

EXPLANATORY MEMORANDUM TO
THE CONSUMER PROTECTION (ENFORCEMENT) (AMENDMENT ETC.) (EU
EXIT) REGULATIONS 2018

2018 No. [XXXX]

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by The Department for Business, Energy and Industrial Strategy and is laid before Parliament by Act.
- 1.2 This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument:
 - a) revokes Regulation (EC) No 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws¹ (“**the CPC Regulation**”); and
 - b) amends Part 8 (enforcement of certain consumer legislation) of the Enterprise Act 2002 (“**the 2002 Act**”) and Schedule 5 (investigatory powers etc.) to the Consumer Rights Act 2015 (“**the 2015 Act**”).

Explanations

What did any relevant EU law do before exit day?

- 2.2 The CPC Regulation establishes a set of reciprocal arrangements for EU Member States to cooperate with each other in the cross-border investigation of and enforcement against infringements of various EU consumer laws, where the collective interests of consumers is being harmed. These laws are specified in an annex to the CPC Regulation.
- 2.3 Part 8 of the 2002 Act, in part, implements Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests² (“**the Injunctions Directive**”) and provides the enforcement mechanisms in the UK for the CPC Regulation. Part 8 allows various categories of enforcement body to apply to court for an enforcement order in the case of breaches of certain domestic and EU laws harming the collective interests of consumers.
- 2.4 In particular, under Part 8 of the 2002 Act:
 - a) pursuant to the CPC Regulation, various UK bodies (known as CPC enforcers) may apply for enforcement orders in the case of breaches of various specified EU consumer laws (Community infringements);
 - b) pursuant to the Injunctions Directive, certain bodies in other EU Member States (Community enforcers) may also apply for enforcement orders in the case of Community infringements – UK bodies have the right to pursue equivalent enforcement actions in other EU Member States.

¹ OJ L 364, 09.12.2004, p.1.

² OJ L 110, 01.05.2009, p. 30.

Schedule 5 to the 2015 Act provides various categories of enforcers, including CPC enforcers (referred to as “EU enforcers” in the 2015 Act), with investigatory powers that can be used in the context of actual or potential 2002 Act proceedings.

Why is it being changed?

- 2.5 The changes are made because, once the United Kingdom ceases to be a Member State, it will cease to benefit from the reciprocal arrangements in the CPC Regulation and the Injunctions Directive. It is therefore not considered appropriate for remaining EU Member States to benefit from those arrangements in the UK.
- 2.6 In addition, the instrument makes changes to the 2002 Act and the 2015 Act to allow them to function effectively after EU exit including by changing EU references which are no longer appropriate.

What will it now do?

- 2.7 The CPC regulation is revoked, from EU exit, in its entirety.
- 2.8 Part 8 of the 2002 Act is amended and the changes in particular:
 - a) recognising that the Injunctions Directive no longer applies to the UK, remove the rights of Community enforcers to bring or continue enforcement proceedings within the UK under that Part and the statutory power for UK enforcers to bring proceedings in EU Member States.
 - b) otherwise allow Part 8 to function effectively within the UK after EU exit. To that end Schedule 13 to the 2002 Act will be replaced so that the current CPC enforcers, which become “Schedule 13 enforcers”, can continue to apply for enforcement orders in the case of infringements of the specified retained EU law, breach of which currently constitutes a Community infringement. After exit, infringement of that legislation will be referred to as a “Schedule 13 infringement”.
- 2.9 Equivalent amendments are made to Schedule 5 to the 2015 Act.
- 2.10 In addition, there are consequential amendments to the Data Protection Act 2018 and the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions Order 2003).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Department has decided to lay this instrument for approval by resolution of each House of Parliament under paragraph 1(3) of Schedule 7 to the European Union (Withdrawal) Act 2018. This decision has been made further to the recommendations of the Sifting Committees before which a draft of this instruments was laid on 10 October 2018.
- 3.2 The Secondary Legislation Scrutiny Committee of the House of Lords published the following recommendation on GOV.UK on 24 October 2018.

“Given that cross-border protections for UK consumers, in cases where their collective interest is being harmed, would be reduced considerably in a “no deal” scenario or in any agreement with the EU that does not achieve reciprocity, the House

may expect the opportunity to debate this instrument. We therefore recommend that this instrument should be subject to the affirmative resolution procedure.”

- 3.3 The European Statutory Instruments Committee of the House of Commons published the following recommendation on GOV.UK on 25 October 2018.

“The Committee therefore recommends that the appropriate procedure for the instrument is for a draft to be laid before, and approved by a resolution of, each House of Parliament before it is made (i.e. the affirmative procedure), on the ground that it is of political and legal importance.”

- 3.4 Consequently, the Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst, has agreed for this instrument to be made affirmative

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)

- 3.5 The territorial application of this instrument includes Wales, Scotland and Northern Ireland.

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 Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst, has made the following statement regarding Human Rights:

“In my view the provisions of The Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument is made in exercise of the powers in section 8 of the European Union (Withdrawal) Act 2018 to remedy deficiencies in retained EU law. These being, in particular, the cessation of reciprocal arrangements under the CPC Regulation and the Injunctions Directive and, in connection, the rights of Community enforcers to bring enforcement proceedings within the UK under Part 8 of the 2002 Act.

7. Policy background

What is being done and why?

The CPC Regulation

- 7.1 The reciprocal arrangements conferred by the CPC Regulation will cease to apply to the UK after EU exit. This is because the UK will no longer be a Member State. Consequently, this instrument repeals the CPC Regulation in full. This ensures that there are no unilateral obligations or rights conferred on or between EU Member States and/or the UK as this will no longer be appropriate after EU exit.

Part 8 of the 2002 Act

- 7.2 After EU exit, it will no longer be appropriate for Community enforcers in EU Member States to bring proceedings under Part 8 of the 2002 Act in a UK court, when

UK enforcers will no longer have equivalent rights in EU Member States. As a result, this instrument repeals the right of Community enforcers in EU Member States to bring (or continue) enforcement proceedings within the UK under that Part.

- 7.3 It is Government policy to ensure, as far as is practicable, that UK consumers are no worse off after EU exit than before. Consequently, this instrument amends Part 8 of the 2002 Act to ensure that UK enforcement bodies retain the same powers as they have now for investigating and addressing infringements of specified retained EU law after EU exit.
- 7.4 Specifically, this instrument ensures that, after exit, UK bodies which are currently CPC enforcers can continue to apply to the UK courts for enforcement orders relating to breaches of specified retained EU law, infringement of which currently constitutes a Community infringement.
- 7.5 The instrument modifies the terminology used in the 2002 Act to reflect these changes. The retained EU law, breach of which currently constitutes a Community infringement, will be set out in Schedule 13 to the 2002 Act. Infringements of that law will be known as “Schedule 13 infringements”. Bodies which are currently CPC enforcers will be known after exit as “Schedule 13 enforcers”.

Schedule 5 of the 2015 Act

- 7.6 This instrument makes changes to Schedule 5 of the 2015 Act which reflect those changes to Part 8 of the 2002 Act.
- 7.7 Specifically, these changes ensure that UK enforcers maintain the same investigatory powers relating to Schedule 13 infringements. However, UK enforcement bodies will no longer be able to use the powers in Part 5 of the 2015 Act in relation to infringements of the laws of EU Member States.

Other consequential changes

- 7.8 This instrument sets out transitional provisions for infringements that occurred, or are suspected to have occurred, before exit day.
- 7.9 Specifically, where, before exit day, CPC / Schedule 13 enforcers have begun court proceedings these may continue until the court determines the matter or it is settled. They may also use their powers under the 2002 and 2015 Acts after exit day in relation to any Community infringements occurring prior to exit.
- 7.10 Any proceedings brought by Community enforcers which are ongoing on or after exit day will cease although UK enforcers will (if they so choose) be able to seek enforcement orders in relation to the relevant infringements.
- 7.11 This instrument applies to the cross-border enforcement of consumer protections which is a transferred matter for Northern Ireland under the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With exit day approaching, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary

legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

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

8.1 This instrument is being made using the power in section 8 of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 There are no plans for consolidation.

10. Consultation outcome

10.1 As this instrument is drafted for a scenario where no agreement is reached between the UK and EU no formal public consultation was undertaken.

10.2 The Competition and Markets Authority was consulted as the UK Single Liaison Officer (the public authority in the UK designated as responsible for coordinating the application of the CPC Regulation within the UK) and a community enforcer. Discussions were also held with other relevant bodies such as the Consumer Protection Partnership.

10.3 The Devolved Administrations, Crown Dependencies and Gibraltar were also consulted and agreed that the action being undertaken is both necessary and proportionate.

11. Guidance

11.1 Guidance will be published in due course.

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 it does not represent a policy change for UK businesses that are compliant with retained EU consumer law. Compliant businesses will experience no change resulting from the changes this instrument brings into effect and will therefore face negligible direct cost. As this instrument has a net direct impact on business or civil society organisations of less than £5 million annually, it qualifies for the *de minimis* threshold and a full regulatory Impact Assessment is not required.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No steps have been taken to minimise the impact of the requirements on small businesses (employing up to 50 people), as no new requirements are being introduced.

The purpose of the instrument is simply to retain existing requirements where possible and ensure they are operable after EU exit.

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 Rachel Smith at the Department for Business, Energy and Industrial Strategy Telephone: 020 7215 1528 or email: Rachel.smith2@beis.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Sarah Mackintosh, Deputy Director for European Consumer Policy at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kelly Tolhurst, Minister for Small Business, Consumers and Corporate Responsibility, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

- 1.1 The Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2018 does no more than is appropriate”.

- 1.2 This is the case because the changes made by this instrument are limited to changes considered appropriate to deal with the deficiencies outlined in paragraph 1.2 and do not bring about a wider policy change or impose any new liabilities or obligations on any relevant persons.

2. Good reasons

- 2.1 The Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action.”

- 2.2 These are that this instrument addresses failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU outlined in paragraph 1.2. The changes made by this instrument are considered appropriate as explained in paragraph 2.2 and in section 2 and 7 of this Explanatory Memorandum. The Department has therefore concluded that the making of this instrument constitutes a reasonable course of action.

3. Equalities

- 3.1 The Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst, has made the following statement(s):

“The draft instrument 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.

- 3.2 The Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, The Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst, 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.”

4. Explanations

- 4.1 The explanations statement has been made in section 2 of the main body of this Explanatory Memorandum.