

EXPLANATORY MEMORANDUM TO
THE CHALLENGES TO VALIDITY OF EU INSTRUMENTS (AMENDMENT) (EU
EXIT) REGULATIONS 2020

2020 No. 1503

1. Introduction

1.1 This explanatory memorandum has been prepared by the Cabinet Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to ensure that the Challenges to Validity of EU Instruments (EU Exit) Regulations 2019 (SI 2019/673)¹ (“the 2019 SI”) that was made before the enactment of the European Union (Withdrawal Agreement) Act 2020 (“WAA”) works coherently and effectively following the end of the Transition Period.

2.2 The 2019 SI was made under the European Union (Withdrawal) Act 2018 (“EUWA”) before it was known whether there would be a Withdrawal Agreement between the UK and the EU. The Withdrawal Agreement was implemented by WAA. As a result of WAA, the commencement of EU-exit SIs that had already been made was delayed until IP completion day².

2.3 Whilst the commencement of the 2019 SI was delayed to IP completion day, the related provisions of the 2019 SI need to be updated and tidied to reflect the legal changes that have already been made by WAA. Therefore, this SI amends references from “exit day” to “IP completion day” in the 2019 SI to ensure it operates effectively and in accordance with the agreed policy.

Explanations

What did any relevant EU law do before exit day?

2.4 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.

2.5 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)³. 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.

2.6 Article 264 of the TFEU⁴ states that if the CJEU finds that the institutions have acted in violation of any of the grounds listed above, the CJEU shall declare the legislation

¹ <https://www.legislation.gov.uk/ukxi/2019/673/contents/made>

² <https://www.legislation.gov.uk/ukpga/2020/1/schedule/5/enacted>

³ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E263:EN:HTML>

⁴ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E264:EN:HTML>

in question to be invalid and void the legislation. In such instances, it is as if the law in question never existed.

- 2.7 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 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.
- 2.8 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?

- 2.9 EUWA contains a restriction setting out 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 invalid⁵. After exit, rulings of the CJEU will generally 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, the Government recognised at the time of passing EUWA that 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. For this reason the Government included in EUWA a power to allow ministers to authorise the validity of retained EU law to be challenged in certain cases.
- 2.10 Following consultation, the 2019 SI was made to create 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 would be able to rule on the validity EU law.
- 2.11 The WAA contained a number of important provisions that affect the operation of the 2019 SI:

WAA amended EUWA so that:

- a. Retained EU law comes into effect on IP completion day, not exit day; and
- b. The restriction on the right to challenge retained EU law (contained in paragraph 1 of Schedule 1 EUWA⁶) only applies from IP completion day, not exit day.

WAA deferred the commencement of EU-exit SIs to IP completion day (paragraph 1 of Schedule 5 to the WAA⁷)

What will it now do?

- 2.12 This instrument updates the provisions of the 2019 SI to reflect the legal changes to the 2019 SI that have already been made (i.e. the delayed commencement of the 2019 SI to IP completion day). This is achieved by updating references from “exit day” to “IP completion day”.

⁵ <https://www.legislation.gov.uk/ukpga/2018/16/schedule/1/enacted>

⁶ <https://www.legislation.gov.uk/ukpga/2018/16/schedule/1/enacted>

⁷ <https://www.legislation.gov.uk/ukpga/2020/1/schedule/5/enacted>

- 2.13 The amendments made by this instrument to the 2019 SI ensure that the original policy applies, albeit by reference to IP completion day instead of exit day.

3. Matters of special interest to Parliament

- 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 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

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

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 To ensure that the domestic legal system continues to function correctly outside of the EU, EUWA converts and saves particular elements of EU law as it stands at the moment of exit into domestic law before the UK leaves the EU and preserves law made in the UK to implement EU obligations. In doing so, EUWA creates a new body of domestic law, known as “retained EU law”.
- 6.2 EUWA contains a restriction setting out 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. However, the Government recognised that 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 the 2019 SI was made to make 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 validity of EU law, judges in the UK courts are able to rule on the validity of EU law.
- 6.3 The 2019 SI was made at a time when it was not clear if the UK would exit the EU with a Withdrawal Agreement. The UK and the EU have since agreed a Withdrawal Agreement which was implemented the WAA and came into force on 31 January 2020 at 11pm (“exit day”).
- 6.4 Under the contains a restriction setting out 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. However, the Government recognised that 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 the 2019 SI was made to make 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 validity of EU law, judges in the UK courts are able to rule on the validity of EU law.

6.5 As outlined above, the WAA contained a number of important provisions that affect the operation of the 2019 SI, including deferring its commencement to IP Completion Day.

7. Policy background

What is being done and why?

7.1 This SI does not make any policy changes.

7.2 Policy changes were implemented in the 2019 SI. This SI makes technical amendments necessary to allow the policy set out in the 2019 SI to work as originally intended, by fixing an anomaly in the law created by the WAA.

7.3 Therefore this SI brings the 2019 SI back to its original policy intention.

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 under Section 41(1) of the European Union (Withdrawal Agreement) Act 2020.

9. Consolidation

9.1 This instrument is not consolidating any provisions.

10. Consultation outcome

10.1 No public consultation was required as the SI makes limited technical changes to existing secondary legislation with no impact on businesses, charities or voluntary bodies.

11. Guidance

11.1 Guidance is not being provided in relation to this instrument.

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 we expect it to have no impact on businesses.

13. Regulating small business

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

14. Monitoring & review

14.1 No specific monitoring arrangements are needed.

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

15. Contact

- 15.1 The Transition Taskforce at the Cabinet Office, email: tff-legislation@cabinetoffice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Marianne Ainsworth-Smith, Deputy Director for Parliamentary Engagement and Legislation within the Transition Taskforce, at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Paymaster General, Penny Mordaunt MP, at the Cabinet Office can confirm that this Explanatory Memorandum meets the required standard.