Schedule 1 to the EUWA, the provisions of the Act will not affect any decisions made by the CJEU prior to exit day regarding validity. This means that any instrument found to be invalid before exit day, will not become part of retained EU law as it was not valid on exit day. Only valid law on exit day will become part of the new body of law know as retained EU law (REUL).

6.6 Further to this, once the UK has left EU, any CJEU declaration of invalidity will have no effect in the UK as CJEU judgments will not be binding in or on the UK. It would be impossible, therefore, to bring a challenge to retained EU law on that basis. This is made clear in the EUWA in Sections 6(1) and (3)[6]. Section 6 (1) makes clear that no court in the United Kingdom will be bound by CJEU decisions and section 6(3) goes on to clarify that when considering the validity of retained EU law, domestic courts can only look at pre-exit CJEU case law.

6.7 Paragraph 1(2)(b) of Schedule 1 to the EUWA sets out a power for a Minister of the Crown to describe in regulations, challenges which are exceptions to the general rule in paragraph 1(1). This instrument uses that power to describe those cases that the Government believes should be exceptions from this general rule. As set out in Section 2.1 of this explanatory memorandum, those are cases begun before exit where a UK court is waiting for a ruling on validity from the CJEU, or on-going cases where a ruling on validity would usually have been sought.

6.8 This is the first time this specific power will be used. It was included in the EU Withdrawal Act in recognition of the fact that, as in other policy areas, transitional arrangements might need to be in place to prevent sudden, unmanageable changes to court proceedings on exit day.

6.9 This is precisely the scenario that the exercise of this power will manage. It will mean that for those cases begun before exit, where rulings on validity have already been sought, or would ordinarily have been sought, these cases can continue in domestic courts and that domestic judges will have the necessary powers to provide rulings on validity.

7. Policy background

What is being done and why?

7.1 In producing the EUWA, the Government concluded that that the specific mechanism by which it is currently possible to challenge the validity of EU law, on which decisions can only be made by EU courts, could not and should not be replicated in domestic courts after exit from the EU. This is because the Government considered that as we leave the EU it would not be appropriate to create for our domestic courts an entirely new jurisdiction in which they are required to, in effect, step into the shoes of the CJEU and consider, for example, questions around whether the relevant EU institution misused its powers or complied with the applicable procedural requirements when making the instrument.

7.2 Nevertheless, the Government recognised that in some circumstances individuals or businesses may be affected by an EU instrument and that paragraph 1(1) of Schedule 1 would prevent them from challenging the validity of the converted version of the decision that forms part of UK law after our exit from the EU. Recognising this to be the case, the EUWA therefore included a power in paragraph 1(2)(b) of Schedule 1 to

[6] http://www.legislation.gov.uk/ukpga/2018/16/section/6

enable Ministers to make regulations allowing challenges to the validity of retained EU law in certain specific circumstances.

7.3 The Department for Exiting the European Union recognises that there should be two exceptions to this rule to ensure the continued effective delivery of justice once the UK leaves the European Union.

7.4 The first exception relates to those domestic cases where domestic courts have already submitted a validity challenges to the CJEU and where a domestic court is awaiting a response for the CJEU on exit day. Domestic judges cannot rule on validity; this is the sole jurisdiction of CJEU judges. Where a ruling in a domestic case hinges on the validity or otherwise of an EU law, the judge in a domestic court must refer this question to the CJEU.

7.5 Without the creation of this SI allowing domestic courts to rule on validity, these cases would be 'stuck'. Judges in such cases would find that they are unable to proceed given that an answer from the CJEU might never come and even if it did, after exit, this judgment would not be binding.

7.6 At the time of submitting this explanatory memorandum (xx February 2019), publicly available data published on the CJEU website shows that there are only two pending cases relating on questions of validity[7]. If, by exit day, these two cases are still pending, domestic courts will be empowered to make rulings on the questions of validity that they have already sent to the CJEU.

7.7 We have made the regulations as flexible as possible in that judges will be free as to how they manage these cases. Although they may wish to proceed without a ruling from the CJEU, they may also choose to wait for a judgment from the CJEU. If the CJEU does issues a judgment, that judgment will not be binding; domestic judges will be able to take account of the judgment but will not be obliged to follow the CJEU. We have drafted the regulations this way to make sure that, as with other areas, the judiciary is given flexibility as to whether to take into account CJEU rulings, but does not bind them to CJEU rulings.

7.8 The second exception to the general prohibition on validity challenges relates to cases that have begun in domestic courts before exit day, where a ruling on validity would usually have been sought by the CJEU. In those cases, parties to those cases would have expected that as and when questions on the validity of EU law arise, such questions would have ordinarily been lodged at the CJEU. So that parties in cases begun before exit are not abruptly deprived of the ability to have these questions heard as a result of the UK's exit, these regulations give domestic judges the power to rule on validity in these cases, too.

7.9 It is not possible to know precisely how many such cases there will be. Of course, it is also entirely possible that UK courts may submit more questions on validity to the CJEU before exit day. However, historical data suggests that this is likely to be less than a handful, if any at all. Since 2015, UK courts have submitted only 11 cases in total.

7.10 It is important to note that these regulations will do nothing to modify either the frequency of validity challenges, or the courts where such cases are currently heard. The only change that will result from the making of this SI is that in the courts where

[7] https://bit.ly/2sV23KG

judges already consider such questions, rather than make a reference to the CJEU with the relevant question, the judges in that domestic court will be empowered to provide a binding judgment on the validity of that instrument.

7.11 In recognition of the fact that validity questions may touch upon points of law where UK government ministers, Scottish Ministers, a Northern Ireland department, or Welsh Ministers may have an interest in the outcome of a case, the regulations permit them to become a party to any validity case, at their own volition and without any formal requirement. This is so that necessary representations can be made in cases concerning validity where the government, or Devolved Administrations, have an interest in the outcome of the case.

7.12 It is also important that UK government ministers, Scottish Ministers, a Northern Ireland department, or Welsh Ministers are kept informed of instances where a court is planning on issuing a declaration of invalidity. Notification to government is important so that preparations can be made, if need be, to mitigate any negative impacts that result from a declaration of invalidity. These regulations, therefore, make it a requirement that a court must issue a notification to a UK government minister, a Scottish Minister, a Northern Ireland department and a Welsh Minister.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is not being made to address a deficiency in retained EU law but relates to the withdrawal of the United Kingdom from the European Union because it is being made under the powers at paragraph 1(2)(b) of Schedule 1 to the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 This instrument is not consolidating any other provisions.

10. Consultation outcome

10.1 The Department for Exiting the European Union wrote to interested stakeholders when developing its proposals on validity challenges after exit in the form of a discussion paper. Given the parliamentary time constraints before exit, a full public consultation would not have been possible, and given the limited number of people likely to be directly affected it was also judged to be disproportionate. Instead, the Department considered that targeted discussion with relevant stakeholders would best inform policy development.

10.2 In light of these considerations, a discussion paper was sent to key stakeholders on November 7, 2018 that set out the Government's initial proposals. It was sent to: the Law Society of England and Wales, the Law Society of Scotland, the Law Society of Northern Ireland, the Society of Solicitor Advocates, Scotland, the Bar Council, the Bar of Northern Ireland, the Ministry of Justice Brexit Law Committee, as well as the Devolved Administrations in Wales, Scotland and Northern Ireland.

10.3 The proposals in this discussion paper made clear the department's clear intention by stating: '*We propose to make a transitional provision that provides that the general inability of UK courts to decide issues of validity does not apply in relation to proceedings which have begun in the UK courts before exit day but are not yet decided. This includes both cases where a preliminary reference has already been*

lodged with the CJEU or those where, had the UK remained a member of the EU, a domestic court would have made such a reference on grounds of a validity question.'

10.4 The department invited views on the proposals including whether the proposals were considered proportionate, if there were any particular issues regarding workability or practicability of the proposals, what the impacts on justice might be, whether the proposals could be improved or whether the government should consider new proposals altogether. The discussion paper invited responses over a period of 3 weeks.

10.5 Very few of the recipients of the paper provided a response. The department did however receive a response from the House of Lords Constitution Committee. This response sought to understand whether the proposed regulations might go further in considering a mechanism to take into consideration future declarations of invalidity by the CJEU. In response, the department made clear that declarations of invalidity made by the CJEU after the UK has left the European Union can have no direct effect on the validity of retained domestic EU law by virtue of sections 6 (1) and (3) of the EU Withdrawal Act. Indeed, the intention of the Withdrawal Act was that the jurisdiction of the CJEU in and on the UK will end and that it is consistent with the government's approach that the EUWA should take a snapshot of EU law as it stands on exit day, and that afterwards it will be for Parliament to decide whether and how to diverge.

10.6 The department also continued to work with the Ministry of Justice on the proposals. Work with the Ministry of Justice prompted the department to include a mechanism by which a UK government Minister, Scottish Ministers, a Northern Ireland department, or Welsh Ministers could become party to any case concerning validity in recognition of the fact that they may have an interest in the outcome of any such cases. Work with the Ministry of Justice also prompted the department to include a mechanism so that a Minister of the Crown should be notified in instances where domestic courts plans to issue a declaration of invalidity.

10.7 Mr Chris Heaton-Harris, MP, Parliamentary Under-Secretary of State for Leaving the European Union, wrote to Mr Michael Russell, MSP, Cabinet Secretary for Government Business and Constitutional Relations in the Scottish Government and Mr Jeremy Miles, AM, Counsel General and Minister for EU Exit in the Welsh Government regarding these finalised proposals and invited any final comment ahead of laying the regulations. Mr Michael Russell, MSP, Cabinet Secretary for Government Business and Constitutional Relations in the Scottish Government, issued a formal response requesting that in instances where Courts are planning to issue declarations of invalidity, that Scottish Government Ministers are also notified when judges are exercising jurisdiction in relation to matters within the legislative competence of the Scottish Parliament.

10.8 The Government accepted this request, and considered that the same argument also arose in relation to the administrations in Wales and Northern Ireland. In response to this suggestion from the Scottish Government, therefore, the Department altered the final regulations to ensure where judges are exercising power under this new jurisdiction, they must also inform Scottish Ministers, a Northern Ireland department, or Welsh Ministers, as well as UK Ministers. We formally notified officials in the Devolved Administrations of this change on January 31st 2019.

10.9 Mr Mark Drakeford, AM, the First Minister of Wales also issued a formal response on February 4th stating that the Welsh Government was content with the proposed

approach and had no objections to the SI. They also noted in their letter that central government officials had worked productively with official in the Welsh Government on this SI.

11. Guidance

11.1 No guidance is required, as the Regulations do not change any existing legislation that impacts on business, charities or voluntary bodies.

11.2 The regulations may require amendments to be made to the Civil procedure rules. If such amendments are needed, these will be made at the discretion of the Judiciary in each of the jurisdictions of the UK.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the Regulations do not change any existing legislation that impacts on business, charities or voluntary bodies.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Andrew Quigley at the Department for Exiting the European Union, email: andrew.quigley@dexeu.gov.uk can be contacted with any queries regarding the instrument.

15.2 James Gerard, Deputy Director for Parliamentary Team, at the Department for Exiting the European Union can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Parliamentary Under-Secretary of State, Mr Chris Heaton-Harris MP, at the Department for Exiting the European Union can confirm that this Explanatory Memorandum meets the required standard.