

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES (EEA STATE) REGULATIONS 2007

2007 No. 108

1. This explanatory memorandum has been prepared by Her Majesty's Treasury and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 These Regulations substitute a new definition of "EEA State" in the Financial Services and Markets Act 2000 ("FSMA") and in regulations implementing Community legislation in relation to financial services. The new definition includes Bulgaria and Romania which became Community member States on 1st January 2007.

3. Matters of Special Interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 These Regulations substitute a new definition of "EEA State" in paragraph 8 of Schedule 3 to FSMA. Section 425(1) of the FSMA provides that the definition applies for the purposes of the Act. The existing definition of "EEA State" excludes Bulgaria and Romania which became Community member States on 1st January 2007. It is amended in order correctly to transpose the single market directives (listed in paragraph 1 of Schedule 3 to FSMA). The new definition refers to the definition of "EEA state" inserted into the Interpretation Act 1978 (c. 30) by the Legislative and Regulatory Reform Act 2006 (c. 51); it therefore includes all Community member States.

4.2 Some of the subordinate legislation made under FSMA contains references to "EEA State". The Treasury considers that by virtue of section 11 of the Interpretation Act 1978 (c. 30) read with sections 20(2) and 22(1) of that Act such references are to be read as references to the definition of "EEA State" inserted by these Regulations.

4.3 The Regulations also substitutes the same definition of "EEA State" in regulations made under section 2(2) of the European Communities Act 1972 in relation to financial services which currently contain definitions excluding Bulgaria and Romania.

5. Extent

This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Economic Secretary has made the following statement regarding Human Rights: “In my view the provisions of the Regulations are compatible with the Convention Rights”.

7. Policy background

7.1 Under the single market directives, a person whose head office is in the UK and who is entitled to carry on an activity in another EEA State may either establish a branch in another EEA State or provide cross-border services into another EEA State, subject to the fulfilment of the conditions in the relevant directive. And firms from other EEA States have the same rights to “passport” into the UK. Passporting rights can be exercised after following simple notification procedures. Passporting rights only apply within the EEA.

7.2 Paragraph 8 of Schedule 3 to FSMA defines “EEA State” as “a State which is a contracting party to the agreement on the European Economic Area signed at Oporto on 2 May 1992 as it has effect for the time being”.

7.3 To date this definition has not caused difficulty because EU member states have also ratified the EEA Agreement (or where they have not there has been Community legislation to the effect that they be treated as EEA States). However, Bulgaria and Romania became Community member States on 1st January 2007 but have not ratified the EEA Agreement and therefore are not covered by the FSMA definition. The failure of Bulgaria and Romania to ratify the EEA Agreement was an unanticipated development which is beyond the control of the UK. It had been expected that they would ratify to coincide with accession to the EU. And there is no Community instrument dealing with the matter.

7.4 The definition needs to be amended as quickly as possible in order to secure that the full range of FSMA passporting rights can be exercised by UK, Bulgarian and Romanian firms. Passporting applications relating to these countries have been made to the FSA. The FSA handbook also requires amendment.

7.5 We understand that in order to comply with the requirements of the directives, the FSA has already issued about 25 letters to overseas regulators in respect of passporting applications under Schedule 3 of FSMA in respect of UK firms wishing to provide services or establish branches in Bulgaria or Romania and in respect of Bulgarian and Romanian firms wishing to provide services or establish branches in the UK. The letters assume that the definition of “EEA State” in FSMA has already been amended to include Bulgaria and Romania. The position needs to be regularised as quickly as possible. In addition, FSA want to change their rules on the meaning of "EEA state" in order to bring the Handbook up to date as soon as possible, and they cannot do this until the FSMA definition has been amended..

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 A Transposition Note has not been produced. The Economic Secretary made the following statement "In the Government's view, the resources required to produce

a Transposition Note are significantly greater than can be justified by the resulting added benefit to the reader".

9. Contact

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