

EXPLANATORY MEMORANDUM TO

THE TAKEOVERS (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Act.

2. Purpose of the instrument

- 2.1 These Regulations amend Part 28 of the Companies Act 2006 (the Act) to enable the domestic takeovers regime to operate effectively on a freestanding basis outside the EU framework. Shareholders should continue to receive the protection of takeover regulation that ensures, so far as possible, fair treatment during a takeover bid.

Explanations

What did the relevant EU law do before exit day?

- 2.2 Directive 2004/25/EC of the European Parliament and of the Council (the Directive) established the legal framework through which company takeovers are regulated in the European Economic Area (EEA). It was transposed into UK domestic law by Part 28 of the Act.

Why is it being changed?

- 2.3 At EU exit the UK will no longer have a legal obligation to transpose the Directive.

What will it now do?

- 2.4 These Regulations will make the changes needed to fix deficiencies in the Act arising from EU exit and thus preserve, so far as possible, the current takeover regime.

3. Matters of special interest to Parliament

Matters of special interest to the Joint 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 The territorial application of these Regulations includes Scotland and Northern Ireland.
- 3.3 These Regulations are made to cover the entire United Kingdom (see the EUWA) and the territorial application of these Regulations is not limited either by the EUWA or by the Regulations.

4. Extent and Territorial Application

- 4.1 The territorial extent of these Regulations is all of the United Kingdom.
- 4.2 The territorial application of these Regulations is all of the United Kingdom.

5. European Convention on Human Rights

5.1 Parliamentary Under-Secretary of State Kelly Tolhurst has made the following statement regarding Human Rights:

“In my view the provisions of the The Takeovers (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

6.1 Part 28 of the Act implemented the Directive and designated the Panel on Takeovers and Mergers (the Panel) as the UK’s supervisory authority for takeovers. The Directive created minimum standards on takeover supervision in the regulated markets of EEA member states. In the UK the primary regulated market is the main market of the London Stock Exchange.

6.2 These Regulations are made to effect the changes required to Part 28 of the Act to separate the UK domestic takeover regime from the European takeover regime. Transposing the text of Articles from the Directive, with amendments where necessary, will result in a freestanding domestic takeovers regime.

6.3 The Panel has a statutory duty to make rules relating to takeover supervision in the UK. Since these Regulations affect the terms under which the Panel may exercise its legislative power, they are subject to an affirmative Parliamentary procedure.

7. Policy background

What is being done and why?

Consequential amendments

7.1 Consequential legislative amendments in these Regulations remove references to EU law in order to ensure legal clarity and to effect a freestanding domestic takeover regime. The following consequential amendments are made:

- cross-references to Directive Articles have been updated in sections 943, 953, 968, 970 and 980;
- references to the Directive and definitions for the Directive have been removed in sections 971 and 980;
- provisions specifically for EEA member states have been removed in sections 978 and Schedule 2;
- definitions have been clarified in section 971; and
- the definition of takeover bid has been amended and consolidated in paragraph 20 of the new Schedule 1C to the Act, removing existing definitions of takeover bid throughout the Act.

Duty for the Panel to make rules giving effect to specific Directive Articles

7.2 The obligation for the Panel to make rules giving effect to specific Directive Articles was transposed by cross-referring to these Articles in the Directive.

7.3 These Regulations copy the relevant Articles into the Act in Schedule 1C, with the exception of Article 4.2 on shared jurisdiction. Corrective amendments have been made where appropriate for UK legislation. The meaning and applicability of these Articles have not changed.

Shared jurisdiction

- 7.4 The EU takeovers regime includes a system of shared jurisdiction for companies that have their registered offices and their securities admitted to trading in different EEA member states under Article 4.2 of the Directive. Article 4.2 specifies the competent authority responsible for supervising particular aspects of a takeover bid for such companies. The supervision of a takeover bid of companies captured by the shared jurisdiction regime is shared by two supervisory authorities, one in the country where the company has its registered office and the other where the company's securities are admitted to trading on a regulated market.
- 7.5 The shared jurisdiction regime works on a reciprocal basis within the EU legislative and cooperative framework. This reciprocal arrangement would no longer apply to the UK after exit, therefore these Regulations will remove the requirement for the Panel to implement the shared jurisdiction regime from the Act.
- 7.6 Offers for companies that have their registered office in the UK and that satisfy the "residency test" within the City Code on Takeovers and Mergers will be placed within the sole jurisdiction of the Panel. Offers for companies that have their registered office in an EEA member state and their securities admitted to trading only on a regulated market in the UK will no longer be regulated by the Panel.

Restrictions on the disclosure of confidential information

- 7.7 Section 948 of the Act restricts the disclosure of confidential information obtained by the Panel during the course of its duties, prescribing the conditions under which such information can be disclosed and the persons or organisations that information can be shared with. It applies both to the Panel and to bodies with whom it shares information. Section 949 of the Act makes disclosure of information in contravention of section 948 a criminal offence. Schedule 2 lists the organisations to which the Panel can disclose information for specified purposes.
- 7.8 The Act provides an exemption from the section 948 restriction to EEA public bodies in particular circumstances, enabling them to disclose confidential information forwarded to them by the Panel in order to discharge a Community obligation.
- 7.9 The Directive provides reciprocal protections for the disclosure of confidential information. The exempt EEA public bodies are bound by their national laws and EU laws to prevent inappropriate disclosure of information passed to them by the UK authorities. After exit these reciprocal obligations will no longer apply to the UK.
- 7.10 These Regulations remove the specific exemption for EEA public bodies from the section 949 offence and thus ensure recourse for inappropriate onward disclosures of information.
- 7.11 Section (E) of Part 2 of Schedule 2 allows for the disclosure of information by the Panel for the purpose of assisting overseas regulatory authorities to exercise their regulatory functions. After exit the Panel will therefore continue to be able to disclose information to EEA public authorities (as it can to authorities from other countries), but onward disclosure by EEA authorities will no longer be permitted.
- 7.12 Section (E) of Part 2 of Schedule 2 also allows disclosure of information in pursuance of any EU obligation. These Regulations remove this information gateway, as the UK will no longer be part of the EU regime.

Duty of cooperation

- 7.13 Cooperation with overseas authorities is mutually beneficial. Section 950 of the Act places a duty on the Panel to cooperate with its counterparts and financial authorities with similar regulatory functions to the Financial Conduct Authority, the Prudential Regulation Authority and the Bank of England in any country or territory outside the UK.
- 7.14 The Act also places a specific duty on the Panel to cooperate with EEA member state supervisory authorities and public financial institutions. This duty is reciprocal, but after exit EEA member states will no longer be obliged by the Directive to cooperate with the UK in this way.
- 7.15 These Regulations therefore remove the specific obligation for the Panel to cooperate with EEA member states' supervisory authorities and public financial institutions. However, the Panel will still have a duty to cooperate with these authorities under the general duty to cooperate with overseas authorities.

Breakthrough

- 7.16 Article 11 of the Directive concerning breakthrough enables offerors for companies with specified restrictions (e.g. concerning the transfer of securities or voting rights) in their articles of association, or with specified contractual restrictions, to overcome those restrictions during the course of a takeover bid. Article 12 of the Directive allows EEA member states to make Article 11 optional for companies but they must provide a legal framework for companies to use these provisions if they choose to do so. The UK has opted to make Article 11 optional.
- 7.17 The breakthrough provisions were transposed in Chapter 2 of Part 28 of the Act but use cross-references to the Directive. These Regulations transpose the text of the Directive, with drafting corrections where required, to ensure appropriate statutory interpretation.

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

- 8.1 These Regulations are being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 At this time the Government is not considering a consolidation of the Companies Act 2006 amended by these regulations.

10. Consultation outcome

- 10.1 Consultation has been undertaken with the Panel, the supervisory authority for takeovers in the UK. Its views have been taken into consideration in the development of these Regulations.

11. Guidance

11.1 It is not necessary to issue specific guidance with respect to these Regulations.

12. Impact

12.1 The impact of these Regulations on business, charities or voluntary bodies is minimal. The loss of the EU shared jurisdiction regime will affect approximately 25 EEA companies and 10 UK companies.

12.2 There is no impact on the public sector.

12.3 An Impact Assessment has not been prepared for these Regulations because the impact on most businesses will be minimal.

13. Regulating small business

13.1 These Regulations apply to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

14. Monitoring & review

14.1 As these Regulations are made under the EU (Withdrawal) Act 2018, no review clause is required.

15. Contact

15.1 Sam Scott at the Department for Business, Energy and Industrial Strategy (Telephone: 020 7215 5958 or email: sam.scott@beis.gov.uk) can answer queries regarding these Regulations.

15.2 Christopher Blairs, Deputy Director for Competition Policy at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 Parliamentary Under-Secretary Kelly Tolhurst at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal	Sub-paragraphs (3) and (7)	Ministers of the Crown	Set out the 'good reasons' for creating a

offences	of paragraph 28, Schedule 7	exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 Parliamentary Under-Secretary Kelly Tolhurst has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the The Takeovers (Amendment) (EU Exit) Regulations 2019 do no more than is appropriate”.

1.2 This is the case because the Regulations address legislative deficiencies arising from EU exit.

2. Good reasons

2.1 Parliamentary Under-Secretary Kelly Tolhurst has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in these Regulations and I have concluded they are a reasonable course of action”.

2.2 These reasons are set out in the Policy Background, sub-paragraphs 7.1 to 7.17.

3. Equalities

3.1 Parliamentary Under-Secretary Kelly Tolhurst has made the following statement:

“These Regulations do not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.

3.2 Parliamentary Under-Secretary Kelly Tolhurst has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to these Regulations, I have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.