

EXPLANATORY MEMORANDUM TO
THE ELECTRICITY AND GAS (INTERNAL MARKETS AND NETWORK CODES)
(AMENDMENT ETC.) (EU EXIT) REGULATIONS 2020

2020 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 Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument is one of several statutory instruments required to ensure that legislation governing the energy system in Great Britain ('GB') will function effectively if at the end of the implementation period ('IP') the UK does not reach a further agreement with the European Union ('EU') or if the agreement reached does not cover the relevant policy area.

2.2 The instrument amends directly applicable EU law governing GB's energy system to ensure this legislation remains operable at the end of the IP when it is converted into retained EU law. It also revokes Regulation (EU) 2019/942 relating to the Agency for the Cooperation of Energy Regulators ('ACER'). By maintaining the function of GB energy legislation, this instrument is designed to maximise continuity for industry.

Explanations

What did any relevant EU law do before exit day?

2.3 The EU has recently agreed on a comprehensive update of its energy legislation known as the 'Clean Energy for All Europeans Package'. On 1 January 2020, the following recast regulations came fully into force:

- Regulation (EU) 2019/943 of the European Parliament and the Council of 5 June 2019 on the internal market for electricity ('the Electricity Regulation 2019 (recast)')
- Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators ('the Agency Regulation 2019 (recast)')

2.4 The purpose of these regulations is to further integrate energy markets across the EU by placing an obligation on Member States to liberalise their energy markets, encourage cooperation between its actors, and establish EU-level frameworks for regulating electricity and gas markets. To assist with this process, the Agency Regulation 2019 (recast) sets out the role of the Agency for the Cooperation of Energy Regulators to coordinate energy regulator implementation of the Clean Energy for All Europeans Package and to resolve disputes between Member State regulators.

2.5 The following EU electricity Network Codes (collectively referred to here as the 'Connection Codes') were adopted as part of the 'Third Energy Package', the predecessor to the Clean Energy for All Europeans Package:

- Commission Regulation (EU) No 2016/631 of 14 April 2016 establishing a network code on requirements for grid connection of generators
- Commission Regulation (EU) No 2016/1388 of 17 August 2016 establishing a network code on demand connection
- Commission Regulation (EU) No 2016/1447 of 26 August 2016 establishing a network code on requirements for grid connection of high voltage direct current systems and direct current-connected power park modules

2.6 Under the Third Energy Package, the Network Codes are established by the European Network of Transmission System Operators for Electricity (ENTSO-E), a representative body for electricity transmission system operators (TSOs) across the EU, signed off by ACER and approved through the EU procedures required for implementing EU law. The Codes introduce common technical rules aimed at further integrating energy markets across the EU and promoting their efficient, harmonised operation.

Why is it being changed?

2.7 On the IP completion day, the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”) will incorporate into UK law those pieces of EU legislation that directly apply immediately before the IP completion day. This includes the Electricity Regulation 2019 (recast), the Agency Regulation 2019 (recast) and the Connection Codes.

2.8 If left unamended, this retained EU law will contain numerous deficiencies as defined by section 8 of the Withdrawal Act. These deficiencies range from references to EU Member States to more significant issues, such as obligations for UK bodies to accept binding decisions from the European Commission.

2.9 Failure to address these deficiencies will create uncertainty and inefficiency in the operation of GB’s market regulation, the role and functions of domestic and EU bodies in the markets, and requirements on market participants. This uncertainty could result in an increase in wholesale prices.

What will it now do?

2.10 As set out in detail in section 7, this instrument will amend the relevant pieces of domestic and retained EU law relating to energy to make them operable by correcting any deficiencies identified whilst retaining regulatory functions needed to keep the GB market working effectively.

2.11 Notable changes made by this instrument include: removing provisions relating to the role of the cross-European coordination body ENTSO-E in the Electricity Regulation 2019 (recast); removing obligations on GB institutions and businesses to share information with EU institutions in the Connection Codes; revoking the Agency Regulation 2019 (recast) (which sets out the rules governing ACER that are no longer applicable in a non-EU context); and making consequential amendments to previously made EU Exit SIs.

2.12 Through these amendments, this instrument will maintain the functionality and reliability of GB’s energy legislation and ensure stability for GB industry and consumers.

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 this instrument includes Scotland.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales and Scotland.

4.2 The territorial application of this instrument is England and Wales and Scotland.

5. European Convention on Human Rights

5.1 The Minister of State, the Rt Hon Kwasi Kwarteng MP has made the following statement regarding Human Rights:

“In my view the provisions of the Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

6.1 On 29 March 2017 the Prime Minister triggered Article 50 of the Treaty on European Union, starting the UK’s withdrawal from the EU. After securing a Withdrawal Agreement on 17 October 2019, the UK officially left the EU on 31 January 2020 and subsequently entered the IP. To ensure business and legislative continuity for the UK, following over 40 years of EU membership, the Withdrawal Act will incorporate directly applicable EU legislation and EU derived legislation as it applied immediately before the IP completion day into domestic law.

6.2 This instrument uses powers set out in section 8(1) of the Withdrawal Act to resolve ‘deficiencies’ caused by the withdrawal of the UK from the EU in EU legislation relating to electricity. The instrument amends the Electricity Regulation 2019 (recast), the Connection Codes, and revokes the Agency Regulation 2019 (recast). Consequential changes are also being made to S.I 2019/532 and S.I. 2019/533.

6.3 The Electricity Regulation 2019 (recast) replaced the Regulation (EC) No 714/2009 (“the Electricity Regulation 2009”) on 1 January 2020. It sets out the high-level rules and requirements for the operation of electricity markets and defines the relationships between EU bodies in this area. The Agency Regulation 2019 (recast) replaced Regulation (EC) No 713/2009 (“the Agency Regulation 2009”). It establishes and provides for the funding and operation of the European Union Agency for the Cooperation of Energy Regulators. The Connection Codes were made in 2016 as part of the Third Energy Package to introduce common technical rules aimed at further integrating energy markets across the EU and promoting their efficient, harmonised operation.

6.4 This instrument does not modify EU energy law as it applies in Northern Ireland (‘NI’). Energy is mostly a transferred matter in NI. Following the restoration of the NI Executive, legislative decisions are now being made by the relevant NI Minister and legislation is expected to pass through Stormont rather than Westminster. Whilst this

SI will make retained EU law ‘workable’ for GB, in the event that the UK does not reach a further agreement with the EU, NI will be able to use the powers in the Withdrawal Act to make any necessary changes to these EU Regulations.

7. Policy background

What is being done and why?

- 7.1 The aim of this instrument is to ensure that the relevant retained EU law, listed in section 2, remains operable after the end of the IP to ensure that the GB energy market continues to operate effectively. The deficiencies dealt with in this instrument are numerous, and it would not be practical to list them all. The following paragraphs highlight examples of typical deficiencies described above.
- 7.2 The most significant amendments this instrument makes to the legislation listed in section 2 are: updating definitions in the Electricity Regulation 2019 (recast) to ensure they work in a non-EU context – for example by amending the definition for ‘small enterprise’ in Article 2 so that it no longer refers to Euros but instead to Sterling – and revoking articles relating to the cross-European coordination body ENTSO-E, which will be redundant when incorporated into the domestic statute book; revoking the Agency Regulation 2019 (recast) in full; and removing obligations in the Connection Codes for GB bodies to provide information to EU institutions or to take account of their recommendations.
- 7.3 In addition, this instrument modifies those provisions of the Connection Codes which set time limits from the point at which the Codes were finalised in 2016, to make it clear exactly when these time limits ended. It also removes provisions from the Codes that relate to EU Member States as these will be redundant in GB after the IP completion day. For example, Table 1 in Article 5 of the Requirements for Grid Connection of Generators code has been amended to display thresholds limits for GB only, removing the limits for Continental Europe, Ireland and Northern Ireland, Nordic and Baltic Member States. Provisions relating to NI have also been removed as the extent of the changes are limited to GB.

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

- 8.1 This instrument is being made using the power in section 8 of the Withdrawal Act in order to address failures of retained EU law to operate effectively or other 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 Consolidation is not required for this instrument.

10. Consultation outcome

- 10.1 Statutory instruments made under the powers in the Withdrawal Act do not require consultation, and a consultation has not been conducted for this instrument. Technical and factual input relevant to this instrument has been provided by GB’s energy regulator, the Office of Gas and Electricity Markets (Ofgem).

11. Guidance

11.1 Guidance has not been produced for this instrument.

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 full Impact Assessment has not been prepared for this instrument because the impacts are below the threshold required to carry out a full Impact Assessment. Key stakeholders including Ofgem, National Grid, have been informed of BEIS' conclusions, set out in the De Minimis that any direct impacts on business or public bodies that have been identified are considered to be negligible (less than the £5m total De Minimis threshold).

12.4 The counterfactual used to assess the impacts of EU Exit SIs states that the impacts are to be assessed against the UK statute book prior to exit day on 31 January 2020 (the *static acquis*), as per Government analytical guidance on Impact Assessments. The analytical guidance also states that impacts that occur as a direct consequence of our departure from the EU should not be quantified as this would overlap with the scope of the assessments made as part of the Withdrawal Act, which passed prior to exit day.

12.5 When these same changes are assessed against the do-nothing counterfactual, a scenario in which an agreement on the future relationship is not reached, the SI will come into force and help ensure that the UK has a functioning statute book and that EU legislation remains operable once incorporated into domestic law at the end of the IP. This in turn will help to ensure that the regulatory framework that underpins gas and electricity markets is coherent and functions effectively.

13. Regulating small business

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

13.2 The basis for this decision is that the scale of the impacts identified in connection with this instrument is small, and they do not fall disproportionately on small businesses.

14. Monitoring & review

14.1 The Department does not intend to monitor this instrument.

14.2 As this instrument is made under the Withdrawal Act, no review clause is required.

15. Contact

15.1 Joan McGarvey at the Department for Business, Energy and Industrial Strategy Telephone: 020 7215 3189 or email: joan.mcgarvey@beis.gov.uk can be contacted with any queries regarding the instrument.

15.2 Robert Hewitt, Deputy Director for Energy Security, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister of State, the Rt Hon Kwasi Kwarteng MP, at the Department for Business, Energy & 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
Appropriateness	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	<p>Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them.</p> <p>State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.</p>
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	<p>Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2</p> <p>In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs</p>	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.

Part 2

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

1. Appropriateness statement

1.1 The Minister of State, the Rt Hon Kwasi Kwarteng MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Electricity and Gas (Internal Markets and Network Codes) (Amendment etc.) (EU Exit) Regulations 2020 does no more than is appropriate”.

1.2 This is the case because:

- The amendments made by this instrument are necessary to resolve deficiencies as defined in section 8 of the Withdrawal Act.
- The vast majority of amendments made by this instrument resolve minor deficiencies in the corresponding legislation, such as references to EU institutions.
- The Agency Regulation 2019 (recast), which is revoked by this instrument, is composed entirely of articles that will be inoperable in GB after the end of the IP, such as rules governing the funding of EU institutions.

2. Good reasons

2.1 The Minister of State, the Rt Hon Kwasi Kwarteng MP 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 this instrument, and I have concluded they are a reasonable course of action”.

These reasons are:

- Continued references to EU institutions and processes would create significant uncertainty in the operation of GB market regulation, the role and functions of domestic and EU bodies in the market, and requirements on market participants.
- In line with the Withdrawal Agreement, amendments made by this instrument are necessary to avoid defective legislation and remedy deficiencies which would otherwise disrupt the efficient operation of GB energy systems.

Further information about the reasons for the provisions in this instrument is provided in section 7 above.

2.2 Equalities

2.3 The Minister of State, the Rt Hon Kwasi Kwarteng MP has made the following statement(s):

“The draft instrument does 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.”

- 2.4 The Minister of State, The Rt Hon Kwasi Kwarteng MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, Kwasi Kwarteng 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.”

- 2.5 This instrument has no, or no significant, differential impact on those with protected characteristics under the Equality Act 2010.

3. Explanations

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