

EXPLANATORY MEMORANDUM TO

THE TOBACCO PRODUCTS (TRACEABILITY SYSTEM AND SECURITY FEATURES) (AMENDMENTS) (EU EXIT) REGULATIONS 2020

2020 No. 1496

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Her Majesty's Revenue and Customs (HMRC) and is laid before the House of Commons by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 These regulations ensure that the tobacco products traceability scheme and security feature scheme for the whole of the United Kingdom (UK) continue to function effectively at the end of the transition period, when Great Britain will lose access to the European Union (EU) system. The regulations also make some specific provisions in order for the EU traceability and security features schemes to continue to apply in Northern Ireland, allowing the UK to meet its obligations under the Protocol on Ireland/Northern Ireland (the Protocol) to the Withdrawal Agreement. This means cigarettes and hand-rolling tobacco products manufactured in or, imported into, Northern Ireland will be tracked under both the systems from 1 January 2021.

3. Matters of special interest to Parliament

Matters of special interest to the Select 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 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.
4.2 The territorial application 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 This instrument is being made in order to ensure that:
- legislation in relation to the tobacco products traceability scheme and security feature scheme for the whole of the UK continues to function effectively at the end of the transition period, and
 - the UK's obligations under the Protocol to the Withdrawal Agreement are met.

Relevant EU law

The Tobacco Products Directive and related direct EU legislation

- 6.2 Article 15 (traceability) of the Tobacco Products Directive (2014/40/EU) (TPD) requires all unit packets of tobacco products to be marked with a unique identifier and for their movements to be recorded so that such products can be tracked and traced throughout the Union.
- 6.3 Article 15 of the TPD was partially implemented by two directly applicable EU regulations made under powers in the TPD:
- the Commission Implementing Regulation ((EU) 2018/574), on technical standards for the establishment and operation of a traceability system for tobacco products (CIR); and
 - the Commission Delegated Regulation ((EU) 2018/573) on key elements of data storage contracts to be concluded as part of a traceability system for tobacco products (CDR).
- 6.4 Article 16 (security features) of the TPD requires unit packets of tobacco products to be marked with security features to facilitate the verification of whether or not tobacco products are authentic. Article 16 is supported by the Commission Implementing Decision ((EU) 2018/576) on the technical standards for security features applied to tobacco products (CID).
- 6.5 Article 23 of the TPD requires that non-compliant products cannot be placed on the market.

Domestic implementation of the TPD

- 6.6 The Tobacco Products (Traceability and Security Features) Regulations 2019 (SI 2019/594) (the 2019 Regulations) implemented Article 15 (where not already implemented by the CIR or CDR), Article 16 and Article 23 of the TPD and the CID. The legislation applies to the whole of the UK and was made using powers conferred by section 2(2) of the European Communities Act 1972 (ECA).

Withdrawal legislation: saved domestic law and retained & applied EU law

Saving of 2019 Regulations

- 6.7 The ECA was repealed by the European Union (Withdrawal) Act 2018 (EUWA) on exit day (subject to saving for the transition period). Section 2 of EUWA saves EU-derived domestic legislation so that it continues to have effect in domestic law from the end of the transition period.
- 6.8 The 2019 Regulations are preserved but will require amendment in order to function effectively from the end of the transition period.

Incorporation and application of direct EU legislation

- 6.9 Section 3 of EUWA incorporates the CIR, CDR and CID into domestic law so that they continue to have effect from the end of the transition period. Although these instruments form part of the law of the whole of the UK under section 3 of EUWA from the end of the transition period, they have no practical application in Northern Ireland. This is because the EU legislation is given effect in, and in relation to, Northern Ireland by section 7A of

EUWA (see also paragraphs 6.14 onwards on the Withdrawal Agreement and the Protocol).

Application of retained EU legislation for excise purposes

- 6.10 Section 47 of the Taxation (Cross-border Trade) Act 2018 (TCTA) provides that any EU regulation in relation to excise duty that forms part of the law of the UK as a result of section 3 of EUWA ceases to have effect. Section 47 will come into force from the end of the transition period.
- 6.11 This instrument is made using powers under section 45 of TCTA. Section 47(5) of TCTA confirms that powers in section 45 can be used to apply, with or without modifications, any EU regulation that ceases to have effect in domestic law under section 47(1).
- 6.12 This instrument applies the CIR, with necessary amendments, to the UK so that it continues to have effect in domestic law from the end of the transition period. It will ensure a traceability system is established and operates for the whole of the UK, including Northern Ireland. The CDR is not required for the purposes of the UK track and trace system and so is not applied by this instrument.
- 6.13 The amendments made to the retained CID (unaffected by section 47 of TCTA), by this instrument will ensure the security features system continues to operate effectively from the end of the transition period in relation to products to be placed on the market in Great Britain.

Protocol on Ireland/Northern Ireland

- 6.14 The TPD is listed in Annex 2 of the Protocol to the Withdrawal Agreement. Article 5(4) states Union law listed in Annex 2 shall also apply to and in the UK in respect of Northern Ireland.
- 6.15 The CIR, CDR and CID continue to have direct application in Northern Ireland under section 7A of EUWA.
- 6.16 In order to ensure the TPD continues to apply in Northern Ireland and the obligations under the Protocol are fully met, this instrument:
- provides for the 2019 Regulation to be saved, with necessary modifications, in relation to the traceability system and the marking of tobacco product manufactured in, or imported into, Northern Ireland for placing on the market in Northern Ireland or the EU; and
 - amends the 2019 Regulations to provide for the continued application of security features on products placed on the Northern Ireland market.

Withdrawal Agreement: continued circulation of goods

- 6.17 Article 41(1) of the Withdrawal Agreement provides that goods lawfully placed on either the UK or EU markets before the end of the transition period can continue circulating on both markets after the end of the transition period.
- 6.18 This instrument makes provision to ensure tobacco products manufactured before the end of the transition period, and marked with a traceability mark required for lawfully placing on the UK market, can continue to move freely through the UK.

7. Policy background

What is being done and why?

- 7.1 The UK is a signatory to the World Health Organization’s Framework Convention on Tobacco Control and the Protocol to Eliminate Illicit Trade in Tobacco Products, which requires Parties to implement a traceability scheme to track tobacco products manufactured in or imported into its territory. The EU also ratified the Protocol to Eliminate Illicit Trade in Tobacco Products and so the UK formed part of an EU-wide traceability scheme. In addition, the EU implemented a security feature scheme.
- 7.2 The traceability and security feature schemes are intended to reduce the circulation of non-compliant tobacco products which have not had the correct duty paid or do not meet all legal requirements in terms of content and packaging. Reducing the circulation of non-compliant tobacco products will help reduce the tobacco duty tax gap, protect public health and support legitimate businesses.
- 7.3 Following the end of the transition period, the UK will continue to operate a traceability scheme when access to the current EU-wide system for Great Britain will end. Northern Ireland will form part of the standalone UK system as well as the EU-wide system.
- 7.4 The UK system requires the tracking of cigarettes and hand-rolling tobacco manufactured or imported into the UK. The tracking obligations will be extended to other tobacco products on or after 20 May 2024.
- 7.5 To enable the continued operation of a traceability scheme in the UK, the regulations simplify and provide for the minimum changes necessary in order to minimise impacts on businesses. In particular they:
- introduce a requirement to establish a national data repository;
 - require information in respect of cigarettes and hand-rolling tobacco products manufactured or imported into the UK to be submitted to the national data repository;
 - remove the need for manufacturers and importers in Great Britain to establish and submit data to a primary data repository (a repository that stores data relating exclusively to the products of a given manufacturer or importer); and
 - provide for the unique identifier (used to track cigarettes and hand-rolling tobacco product through the supply chain) to be associated with another unique identifier issued by a person outside of the UK, ensuring that the UK traceability scheme is compatible with other territories traceability schemes whilst avoiding the need to physically mark multiple unique identifier codes on tobacco products.

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

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act but relates to the withdrawal of the United Kingdom from the European Union for the reasons set out in detail in section 6.

9. Consolidation

- 9.1 This instrument does not involve consolidation and there are no plans to consolidate the relevant legislation at this time.

10. Consultation outcome

- 10.1 A public consultation was not carried out on this instrument as it makes the minimum necessary changes to implement the terms of the Protocol to the Withdrawal Agreement and simplify the requirements for an UK wide traceability scheme and security feature scheme.
- 10.2 HMRC has been engaging with the tobacco industry on the actions they will need to take in readiness for the end of the transition period.

11. Guidance

- 11.1 Guidance on the implementation of these measures for businesses affected is being prepared by HMRC and will be published in advance of the changes coming into force at 11pm on 31 December 2020.

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 A Tax Information and Impact Note covering this instrument will be published on the website at <https://www.gov.uk/government/collections/tax-information-and-impact-notes-tiins>.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to continue to allow:
- retailers trading in tobacco products (the vast majority of the small businesses affected by these measures) to have their identification number obtained on their behalf by a supplier; and
 - up to 24 hours for certain tracking and financial data to be transmitted rather than 3 hours.
- 13.3 The basis for the final decision on what action to take to assist small businesses is that the above measures will continue to minimise burdens on small businesses involved in the import, manufacture of wholesale of tobacco products whilst allowing them to fully comply with the requirements.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that HMRC will review the operation of the system through analysis of information in the data repository and ongoing stakeholder engagement with trade bodies and other representative businesses.
- 14.2 The regulation does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 a review clause is not required as the regulations amend provisions relating to a duty.

15. Contact

- 15.1 Lucia Suggitt at HMRC Telephone: 03000 572611 or email: lucia.suggitt@hmrc.gov.uk can be contacted with any queries regarding the instrument.

- 15.2 Judith Kelly, Deputy Director for Excise and Environmental Tax Design, at HMRC can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kemi Badenoch MP, Exchequer Secretary to the Treasury, can confirm that this Explanatory Memorandum meets the required standard.