A&L Goodbody

# Ireland's Brexit Rulebook

## Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019

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# Introduction

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Business leaders are being continuously advised to "prepare for Brexit".

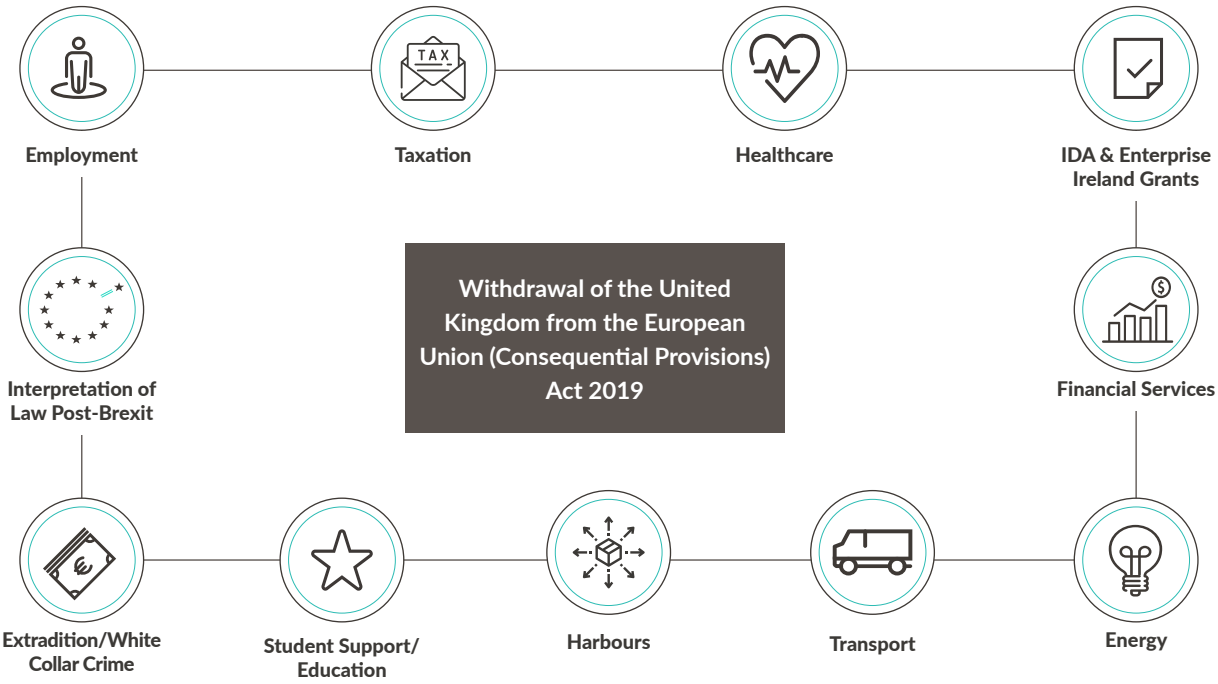
But how do you prepare with no rule book or end game? That is now changing to some extent.

Ireland has now enacted the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2019.

This act was adopted in a swift and smooth process in the Irish parliament (the Oireachtas) and has been signed into law by the Irish President. When it will enter into force depends on when and how (i.e. with or without an agreement) the UK leaves the EU.

Lawyers from all our offices are providing updates on the key elements and implications of the entire Brexit process and hope this update helps you in your Brexit planning.

This update gives you valuable insight into the Irish Brexit Rulebook and how it could affect your business.

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# 1 Employment: Social Welfare

## Most relevant to

- Companies with cross-border employees (particularly between UK and Ireland)
- Cross-border employees

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One of the four freedoms enjoyed by EU citizens is the free movement of workers across the EU.

EU policy has evolved over time to promote this freedom. For example, individuals insured for social security purposes in the EU Member State in which they work are entitled to be treated on an equal footing with nationals of that member state when it comes to availing of social welfare benefits. This principle is particularly relevant on the island of Ireland where an estimated 23,000 to 30,000 people cross the Irish border daily to go to work and others cross the Irish Sea weekly to work. This cross-border existence means that it is essential that social welfare contributions made in both jurisdictions are aggregated when it comes to availing of social welfare benefits.

The ability to aggregate cross-border contributions is governed by EU social security rules which protect the social security rights of mobile workers. These rules will no longer automatically apply after Brexit because the UK would be outside the EU. For that reason, the British and Irish governments recently entered into the Convention on Social Security between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland, which ensures continuity of Common Travel Areas social protection arrangements for Irish citizens living in the UK and UK citizens living in Ireland.

### What does the Act say?

The Act provides for a number of amendments to Ireland's Social Welfare (Consolidation) Act 2005, the majority of which are technical in nature.

The most material amendment proposed is the granting of the power to the Minister for Employment Affairs and Social Protection to make an order to provide for the implementation of the Convention on Social Security, if that is required in circumstances where the bilateral ratification process has not been completed by Brexit day.

The recently agreed Convention on Social Security is to be welcomed, at least insofar as it confirms the current position as regards the social welfare entitlements of UK citizens working in Ireland and vice versa. It effectively ensures social security contributions paid by UK and Irish citizens can be used to meet entitlement criteria for accessing social welfare benefits in either State. However, the position in respect of other EU nationals remains unclear. The 2019 Act effectively does no more than ensure that this Convention can be implemented by Ministerial order if, whatever reason, the Convention ratification process has not been completed in time.

Irish-based employers with multinational workforces will need to keep track of political and legislative developments as the situation evolves. If a no-deal Brexit arises, employers might find that non-Irish citizens are unwilling to work in the UK as their ability to avail of social welfare benefits could be adversely impacted.

# 2 Employment: Protection of Employees

## Most relevant to

- Irish employers
- Cross-border employers
- Cross-border employees
- Insolvency practitioners

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The Protection of Employees (Employers' Insolvency) Act 1984 (the 1984 Act) provides protection to employees in the event of the insolvency of their employer. The Insolvency Payments Scheme (the IP Scheme), which was established under the 1984 Act, protects pay-related entitlements owed to employees where their employer has been made insolvent. The IP Scheme covers employees who are employed in Ireland by an employer who has become insolvent under the laws, regulations and administrative procedures of another Member State.

### What does the Act say?

The overall purpose of Part 12 of the Act is to amend the 1984 Act to ensure that in a no-deal scenario, once the UK leaves the EU and becomes a third country, employees of UK employers who are employed or habitually employed in Ireland can continue to be covered by the IP Scheme where their employer has been made insolvent under the laws of the UK. The amendments do not affect existing employee rights and entitlements under the 1984 Act.

Specific amendments to the 1984 Act will be made to ensure that:

- **Definitions extended to include the UK:** The definition of "competent authority" (which currently covers the UK as a "Member State") includes an employer in a state of insolvency under the laws of the UK. Similarly, the definition of a "relevant officer" will be amended to ensure that administrators of employers which have been made insolvent under the laws of the UK can submit applications on behalf of employees who are employed in Ireland.
- **Insolvency of UK employers:** Employees who are employed in Ireland and whose employers are made insolvent under the laws of the UK continue to be covered.
- **Date of insolvency:** The date on which an employer will be regarded as having become insolvent includes the date an employer is made insolvent under the laws of the UK.
- **Pension contributions:** Amounts (in respect of unpaid pension contributions) certified by an actuary or a person performing a similar task in relation to employers made insolvent in the UK, and the employees are habitually employed in the State, continue to be covered by the IP Scheme.
- **Exchange of information:** Information can be exchanged with a relevant officer appointed to an employer which is in a state of insolvency under the laws of the UK.

# 3 Employment: Immigration

## Most relevant to

- Irish employers
- Cross-border employers
- Cross-border employees
- Insolvency practitioners

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There are two separate aspects to Part 14 of the Act: non-refoulement (sections 95 and 96) and the British Irish Visa Scheme (section 97).

Non-refoulement is an international law principle which prohibits the expulsion, deportation, return or extradition of a refugee or applicant for international protection to a country where there is a risk that his or her life or freedom would be threatened for discriminatory reasons. The principle of non-refoulement has been legislated in Ireland in the Refugee Act 1996 and in the International Protection Act 2015.

An Irish High Court case in March 2018 struck down the references to the prohibition of refoulement in the Immigration Act 1999 and the Immigration Act 2003. This has created a legislative gap where there is no legislative basis for the Minister to consider the principle of non-refoulement in making a deportation order and, similarly, there is no legal basis for an immigration officer or a member of An Garda Síochána (the Irish police force) to undertake an assessment of refoulement risk where a person is refused leave to land or enter Ireland.

Separately, under the Common Travel Area, the British Irish Visa Scheme, which was established in 2014, allows for mutual recognition of short-stay visas between the UK and Ireland. This currently applies for Chinese and Indian nationals allowing those nationals to travel between Ireland and the UK on a single visa without additional immigration requirements. In order to ensure the British Irish Visa Scheme continues in a no-deal Brexit scenario, additional security controls (the taking of fingerprints) are required to ensure the integrity of the Irish immigration system.

### What does the Act say?

The purpose of sections 95 and 96 of the Act is to amend the Immigration Act 1999 and the Immigration Act 2003 so that these Acts are in full compliance with the principle of non-refoulement. In addition, section 95 confirms that if consideration was given to non-refoulement in a deportation order since 31 December 2016, the deportation order will still be valid.

The necessity of these non-refoulement amendments in the case of a no-deal Brexit and therefore the inclusion of these amendments in this Act rather than stand-alone legislation is not entirely clear. However, it may be due to the fact that Ireland and the UK operate a Common Travel Area. They have both opted out of the EU's Asylum Procedures Directive and the Schengen Area, which provide that Member States who have opted in are required to act in full compliance of the principle of non-refoulement. Part 14 of the Act will ensure that Ireland fulfils its international obligations in relation to the principle of non-refoulement.

The purpose of section 97 is to amend the Immigration Act 2004 to provide a legal basis for the taking and maintenance of fingerprints of a person for the purpose of their application for an Irish visa or an Irish transit visa. This is to ensure the continuance of the British-Irish Visa Scheme under the Common Travel Area and the integrity of the Irish immigration system.

# 4 Taxation

## Most relevant to

- Irish corporate taxpayers
- Insurers
- Irish individual taxpayers
- Irish investors
- UK investors
- Pension schemes
- UK university students and their parents

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There are a significant number of provisions in the various Irish Taxes Acts that limit certain tax reliefs or other tax advantageous treatment to activities carried out in, or entities resident in, EU or European Economic Area ("EEA") member states (the EEA States are Iceland, Liechtenstein and Norway).

There are other provisions which extend this favourable treatment to countries with which Ireland has a double tax treaty as well. In such a case, Brexit will not impact on them as Brexit will not affect the existing double tax treaty.

However, in the case of the provisions relating to EU and EEA States, in the absence of any legislative change, Brexit would of course cause some of these reliefs to cease to be available because the UK would not be an EU or EEA Member State.

### What does the Act say?

In light of this, the Act includes measures:

- enabling Irish resident individuals to continue to be able to obtain mortgage interest relief in respect of borrowings relating to properties located in the UK
- in respect of the ability to claim a tax deduction for fees paid to UK universities for tuition
- enabling UK approved pension schemes to obtain an exemption from tax on Irish investments
- enabling Irish residents to treat UK gilt income as exempt
- ensuring that interest can be paid in respect of intra group financing to UK lenders
- to ensure that excess losses can be transferred within a group that includes UK members
- to allow tax deductions to be taken by insurance companies for transfers into equalisation reserves post-Brexit
- enabling the Irish research and development tax credit regime to apply to expenditure carried out on research in the UK
- ensuring that UK brokers will continue to be able to avail of stamp duty intermediary relief on transfer of Irish shares
- providing that stamp duty relief on reconstructions or amalgamations of companies involving a UK company would continue to be available
- confirming that the relevant levies imposed on life insurance and health insurance provided in Ireland will continue to be levied
- The introduction of postponed accounting for VAT for importers registered for Irish VAT which should reduce the cash flow impact of additional import VAT costs

However there are other tax provisions which are not proposed to be amended that will restrict UK person from reliefs or particular treatments that they can currently avail of. For example UK pension funds can currently invest in Irish property funds on an exempt basis, and this may no longer be the case post-Brexit.

# 5 Industrial Development – and Enterprise Ireland Grants

## Most relevant to

- All Irish businesses
- Owners of, and investors in, Irish businesses
- Irish-based businesses which might need Irish Government aid because of Brexit

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### What does the Act say?

The provisions of the Act would enable Enterprise Ireland (EI) to increase the level of support for Irish businesses beyond the levels they have been previously permitted. This would be through a range of increased levels of investment, loans and grants, designed to limit the negative effect of Brexit on small and vulnerable Irish businesses.

Stronger commitment to R&D grants

- Irish businesses will now be permitted to avail of grants to support research activity overseas where those research needs cannot be met in Ireland. Previously, to avail of a R&D grant from EI, the R&D activity had to take place within the State. This development facilitates critical research needs of Irish companies and Irish companies undertaking any R&D abroad should consider whether such R&D could be aided by a grant from EI.
- Research grants can also now be provided up to EU limits of 70% of the approved R&D costs for small enterprises, 60% of the approved R&D costs for medium enterprises and 50% of the approved R&D costs for large enterprises, subject to an overall cap of €7.5m. This was previously restricted to 50% of the approved costs of the R&D concerned. EI will also be permitted to make advance payments of R&D grants to companies (regardless of size) where doing so will enhance the prospects of the business' sustainability. Companies that avail of R&D grants should assess whether they should reapply for the extended amounts.
- For the first time, businesses in the horticultural sector will be able to apply for R&D grants from EI.

### General increase in support and flexibility for funding Irish businesses

- EI will be permitted to grant loans to or enter into convertible loan notes with Irish companies for amounts up to €7.5m.
- There will be an aggregate limit of €15m placed on giving grants, taking shares, issuing convertible loan notes and lending to Irish companies.
- While amounts in excess of an aggregate limit of €15m can be granted, Government consent would be required for any amount in excess of the €15m limit placed on EI.

# 6 Financial Services: Settlement Finality (Third Country Provisions)

## Most relevant to

- Irish, UK and other investors trading Irish equities, bonds and units in exchange-traded funds.

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Part 7 of the Act addresses a very specific (but fundamental) element of Irish financial services infrastructure.

The Irish Stock Exchange currently uses a UK central settlements depositary, CREST, to settle trades in Irish bonds, equities and fund units. In a no-deal scenario, the ability of Irish market counterparties to access CREST or other designated system and to benefit from the relevant EU rules and benefits under the Settlement Finality Directive would be compromised.

To address this issue the EU Commission has proposed a transition period of two years to allow market counterparties to transition to an EU based central security depositary.

### What does the Act say?

Part 7 is proposed to support the EU proposal by conferring power on the Minister for Finance to designate third country systems (such as CREST) under Irish law as a relevant arrangement or designated system under the Settlement Finality Directive.

Under the terms of the Act, an operator of any UK settlement system which falls within the definition of "relevant arrangement" must notify the Central Bank of Ireland (CBI) and the Minister no later than three months from the date on which the operator becomes aware that the section applies. Upon receipt of any notification by the Minister, he or she will notify the European Securities and Markets Authority of the receipt of the notification and the name of the operator of the relevant arrangement.

Once the notification has been received, the Minister may (in his or her discretion) issue a notice designating the system as a relevant arrangement where the CBI has notified the Minister that it is satisfied that:

- the rules would (if the arrangement were an EU system) comply with the regulations implementing the Settlement Finality Directive; and
- the UK laws applicable to matters which the Settlement Finality Directive relates are equivalent to the relevant Irish laws.

The Minister also has the power to issue a withdrawal notice cancelling the designation of a relevant system where the CBI notifies the Minister that it is no longer satisfied that the conditions above apply.

This designation process (whereby UK settlement systems may be designated as a relevant arrangement under the Settlement Finality Directive) will only apply for a transition period of nine months from the date on which part 7 is brought into force by statutory order. This is the same period as outlined in the draft General Scheme and the Bill. The designation will also cease to apply if the Minister issues a withdrawal notice, or if there ceases to be an Irish participant in the relevant UK settlement system.

### Our thoughts

As with the terms of the Bill, the proposal outlined in the Act is very welcome in clarifying the basis for the transitional period, many questions remain for Irish counterparties as to how trades in Irish equities, bonds and fund units will be settled once the transition period has expired. The establishment of a new European central depositary scheme is currently under consideration by Euroclear; however, it is currently unclear as to whether the new system

will replicate all of the current features of the CREST system used by Irish participants. In particular, it remains to be seen whether the new central depositary system will allow counterparties trade Irish equities in the same manner as on the current CREST system.

It is also unclear how market participants will transition to a new system following expiry of the transition period. Primary legislation would be the most efficient manner to allow participants access the new system and to take all necessary steps to transition their current arrangements (such as updating share registers and other administrative changes). However, in the absence of primary legislation, market participants might need to consider individual schemes of arrangement in relation to instruments which are traded and settled on the Irish Stock Exchange.

Part 7 is the only part of the Act dealing with general financial services (apart from insurance which is covered in Part 8). In contrast to Part 8, no proposals have been included to date in Part 7 or elsewhere in the Act to allow market participants in receipt of services or products issued by UK or Gibraltar to continue to rely on such services or products received to date. While customers relying on insurance products may be in a different position to many customers receiving other financial services, it remains to be seen if any further transitional or other arrangements will be proposed for financial service providers currently writing business into Ireland (in particular business involving the provision of products that will continue post-Brexit).

# 7 Financial Services: Insurance

## Most relevant to

- UK insurers and insurance intermediaries
- Irish insurers that work with UK insurers or insurance intermediaries

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## What does the Act say?

Part 8 of the Act relates to insurance.

UK insurers and insurance intermediaries that will still have Irish business (i.e. policyholders) post-Brexit deadline are understandably anxious. "Dear CEO" letters were sent by the Central Bank of Ireland (CBI) in Q4 2018 to all UK insurers and intermediaries passported into Ireland, requesting confirmation of the status of their contingency plans and their intended communications with Irish policyholders about them. While most UK insurers and intermediaries accept that it would not be possible to continue to write new business into the Irish market post-Brexit, not all have a solution in relation to current/legacy business. Part 8 of the Act addresses some but not all concerns in this regard.

Part 8 has been described by Ireland's Department of Finance as "designed to ensure that Irish policyholders that hold existing life and non-life insurance policies with insurance undertakings or through insurance intermediaries, operating in Ireland from the UK or Gibraltar, will not be affected by those undertakings losing their right to conduct business by way of specific proposed regulatory amendments, in EU Member States post Brexit".

## Key proposition

Part 8 of the Act proposes amendments to the European Union (Insurance and Reinsurance) Regulations 2015 (the Irish regulations that implement the Solvency II Directive into Irish law) and to the European Union (Insurance Distribution) Regulations 2018 (the Irish regulations that implement the Insurance Distribution Directive into Irish law). The effect of these amendments will be to allow for a temporary three-year run-off regime for UK insurers and insurance intermediaries, during which time no new insurance contracts can be written, but existing contracts can be serviced. The temporary run-off regime is to apply where the insurer/insurance intermediary:

- is authorised/registered in the UK or Gibraltar
- has exercised its right to carry on business in Ireland on a freedom of establishment or freedom of services basis
- has ceased to issue / administer new insurance contracts in Ireland
- is exclusively administering "its existing portfolio" in order to terminate its activity in the State Irish book of business
- complies with general good rules

## Our thoughts

Part 8 is very helpful, and is attracting much client interest and discussion. However, its scope is narrower than we would have hoped and there are several ambiguities. If the purpose of the legislation is to create breathing space to allow UK insurers to restructure their businesses, in order that Irish policyholders will not be adversely impacted, the following aspects are less than ideal:

- The insurer must have ceased to "conduct [note: we assume means "issue"] new insurance contracts in the State". Significant disruption could result from a broad interpretation of "new contracts" e.g. if a life insurer is contractually committed to providing an annuity under the terms of an existing policy without it setting out the specific terms, it may not be authorised to issue that annuity, thereby depriving the customer of that benefit. The position in relation to mid-term adjustments is also unclear.
- What does "exclusively administers its existing portfolio" mean? It seems very likely that administering extends to paying claims, but more express terminology would have been helpful.
- The position of UK insurers that have also issued reinsurance policies for the benefit of Irish insurers, is unfortunately not clearly addressed. An insurer in that situation does not benefit from the existing exemption in Regulation 10(3) of the European Communities (Insurance and Reinsurance) Regulations 2015, so does equally need a transitional period to run off its reinsurance liabilities, as well as its insurance liabilities. Based on the drafting, it may not have either.

# 8 Healthcare

## Most relevant to

- Healthcare providers in Ireland and the UK
- Health Insurers in Ireland and the UK
- Pharmaceutical Companies in Ireland and the UK

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### What does the Act say?

In a no-deal Brexit, Part 2 of the Act would:

- enable arrangements in relation to health services including reimbursement arrangements to be maintained between Ireland and the UK
- provide for the making of Ministerial Orders and Regulations to facilitate continued access to emergency, routine and planned healthcare in the UK and Ireland

### Section 4 – Arrangements in relation to health services

The Health Act 1970 is amended by the insertion of Part IVA Arrangements in relation to health services. Part IVA comprises sections 75A – D.

Section 75A confers on the Minister for Health a broad power to make Ministerial Orders to continue in being or carry out any reciprocal or other arrangements in relation to health services which were in operation between Ireland and the UK immediately prior to the UK's withdrawal from the EU.

This is necessary to support existing and future all-Ireland and bilateral healthcare programmes. For example:

- access of Irish patients to UK organ transplant programmes
- Irish patients in the northwest who access cancer programmes in Northern Ireland
- paediatric cardiac care programmes which see patients from Northern Ireland receiving complex cardiac surgery in Ireland
- the treatment abroad scheme which allows Irish residents to access treatment which is not available in Ireland or is unavailable within a reasonable period of time

Arrangements in relation to health services is defined as arrangements between Ireland and the UK in respect of the provision of access to health services in Ireland, and reciprocal access to health services in the UK.

In making a Ministerial Order under S75A(1) the Minister is to have regard to certain general policy matters listed at Section 75A(3).

Section 75B confers on the Minister for Health a general power to make Regulations to give full effect to the provisions in Part IVA. In making regulations under this section of the Act the Minister is to have regard to the general policy matters listed under Section 75A(3).

Section 75B(1) (a) – (p) identifies matters which may be provided for by regulations and these include:

- Arrangements for assessing eligibility of persons for health services in Ireland and the UK including the:
  - classes of person including persons resident outside Ireland entitled to access health services in Ireland (S75B(a))
  - classes of person and the qualifying criteria for persons to access planned health services in the UK(S75B(b))
- Arrangements to be administered by the Health Service Executive (HSE) to ensure access to planned health services in the UK and in Ireland by UK residents (S75B(c) and (d))

- The duties of healthcare providers and healthcare professionals to provide information in relation to health services that they provide to persons from the UK (S75B (e))
- The categories of health services to be provided and the financial arrangements to include payments, charges and provisions for reimbursement (S75B (f) - (n)).

Section 75B (n) provides for regulations setting out the basis on which the HSE may reimburse persons for the cost of health services received and paid for by those persons in the UK. This would allow for reimbursement of persons who were incorrectly levied charges in the UK. However, it would also be relevant if Ireland and the UK establish an analogous scheme to the EU Cross Boarder Directive mechanism which would apply post-Brexit. In that event, regulations under this sub-section could facilitate Irish patients to be reimbursed for the cost of healthcare in the UK.

Section 75C also envisages the establishment of an analogous scheme between Ireland and the UK to the current EU Cross Border Scheme as it provides that an authorised officer appointed under the regulations implementing the EU Cross Border Scheme in Ireland would be deemed to be an authorised officer for the purposes of any regulations made under Regulation 75B.

Ministerial Orders and Regulations must be laid before both Houses of Parliament in Ireland (Section 75D).

# 9 Energy

## Transitional power to modify licence conditions concerning the commission for the regulation of utilities, brexit and the single electricity market, etc.

### Most relevant to

- Participants in the energy sector in Ireland, Northern Ireland and the UK generally

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The Single Electricity Market (SEM) is the wholesale electricity market for the island of Ireland (i.e. Ireland and Northern Ireland). It is separate from the electricity market of Great Britain. The SEM is regulated jointly by the Commission for Regulation of Utilities (CRU) in Ireland and the Utility Regulator in Northern Ireland.

The SEM underwent a fundamental change on 1 October 2018 in order to harmonise with EU legislation in respect of EU cross-border trade in electricity, however, it remains an 'all-island' market. The continued operation of the SEM on the island of Ireland is seen as hugely important measure for further creation of market efficiencies, enhancing security of supply (particularly for Northern Ireland) and consumer affordability.

There are two principal 'interfaces' in respect of the Irish electricity market: the SEM with Northern Ireland and the physical and market interconnection with the GB electricity market through the East West Interconnector.

As a consequence of the all-island and relatively isolated nature of the SEM, but recognising there are separate political systems, legal jurisdictions, electricity regulators and network operators, the structure and operation of the SEM is intertwined from a legislative, governance, contractual and also statutory licensing point of view. The SEM and the regulatory system also comply with the complex network of EU regulations and codes which allow effective interconnection and electricity market interaction with Great Britain. There is a 500MW interconnector between Ireland and Wales owned and operated by EirGrid which allows for import and export of electricity subject to the EU regulations and network codes.

The UK and the EU's (and therefore Ireland's) energy and climate change policies have evolved together and are strategically aligned. The continued operation and 'coupling' of the EU electricity markets in the context of Brexit and also the protection of the ongoing operation of the Single Electricity Market has been specifically referred to in the Draft Withdrawal Agreement and also the HM Government 'explainer' of Article 11 of the Draft Withdrawal Agreement. In effect, the UK was committing to ensure the EU legislative 'acquis' in respect of energy into UK law.

The British Department for Business, Energy and Industrial Strategy has also published its guidance on 'Trading electricity if there's no Brexit deal' as well as various statutory instruments in respect of the post Brexit operation of its energy laws. In the guidance the UK government is essentially committing to 'take all possible measures to maintain the Single Electricity Market' but does contemplate a scenario where no agreement with the Irish government and the EU Commission can be reached to continue the SEM.

www.gov.uk/government/publications/trading-electricity-if-theres-no-brexit-deal/trading-electricity-if-theres-no-brexit-deal

### What does the Act say?

Part 4 of the Act introduces a new section 14(B) to the Electricity Regulation Act 1999 to give the Commission for Regulation of Utilities a wide ranging power to modify the conditions of statutory licences issued to electricity market participants in the context of the withdrawal of the UK from membership of the EU.

Under the Electricity Regulation Act 1999, the CRU issues licences in respect of a number of electricity market activities. This includes electricity generation and retail supply, but also network owners and network operators, the SEM market operator and interconnector owners and operators. The licences contain detailed conditions which must be complied with by the licensee and which reflect both domestic policy and EU regulatory requirements.

While the provisions are generic to all CRU licences in respect of electricity market participants, it is likely that Part 4 is aimed principally at:

- the network owners/operators whose licences contain provisions dealing with the functioning of the SEM (including on a harmonised basis with NI)
- the SEM market operator who operates the SEM in conjunction with the NI market operator
- at interconnector owners/operators who are bound by EU rules on interconnector operations (capacity allocation, congestion, etc.) and who may be faced with dealing with revised access rules for interconnection with GB.

The provisions allow the CRU to modify a condition of a licence where, in consequence of the withdrawal of the UK from membership of the EU, the CRU considers it necessary or expedient to do so in order for the State to continue to comply with EU rules for cross-border trade in electricity or the Electricity Market Directive. This is a very broad power.

Before making a modification, the CRU is bound to consult with the licence holder, the Northern Ireland Authority for Utility Regulation and such other persons as the CRU thinks appropriate. The CRU is also required to notify consulted parties and publish the notification on the CRU website as soon as practicable after a modification has been made.

There is a time limit on the CRU's power to modify licences under this section 14(B) of the legislation. The power may not be exercised after one year from the date the section comes into force.

Consistent with similar powers of modification introduced to implement and facilitate the operation of the Single Electricity Market, certain statutory procedural requirements which the CRU would ordinarily be bound to follow in order to effect licence modifications are expressly disapplied. For example the CRU's obligation to consider and address objections or representations and determine whether a public hearing is necessary have been disapplied.

Unlike more general licence modifications and in recognition of the strategic importance of the withdrawal arrangements, there is no recourse to the statutory Appeals Panel permitted as a consequence of the modifications. The judicial review provisions of the legislation would however seem to be preserved.

The modification powers would however need to be exercised in accordance with the many functions and duties of the CRU provided for in Ireland's Electricity Regulation Act 1999.

The section would also appear to override any terms and conditions of a licence which might conflict with the CRU power under section 14(B) and whether or not it would ordinarily be a matter for the SEM Committee.

The proposed legislation does not deal with new licences but it is however open to the CRU to specify the terms and conditions of the licence at the time of granting the licence. The proposed legislation does not deal with natural gas licences issued by it.

It is also interesting that the amendments do not seek to deal specifically with amendments to the legislation which may be necessary in the event that the SEM was not preserved on the island of Ireland.

# 10 Transport: Third Country Bus Services

## Most relevant to

- Bus companies with services in Ireland and their customers.

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An EU Regulation sets common rules for access to the international market for bus services. There are also a number of international agreements, including the Interbus agreement between the EU, Albania, Bosnia and Herzegovina, Macedonia, Montenegro, Moldova, Turkey and Ukraine. The UK has indicated its intention to join the Interbus Agreement in its own right.

### What does the Act say?

Failing that, the Act gives the Minister for Transport, Tourism and Sport broad powers to exempt vehicles engaging in international carriage from any licencing requirement, when he is of opinion that there is a real risk of disruption to international carriage of passengers by road, and that such an exemption is necessary to ensure continuation of existing services. Alternatively, he can order that a third country licence be deemed to be an international (EU) road passenger operator's licence.

Ireland's National Transport Authority (NTA) regulates bus and coach services. The Act adds a new Part to the Public Transport Regulation Act 2009. It provides for authorisation of bus services provided under: (a) bilateral agreements with third countries or (b) existing reciprocal or other arrangements with third countries with similar arrangements for authorising bus services, which are in effect when the Act comes into law. But this limb (b) will cease to apply to the UK three months after Brexit.

Under the new part, third countries services must be authorised by: (a) the NTA, (b) the relevant body in the third country after giving the NTA notice, or (c) the relevant body in the third country under existing similar arrangements in force when the Act comes into law. Again, this limb (c) will cease to apply to the UK three months after Brexit.

Two weeks after a country joins the Interbus Agreement this new Part will cease to apply to it.

### Railways

The Act's General Scheme included provision for regulation of railways crossing the EU borders. This has been dropped. On 14 March 2019 the EU Council Secretariat recommended accepting the European Parliament's amendments to a proposed Regulation dealing with the two railways linking the EU and the UK. The proposed Regulation would extend existing authorisations as far as Dundalk and Calais-Fréthun, for nine months from date of a no-deal Brexit.

# 11 Harbours Act to be Amended

## Most relevant to

- Shipping companies, harbor companies anyone shipping goods through major Irish ports

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As a general rule, ships of a particular size need to use "harbour pilots" supplied by the relevant harbour company to sail into, move within and leave major Irish ports. This is for reasons of safety.

However, some captains or masters on ships using ports regularly are very familiar with the ports and provided they pass certain examinations, those seafarers can be given 'pilotage exemption certificates' which enable them to operate their vessels without taking a pilot on board.

The system requires those seafarers to have various national certificates of competency and, in an Irish context, many of those certificates are issued by the UK. However, if the UK leaves the EU then there is a real concern about the validity on those UK certificates of competency

### What does the Act say?

Part 9 of the Act would amend the Harbours Act 1996. In essence, the Act, if enacted:

- would allow for 'pilotage exemption certificates' to last for three years instead of the current one year;
- existing holders of these certificates could apply for new certificates up to the 29 March 2019; and
- harbour companies could amend their bye-laws to address the issue.

While the amendment is technical in nature, it has huge strategic significance in terms of keeping roll-on/roll-off vessels (the backbone of the west-to-east trade between Ireland and the UK) operating efficiently and without interruption.

# 12 Student Support/Education

## Most relevant to

- Educational institutions and students in Ireland and Northern Ireland

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Under the Student Support Act 2011, Student Universal Support Ireland (SUSI, which is an operation of the City of Dublin Education and Training Board) awards higher education grants to students. To be eligible for a grant, a student must be:

1. ordinarily resident in the State
2. accepted to pursue, or pursuing, an 'approved course' at an 'approved institution'
3. be a national of a Member State, an EEA state or Switzerland, a member of a family of such a national as prescribed by the Minister, a refugee, or in one of certain other categories permitted to reside in the State

### What does the Act say?

The Act allows the Minister for Education to extend point (3) to cover:

a. nationals of other countries. For this, the Minister must have regard to whether there are reciprocal arrangements with the country specified, the needs for skills and knowledge in identified sectors, the qualification to be awarded, available resources for student support, and the contribution that people from the country will make to higher education here

b. UK nationals or Irish citizens. This is focused on Northern Ireland. Here the Minister must have regard to promoting greater tolerance, understanding, exchange of ideas, integration and co-operation between the people of the State and Northern Ireland, and greater understanding of and respect for the diversity of cultures on the island of Ireland

c. their families

The Act introduces the term 'relevant specified jurisdiction' (RSJ). When dealing with third country nationals specified by the Minister under (a) above, the RSJ is a country specified by the Minister in regulations. When dealing with UK and Irish nationals specified under (b), the RSJ is Northern Ireland.

The requirement to be 'ordinarily resident in the State' remains. It means resident in the State for at least three out of the five years ending when a year of study starts, or the course started. There is an exception for temporary absence to study abroad in a Member State. The Act extends this exception to temporary absence from the State to study in the RSJ.

In reckoning time of residence in the State, periods of 'unlawful presence in the State' do not count. This factor is disapplied for Irish citizens and people entitled to be in the State under European freedom of movement law. The Act also disapplies it to people entitled to be in the State under common travel arrangements with the UK or with an RSJ.

'Approved institutions' includes publicly funded educational institutions in Member States. The Act extends this to institutions in an RSJ funded by public funds of the RSJ or any Member State.

The Act also extends to UK residents the 'Free Fees Initiative' under which the State pays tuition fees for eligible EU residents pursuing undergraduate courses at eligible institutions.

# 13 Extradition/White Collar Crime

## Most relevant to

- Anyone interested in white collar crime and extradition

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The UK will no longer be party to the European Arrest Warrant (EAW) scheme if it leaves the EU in a no-deal scenario. The EAW scheme is the basis for current extradition arrangements between the UK and Ireland.

### What does the Act say?

The Act provides that in the event of a no-deal Brexit, Ireland will amend and pass secondary legislation under Ireland's Extradition Act 1965 to achieve the following:

- a return to reliance on the 1957 Council of Europe Convention on Extradition (the 1957 Convention) for extradition matters involving the UK
- a mechanism to ensure that the current reciprocal arrangements in relation to the extradition of UK and Irish nationals continue between the two states
- a mechanism to allow the electronic transmission of supporting documents for a request for extradition from the UK

The 1957 Convention would not be nearly as efficient or as straightforward an extradition mechanism as the EAW system, even allowing for the electronic transmission of documents. It would mean a return to the use of diplomatic channels for making extradition requests and for resolving any disputes which arise under them.

In our view, this would inevitably lead to delays in extraditions between Ireland and the UK, as well as higher costs. It also raises the possibility of political interference in extradition matters, which the EAW scheme sought to avoid by placing court-to court communications at the heart of the extradition process.

Finding an effective replacement of the EAW mechanism has been a focus for the UK from the start of Brexit negotiations. This is because reliance on the 1957 Convention for extraditions to and from the UK will not be possible in many other EU countries. Effective cross-border law enforcement remains a stated priority for the UK government. We expect to see concerted efforts by the UK to agree arrangements which closely mirror the EAW scheme for the future.

In the meantime, it is business as usual for extradition requests between the UK and Ireland. Last year, the Irish Supreme Court asked the Court of Justice of the European Union (CJEU) whether extraditing a defendant (R.O.) to the UK under the EAW system was permissible in light of the UK's anticipated withdrawal from the EU. The CJEU ruled that Member States must continue to execute EAWs for as long as the UK is still in the EU, unless there are substantial grounds to believe that the person concerned is at risk of being deprived of his or her fundamental rights.

# 14 Interpretation of Legislation Post-Brexit

## Most relevant to

- Anyone who has to interpret Irish legislation post-Brexit

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One of shortest and most technical parts of the legislation relates to interpretation of Irish legislation post-Brexit.

Despite its brevity, this part could have an impact across many businesses - particularly regulated businesses and those involved in international trade.

### What does the Act say?

Part 15 would apply if the UK enters a 'transition' period under a withdrawal agreement. This 'transition' period is known by the UK Government as the "implementation" phase.

The Act relates to existing legislation. Where, immediately before the coming into operation of Part 15, a reference in an enactment to a Member State included a reference to the UK by virtue of that state being a Member State of the European Communities or of the EU, then, on the coming into operation of Part 15, the reference in the enactment shall, in so far as is necessary to give effect to the terms of a withdrawal agreement, continue to include a reference to the UK. This applies whenever the enactment came into operation.

The Act also relates to future legislation. A reference to a Member State in an enactment that comes into operation at the same time as, or at any time after, the coming into operation of this Part shall, in so far as is necessary to give effect to the terms of a withdrawal agreement, include a reference to the UK.

A 'withdrawal agreement' means an agreement concluded under Article 50 of the Treaty on European Union between the UK on the one part and the EU on the other part setting out the arrangements for the withdrawal of the UK from membership of the EU.

In essence, Part 15 will enable legislation to be enacted as if the UK were still a Member State but where it is 'necessary' to give effect to the terms of the withdrawal agreement. One could anticipate some issues over whether or not it is 'necessary' (and not just desirable) to give effect to the terms of the withdrawal agreement.

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