

EXPLANATORY MEMORANDUM TO
THE EUROPEAN COMMUNITIES (DESIGNATION) (No.2) ORDER 2008

2008 No. 1792

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

2. Description

2.1 This Order designates the Secretary of State so that the Secretary of State may exercise the powers conferred by section 2(2) of the European Communities Act 1972 (“section 2(2)”) in relation to private international law. It also designates the Treasury so that it may exercise the powers conferred by section 2(2) in relation to payment services. The Order also designates the Welsh Ministers so that they may exercise the powers conferred by section 2(2) in relation to the veterinary and phytosanitary fields for the protection of public health.

2.2 This Order revokes two existing designations which have now been superseded by the new designations of the Secretary of State and the Welsh Ministers.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None.

4. Legislative Background

4.1 Section 2(2) confers a power which may be exercised by a designated Minister or government department, or by the devolved administrations of Wales or Northern Ireland.

4.2 A designated Minister, government department or devolved administration can then make provision by order, rules, regulations, or scheme for the purpose of enabling a Community right to be exercised or implementing a Community obligation (or to deal with matters arising out of or related to any such obligation) in relation to the subject matter of the designation.

4.3 The Welsh Ministers may be designated for the purposes of section 2(2) by virtue of section 59(1) of the Government of Wales Act 2006.

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (“Rome II”)

4.4 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations

(“Rome II”)¹ establishes uniform choice of law rules in the field of non-contractual obligations, principally in the context of proceedings in tort or delict.

- 4.5 Rome II will take effect from 11 January 2009.
- 4.6 Rome II applies to conflicts as between the laws of Member States and to conflicts between the laws of Member States and the laws of third countries. Conflicts between the laws within a single Member State are, however, expressly excluded from its scope.
- 4.7 In accordance with Article 249 of the EC Treaty, Rome II will be directly applicable in UK law. Any provisions of UK law which are inconsistent with, or duplicate, Rome II must, therefore, be disapplied, repealed or amended.
- 4.8 Part III of the Private International Law (Miscellaneous Provisions) Act 1995² makes provision in the UK as to conflicts in the law of tort. At present, however, it makes no distinction between ‘inter-State’ conflicts of law arising as between the law of the UK and that of another Member State or a third country and ‘intra-UK’ conflicts arising between the laws applicable within the three UK jurisdictions (England and Wales, Scotland and Northern Ireland) or the laws of Gibraltar.

Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market (“the Directive”)

- 4.9 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market (“the Directive”)³ introduces a new, Community-wide licensing regime for payment service providers other than credit and e-money institutions. The Directive will allow such payment institutions to offer their services across the Community on the basis of a licence obtained in one of the Member States. Amongst other things, the Directive also introduces conduct of business rules for all payment service providers (including credit institutions, e-money institutions and payment institutions.)
- 4.10 The Treasury submitted an explanatory memorandum to Parliament, dated 10 January 2006, on the legislative proposal for the Payment Services Directive (doc. 15625/05). The House of Commons Select Committee on European Scrutiny reported on the draft Directive in reports 16 (2005-06), para 8 (25 January 2006), 32 (2005-06), para 6 (21 June 2006) and 4 (2006-07), para 16 (14 December 2006), clearing it after Ministerial correspondence (letter from Ed Balls of 28 November 2006). The House of

¹ A copy of the Rome II Regulation can be accessed via the following link:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:01:EN:HTML>

² 1995 (c.42).

³ A copy of Directive 2007/64/EC can be accessed via the following link:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:319:0001:01:EN:HTML>

Lords European Union Committee considered the draft Directive in Sub-Committee B (Internal Market) and cleared it from scrutiny on 29 November 1006 after Ministerial correspondence (see report 1 (2006-07) of 1 December 2006).

4.11 The Directive must be fully implemented by 1 November 2009.

Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin (“the Regulation”)

4.12 Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 (“the Regulation”)⁴ repeals and replaces a number of existing directives which fix maximum residue levels of pesticides in or on food and feed of plant and animal origin.

4.13 The Regulation is based on Articles 37 and 152(4)(b) of the EC Treaty and requires Member States to create appropriate penalties for its breach.

4.14 The Regulation was published to enter force on 5 April 2005, but does not fully apply until the establishment of Annexes I to IV. Annex I was established under Commission Regulation (EC) No 178/2006. Annexes II to IV are established under Commission Regulation 149/2008 which, under the terms of transitional arrangements, comes into force on 1 September 2008.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

5.2 However, with the exception of subordinate legislation which is made jointly with a Minister of the Crown or government department (other than a Northern Ireland Minister or Northern Ireland department) the designation of the Welsh Ministers is restricted to the making of subordinate legislation which applies in relation to Wales.

6. European Convention on Human Rights

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

7. Policy Background

Designation of the Secretary of State in relation to private international law

7.1 The Secretary of State for Justice proposes to make regulations under section 2(2) to remove any inconsistencies between Part III of the Private International Law (Miscellaneous Provisions) Act 1995 and Rome II. The

⁴ A copy of Regulation 396/2005 can be accessed via the following link:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005R0396:EN:HTML>

Secretary of State also proposes that those regulations will extend the application of the choice of law rules in the Rome II Regulation to 'intra-UK' conflicts arising between the laws of the three jurisdictions within the UK or the laws of Gibraltar.

- 7.2 The regulations will be made under section 2(2) as the powers available to the Secretary of State under existing legislation are not sufficient to give full effect to the obligations arising out of Rome II or to deal with other matters related to it.
- 7.3 The existing designation of the Lord Chancellor in relation to jurisdiction and the recognition and enforcement of judgments, by virtue of the European Communities (Designation) (No.2) Order 2007⁵, is not sufficient to enable the Secretary of State to take measures in relation to the choice of law rules introduced by Rome II.
- 7.4 The new designation of the Secretary of State in respect of private international law is broad enough to cover both choice of law rules and matters relating to jurisdiction and the recognition and enforcement of judgments. This, broader, designation will supersede the existing designation of the Lord Chancellor which is, therefore, revoked.

Designation of the Treasury in relation to payment services

- 7.5 The Treasury intends to implement the Directive by way of regulations using the powers under section 2(2). In particular, those regulations will provide for a licensing regime for payment institutions, which will be administered, supervised and enforced by the Financial Services Authority ("FSA"). Further, they will set out the conduct of business requirements applying to all payment service providers, which will again be supervised and enforced by the FSA.
- 7.6 This subordinate legislation will be made under section 2(2) as the powers available to the Treasury under existing legislation are not sufficient to effect full implementation of the Directive.
- 7.7 The European Communities (Designation) (No.3) Order 1998⁶ designates the Treasury to take measures relating to payment systems but this is not wide enough to allow the Directive to be implemented. By virtue of this Order, the Treasury will also be designated in relation to payment services.

Designation of the Welsh Ministers in relation to the veterinary and phytosanitary fields

- 7.8 The Welsh Ministers intend to make regulations, jointly with the Secretary of State and pursuant to the powers in section 2(2), to transpose the requirements of the Regulation. It is intended that those regulations will

⁵ S.I. 2007/1349.

⁶ S.I. 1998/2793

provide for penalties and enforcement mechanisms to ensure compliance with the Regulation.

7.9 The regulations will be made under section 2(2) as the powers available to the Welsh Ministers and Secretary of State under existing legislation are not sufficient to enable them to adopt such measures.

7.10 The Welsh Ministers⁷ are already designated in respect of measures in the veterinary field for the protection of public health by virtue of the European Communities (Designation) (No.2) Order 2003⁸. This Order will extend that designation to cover the phytosanitary field. It will also mirror existing designations of the Secretary of State and any Northern Ireland department, in the European Communities (Designation) (No.2) Order 1999⁹, in respect of measures in the veterinary and phytosanitary fields for the protection of public health,

7.11 The new designation will supersede the existing designation of the National Assembly for Wales¹⁰ in respect of measures in the veterinary field for the protection of public health. This designation is therefore revoked.

8. Impact

8.1 An Impact Assessment has not been prepared for this instrument as it is an enabling instrument and in itself has no impact on business, charities or voluntary bodies.

8.2 There is no impact on the public sector.

9. Contact

Les Saunders at Cabinet Office European Secretariat, Tel: 020 7276 0190 or email Les.Saunders@cabinet-office.x.gsi.gov.uk, can answer any queries regarding the instrument.

Cabinet Office
European and Global Issues Secretariat
16th July 2008

⁷ By virtue of section 162 of, and paragraph 28(1) of Schedule 11 to, the 2006 Act, designations of the National Assembly for Wales constituted by the Government of Wales Act 1998 (c.38) (“the 1998 Act”), which were made under section 2(2) by virtue of section 29(1) of the 1998 Act, have effect as designations of the Welsh Ministers by virtue of section 59(1) of the 2006 Act.

⁸ S.I. 2003/1246.

⁹ S.I. 1999/2027.

¹⁰ See the European Communities (Designation) (No.2) Order 2003 (S.I. 2003/1246).

