

**Brexit
Civil Society
Alliance.**



Public Law Project



Rt Hon Stephen Barclay MP
Secretary of State for
Exiting the European Union
9 Downing Street
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United Kingdom

Your Ref:

Our Ref:

Date: 20 February 2019

CC: The Chair of the European Statutory Instruments
Committee, the Chair of the Secondary Legislation
Scrutiny Committee, the Chair of the Committee on
Exiting the European Union, DEFRA, the Home Office
and the Food Standards Agency.

Dear Minister,

**Re: Removal of the requirement for effective, proportionate and dissuasive
penalty schemes from retained EU law**

We are writing to register our concern for a trend that we are noticing across a significant subsection of Statutory Instruments (“SIs”) being laid under s 8(1) of the EU (Withdrawal) Act 2018 as part of the process of preparing for withdrawal. SIs are consistently removing the requirement from retained EU law that penalty schemes are effective, proportionate and dissuasive. What is of further concern is that the removal of these requirements has not been recorded in the explanatory notes accompanying the SIs that we have seen. This makes it impossible to determine if there is a rationale behind the wholesale removal of these provisions, and impedes effective Parliamentary scrutiny of the SIs.

Effective, proportionate and dissuasive penalties are a long-established principle of EU law which as a result has been part of UK law for decades. To remove the requirement appears to be an attempt to make policy changes, when the Government has stated on multiple occasions (and notably to the Secondary Legislation Scrutiny Committee)¹ that the power to create SIs under s 8(1), which enables the Government to correct deficiencies in EU law, is not to be used to implement policy changes.² There is no reason why the requirement for penalties

¹ Secondary Legislation Scrutiny Committee (Sub-Committee A) Report of Session 2017-19, published 21 November 2018, HL Paper 235, Appendix 1.

² Department for Exiting the European Union, Legislating for the United Kingdom’s withdrawal from the European Union Cm 9446, 30.03.2017, (‘the White Paper’) paragraphs 3.10 and 3.17, see also paragraph 14 of the Explanatory Notes and HC Hansard 30 March 2017 Col 431.

to be effective, proportionate and dissuasive could not function meaningfully in UK law after exit day.

For example, in The Common Fisheries Policy (Amendment etc.) (EU Exit) Regulations 2018, DEFRA has omitted Article 36(3) of *Regulation No 1380/2013 on the Common Fisheries Policy*. Article 36(3) reads (emphasis added):

Member States shall adopt appropriate measures for ensuring control, inspection and enforcement of activities carried out within the scope of the CFP, including the establishment of effective, proportionate and dissuasive penalties.

The Government made no mention of this omission in the explanatory memorandum to the SI. Instead it stated at paragraph 2.6:

This instrument makes the minimum necessary technical fixes to address deficiencies within CFP legislation and enable the same sustainable fisheries management in UK waters after exit as is currently provided for by the CFP.

Without a statutory duty of dissuasiveness of penalties operating on the Government, the UK could decide to reduce or remove the penalties for breaches of fishery policy which could incentivise operators to act unlawfully. The absence of any reference to this change in the explanatory materials published alongside the SIs also means that the Government's intention is unclear, and we are unaware of any commitment to retain the requirement for penalties to be effective, proportionate and dissuasive.

This trend of removal has been observed in a wide array of policy areas. The General Food Law (Amendment etc.) (EU Exit) Regulations 2019 laid on 31 January 2019 have omitted Article 17(2) of *Regulation No 178/2002 Laying down the general principles and requirements of food law* which says (emphasis added):

2. Member States shall enforce food law, and monitor and verify that the relevant requirements of food law are fulfilled by food and feed business operators at all stages of production, processing and distribution.

For that purpose, they shall maintain a system of official controls and other activities as appropriate to the circumstances, including public communication on food and feed safety and risk, food and feed safety surveillance and other monitoring activities covering all stages of production, processing and distribution.

Member States shall also lay down the rules on measures and penalties applicable to infringements of food and feed law. The measures and penalties provided for shall be effective, proportionate and dissuasive.

Food safety is obviously of critical importance and the public takes very seriously penalties for operators that put an individual's health and safety at risk. The removal of this statutory duty means that the UK could choose to vary,

unimpeded, s 19 of The Food Safety and Hygiene (England) Regulations 2013 which currently provides penalties for operators who breach food safety regulations.

The equivalent penalty provisions, with a requirement for penalties to be effective, proportionate and dissuasive, are also removed by the following SIs without discussion in the accompanying explanatory notes:

- The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (relating to pesticides)
- The Timber and Timber Products and FLEGT (EU Exit) Regulations 2018
- Air Quality (Miscellaneous Amendment and Revocation of Retained Direct EU Legislation) (EU Exit) Regulations 2018
- Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 (omits an EU law requirement for the imposition of effective, proportionate, and dissuasive penalties for the illicit manufacture of drug precursors).
- The Animal Feed (Amendment) (EU Exit) Regulations 2019

These penalty provisions have likely been removed from additional SIs as well, but scrutiny of this is a difficult task when the explanatory notes do not telegraph the removals. The SIs themselves do not state they are removing a penalty clause, they state, for example, “omit Article 17(2)” and as a result it is contingent upon committed civil society organisations to read the EU regulations being amended to establish which articles the SIs are referring to.

We would therefore be grateful for a response to the following questions:

- (1) What is the justification for removing these requirements for penalties to be effective, dissuasive and proportionate?
- (2) In what respect does the Department for Exiting the European Union consider that these provisions will be ‘defective’ as a result of the UK’s departure from the EU?
- (3) Why are these changes not mentioned in the explanatory memoranda accompanying the relevant SIs?
- (4) What alternative provision, if any, does the Government intend to make to ensure that penalties for breaches of retained EU law are effective, proportionate and dissuasive?

We are copying this letter to the Chairs of the European Statutory Instruments Committee, the Secondary Legislation Scrutiny Committee and the Committee on Exiting the European Union as well as the sponsoring departments of the relevant SIs.

Yours sincerely,

Brexit Civil Society Alliance

Buglife

Client Earth

Equality and Diversity Forum

Friends of the Earth England, Wales and Northern Ireland

National Council for Voluntary Organisations

National Secular Society

Pesticide Action Network

Public Law Project

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The Wildlife Trusts

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