



# Public Law Project

## PUBLIC LAW PROJECT BRIEFING:

### DRAFT FREEDOM OF ESTABLISHMENT AND FREE MOVEMENT OF SERVICES (EU EXIT) REGULATIONS 2019

1. The draft Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019 ('the Regulations') were laid under section 8 of the European Union (Withdrawal) Act 2018 ('the Withdrawal Act') on 11 July 2019. They are subject to the draft affirmative procedure.
2. The Regulations significantly reduce the rights of EU, EEA, Swiss and Turkish nationals. Specifically, they disapply:
  - (1) their rights to be self-employed, own and manage companies or provide services in the UK on the same basis as UK nationals; and
  - (2) their right to bring nationality discrimination claims in relation to the rights to be self-employed, own and manage companies or provide services in the UK.
3. The Regulations were drawn to the special attention of the House by the Secondary Legislation Scrutiny Committee ('SLSC') because they remove EU Treaty rights and make a policy change. They are to be debated in the Third Delegated Legislation Committee of the House of Commons at **6.00 pm on Monday 21 October 2019** and in the Main Chamber of the House of Lords at **3.00 pm on Wednesday 23 October 2019**.
4. This briefing identifies four key concerns with the Regulations:
  - (1) secondary, rather than primary, legislation is being used to make **significant policy changes and disapply important rights**;
  - (2) the changes **may impact on immigration rights** and so ought to be included in the Immigration and Social Security Coordination (EU Withdrawal) Bill ('the Immigration Bill');
  - (3) they **go beyond the powers conferred on Ministers** by the Henry VIII power in section 8 of the Withdrawal Act; and
  - (4) there has been **no impact assessment** before laying the Regulations despite the obvious impact on businesses and individuals.

#### **Secondary, rather than primary, legislation is being used to make significant policy changes and disapply important rights**

5. The draft Regulations are being made under section 8 of the Withdrawal Act which gives the Government power to amend retained EU law in order to correct or mitigate 'deficiencies' or a failure of retained EU law to operate effectively after Brexit.

6. During the passage of the Withdrawal Act through Parliament, the Government was clear that it was not its intention to use the Henry VIII power in section 8 as “a vehicle for policy changes”.<sup>1</sup> For example, in introducing the relevant White Paper to Parliament, the then Secretary of State for Exiting the European Union said that it “almost goes without saying” that “no change should be made to rights through delegated legislation”.<sup>2</sup>
7. It is against this backdrop that the Regulations must be considered; notwithstanding such unambiguous assurances, they both introduce radical policy changes and remove crucial rights from a large number of people.
8. As set out above, the Regulations disapply the rights of a large cohort of EU, EEA, Swiss and Turkish nationals who are presently self-employed, owning and managing companies or providing services in the UK. They remove their rights to be so engaged on the same basis as UK nationals, and preclude them bringing nationality discrimination claims in respect of those rights.<sup>3</sup>
9. On any analysis, these are matters of great significance. Indeed, in drawing the Regulations to the special attention of the House on public policy grounds, the SLSC has described them as “appear[ing] to be a significant reduction of rights”.<sup>4</sup>
10. Innovations of such a profound character ought not to be made by way of secondary legislation; rather, they ought to be introduced in primary legislation and thereby subjected to full Parliamentary scrutiny.

**The changes may impact on immigration rights and so ought to be included in the Immigration Bill**

11. On 5 September 2019, the Home Secretary released a policy paper in which she stated that free movement would be ended after exit day by way of primary legislation.<sup>5</sup>
12. Notwithstanding this assurance, by removing the rights of EU and EEA nationals to be self-employed, own and manage companies or provide services in the UK on the same basis as UK nationals, it appears that these Regulations may affect the underlying basis for this group’s lawful residence in the UK because, in general terms, such lawful residence rests on an individual being economically active.<sup>6</sup>
13. Indeed, for the purposes of establishing a right of residence in the UK based on self-employment, the Immigration (European Economic Area) Regulations 2016 define a self-employed person as “a person who is established in the United Kingdom in order to pursue activity as a self-employed person in accordance with Article 49 of the Treaty on the Functioning of the European Union”.<sup>7</sup> Rights derived from that Article are among those disapplied by the Regulations.<sup>8</sup>
14. There is no sensible basis on which to hive-off one set of changes that affect immigration rights from those contemplated by the Immigration Bill proposed in the Queen’s Speech; all such changes ought to be dealt with together.

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<sup>1</sup> See foreword to ‘Legislating for the United Kingdom’s withdrawal from the European Union’ by Rt Hon. David Davis MP, Secretary of State for Exiting the European Union; see also paragraphs 3.10 and 3.17 and the Explanatory Notes to the European Union (Withdrawal) Act 2018, paragraph 14.

<sup>2</sup> HC Hansard 30 March 2017 Col. 431.

<sup>3</sup> The Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019, regulations 2, 3 and 4; Secondary Legislation Scrutiny Committee 58th Report of Session 2017-19 - published 25 July 2019 - HL Paper 415, paragraph 11.

<sup>4</sup> Secondary Legislation Scrutiny Committee 58th Report of Session 2017-19 - published 25 July 2019 - HL Paper 415, paragraph 5.

<sup>5</sup> See ‘No deal immigration arrangements for EU citizens arriving after Brexit’, updated 5 September 2019.

<sup>6</sup> The Regulations contain carve-outs which mean that the immigration rights of Swiss and Turkish nationals will not be affected: The Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019, regulations 2(2) and 3(2).

<sup>7</sup> The Immigration (European Economic Area) Regulations 2016, regulation 4(1)(b).

<sup>8</sup> The Freedom of Establishment and Free Movement of Services (EU Exit) Regulations 2019, regulations 2(b)(i).

15. It appears to be the Government position that the Regulations will not affect the immigration rights of EU / EEA nationals.<sup>9</sup> We urge the Government to publish its legal analysis of why that is the case in full in advance of next week's debate. Members may wish to ask the Government to explain its analysis, and how EU / EEA nationals whose right of residence depends on their self-employment or establishment in business will be affected by these changes.

**The Regulations go beyond the powers given to Ministers under the Henry VIII power in section 8 of the Withdrawal Act**

16. Under section 8 of the Withdrawal Act, regulations can be made only where the Minister has identified either (1) a failure of retained EU law to operate effectively or (2) any other deficiency in retained EU law.<sup>10</sup> It is far from clear that there is any 'deficiency' or 'failure to operate effectively' in the retained EU law being amended by these Regulations.

17. The SLSC reports the Government's position to be that the rights are based on 'reciprocity' and that:

"[...] the instrument removes these treaty rights as reciprocity would be lost in a 'no deal' scenario, and that the changes seek to ensure the UK's compliance with the World Trade Organisation's (WTO) 'most favoured nation' principle."<sup>11</sup>

18. Similarly, the draft explanatory memorandum to the Regulations states that they make:

"[...] amendments to UK legislation to correct deficiencies in retained EU law and to ensure the UK is compliant with its World Trade Organisation obligations, in particular the General Agreement on Trade in Services, in a scenario in which the UK leaves the EU without an agreement"<sup>12</sup>

Further, they are said to be designed to remedy "any inoperability and to ensure UK law continues to function effectively" and deficiencies "including a lack of reciprocity".<sup>13</sup>

19. The rights of EU, EEA, Swiss and Turkish nationals to be self-employed, own and manage companies or provide services *could* still operate effectively after exit day – these are not matters that are in any way contingent on EU membership (as demonstrated by these rights presently being held by the nationals of the EEA states, Switzerland and Turkey, which are not EU member states). There is simply no prospect that the law here would become inoperable or cease to function effectively on exit day.
20. As for the purported deficiency – that is, the absence of reciprocity – the UK's policy in the context of freedom of establishment and freedom of services is *not* contingent on any reciprocity of obligations. The Government could choose, for perfectly proper reasons of policy, to maintain these rights even if they were not reciprocated. Indeed, at this stage, it is not even known whether or not they would, in fact, be reciprocated.
21. Further, the Government's interpretation of 'deficiency' as including reciprocal rights is so broad as to encompass almost any aspect of EU treaty law. Such a broad interpretation is entirely inconsistent with

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<sup>9</sup> It appears to be the Government's position that the Regulations affect the immigration rights of Swiss and Turkish nationals only: Secondary Legislation Scrutiny Committee 58th Report of Session 2017-19 - published 25 July 2019 - HL Paper 415, paragraph 8-10; Draft explanatory memorandum, part 1, e.g. paragraphs 2.9, 2.17 and 2.18.

<sup>10</sup> European Union (Withdrawal) Act 2018, section 8(1)(a)-(b).

<sup>11</sup> Secondary Legislation Scrutiny Committee 58th Report of Session 2017-19 - published 25 July 2019 - HL Paper 415, paragraph 2.

<sup>12</sup> Draft explanatory memorandum, part 2, paragraph 2.

<sup>13</sup> Draft explanatory memorandum, part 1, paragraphs 2.11, 10.1. The explanatory note to the Regulations states that deficiencies fall within section 8(2)(a), (c) and (e) and 8(3)(a) of the Withdrawal Act.

the cautious approach to the use of the section 8 power to which the Government committed during the passage of the Withdrawal Act through Parliament (see above).

22. There does not appear to be a failure of retained EU law to operate effectively or any other deficiency in retained EU law here. Rather, the Regulations appear to go beyond the powers given to Ministers by the Henry VIII power in section 8 of the Withdrawal Act.

### **The Government failed to undertake an impact assessment before laying the Regulations**

23. The Government justified its decision not to undertake an impact assessment before laying the Regulations on the basis that: “[t]here is no, or no significant, impact on business, charities or voluntary bodies”; “[t]here is no, or no significant, impact on the public sector”; and “[a]n Impact Assessment has not been prepared for this Instrument because the impact of this Instrument has been approved de minimis in line with the Better Regulation Framework”.<sup>14</sup>
24. This is a surprising analysis: it is difficult to give any credence to the contention that the removal of the rights of EU, EEA, Swiss and Turkish nationals to be self-employed, own and manage companies or provide services in the UK on the same basis as UK nationals will have no or no significant impact on businesses, charities, or voluntary bodies.
25. This failure to undertake an impact assessment is a part of a wider trend of the Government failing to undertake such assessments, or producing inadequate assessments, when laying statutory instruments under section 8 of the Withdrawal Act.
26. This trend makes it significantly more difficult for the relevant committees and Parliamentarians to scrutinise these instruments effectively and has been a frequent frustration of the SLSC.<sup>15</sup>
27. Here, in circumstances where it is clear on an objective analysis that the Regulations *are* capable of having a very significant impact, the failure to undertake an impact assessment is an egregious one.

**Public Law Project**  
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<sup>14</sup> Draft explanatory memorandum, part 1, paragraphs 12.1, 12.3 and 12.4.

<sup>15</sup> In February 2019, the SLSC wrote to the Treasury to register its concern at the failure to undertake impact assessments in this context: “If instruments are to be scrutinised effectively, all relevant information including the IA must be submitted at the time that the instrument is laid. It is therefore unacceptable that, at this critical time when Parliament is being asked to consider an exceptionally large volume of instruments concerning highly complex areas of law, your Department has failed to provide IAs in a timely manner”.