

EXPLANATORY MEMORANDUM TO
THE COMPANIES (EEA STATE) REGULATIONS 2007

2007 No. 732

- 1.** 1.1 This explanatory memorandum has been prepared by the Department of Trade and Industry and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the House of Lords Select Committee on the Merits of Statutory Instruments and the Joint Committee on Statutory Instruments.

2. Description

2.1 The Companies (EEA State) Regulations 2007 substitute a new definition of “EEA State” in companies primary and secondary legislation in the United Kingdom (listed in paragraph 4.1 below and described as “the relevant companies legislation”). The new definition provides that “EEA State” has the meaning given by the Interpretation Act 1978 (c.30). This Act was amended by the Legislative and Regulatory Reform Act 2006 (c.51) to insert a definition which covers all Community member States, including Bulgaria and Romania which became Community member States on 1st January 2007.

3. Matters of special interest to the Joint Committee on Statutory Instruments

Regulations coming into force less than 21 days after they have been laid

3.1 The Department regrets that the Regulations will come into force less than 21 days after they have been laid. The need for the Regulations results from the failure of Bulgaria and Romania to ratify the EEA agreement when they joined the EU on 1st January 2007 (see paragraph 4 below). This 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. Reference to the EEA agreement is relied upon in a number of circumstances in the relevant companies legislation to ensure that the UK’s Community obligations are fully complied with. There is no Community instrument dealing with this matter and it is, therefore, considered that the necessary legislation to remedy this matter should come into force with urgent effect.

3.2 Furthermore, the first possible date for making the Regulations is 7th March, being the date when the relevant designation order (made under the European Communities Act 1972 (c.68)) comes into force. There were considerable uncertainties about the extent of the Minister’s power to make these Regulations under existing designations, given the very broad application of the definition of EEA State within companies legislation. The matter has, therefore, been put beyond doubt by a wider designation in relation to companies which forms part of the European Communities (Designation) Order 2007 (S.I. 2007/193) which was laid on 14th February and which comes into force on 7th March.

3.3 It is unlikely, however, that anyone will be put at a disadvantage as a result of this instrument coming into force on 9th March. Companies legislation, which is amended by these Regulations, is closely connected to financial services legislation to which similar amendments were made by the Financial Services (EEA State) Regulations 2007 (S.I. 2007/108). They came into force on 13th February 2007. The interest groups affected by these amendments are largely the same and therefore amendments to companies legislation will not be unexpected given equivalent changes to financial services legislation.

Regulations 5 and 6 – amendments to secondary legislation

3.4 We thought it would be helpful to explain our approach to amending the definition of “EEA State” in secondary legislation, in the light of section 11 of the Interpretation Act 1978.

3.5 Where subordinate legislation made under the Companies Act 1985 and the Companies (Northern Ireland) Order 1986 uses the expression “EEA State” without defining it, we are satisfied that we can rely on section 11. But where such subordinate legislation contains its own (outdated) expression of “EEA State” we think it is more difficult to rely on section 11, which only applies “unless the contrary intention appears”. We identified only two statutory instruments made under any of the Companies Acts (or the NI companies legislation) that use “EEA State” in a freestanding way; the Companies (Summary Financial Statements) Regulations 1995 (S.I. 1995/2092) and the Companies (Summary Financial Statement) Regulations (Northern Ireland) 1996 (S.R. 1996 No.179), where “EEA State” is defined in each case in regulation 2. We considered whether we should remove the definition altogether, so as to rely in future on section 11. We decided against this because we concluded that to do so could create confusion arising out of the fact that when these two instruments were made, there was no definition of “EEA State” in the parent legislation.

3.6 Since this instrument amends primary legislation we have sought comments from Parliamentary Counsel and can confirm that they are content with the proposed amendments (including our approach to amending secondary legislation).

4. Legislative Background

4.1 The Companies Act 1985 (and the Companies (Summary Financial Statement) Regulations 1995 made under that Act) and the Companies Act 2006 include provisions that refer to “EEA State”. The 1985 Act, the 1995 Regulations and the 2006 Act each define “EEA State” (at section 744, regulation 2(1) and section 1170 respectively) by reference to ratification of the EEA Agreement. This definition does not include Bulgaria and Romania because Bulgaria and Romania are not yet members of the EEA. However, it was always intended that the references to “EEA State” would include any State that is for the time being a member State of the EC as well as any other State that is for the time being a contracting party to the EEA agreement. The same issues arise in respect of legislation achieving equivalent effect in relation to Northern Ireland (the Companies (Northern Ireland) Order 1986 and the Companies (Summary Financial Statement) Regulations (Northern Ireland) 1996) and the Takeovers Directive (Interim Implementation) Regulations 2006 (which apply throughout the UK).

4.2 Therefore, these Regulations amend the definition of “EEA State” to include Bulgaria and Romania for the purposes of the relevant companies legislation. The new definition refers to the definition of “EEA State” inserted into the Interpretation Act 1978 by the Legislative and Regulatory Reform Act 2006, which includes all Community member States. That insertion relates only to enactments made on or after 8th January 2007 which is why it is necessary to amend companies legislation made before that date so as to apply the definition in the Interpretation Act.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 Ian McCartney, Minister of Trade, Investment and Foreign Affairs, has made the following statement regarding human rights:

“In my view the provisions of The Companies (EEA State) Regulations 2007 are compatible with the Convention rights.”

7. Policy background

7.1 Bulgaria and Romania became full members of the European Union with effect from 1st January 2007. There are a number of European obligations in relation to company law that must be given effect to in relation to Romania and Bulgaria. For instance concerning:-

- the right of Bulgarian and Romanian shareholders in UK companies to receive communications from the company, and the manner of such communications;
- relaxation of certain accounting requirements in respect of UK subsidiaries of Bulgarian and Romanian companies; and
- information exchange between UK takeover and financial services regulators and Bulgarian and Romanian authorities in implementing the Takeovers Directive.

7.2 A simple drafting device has been utilised in the relevant companies legislation to ensure that the UK’s European obligations are met in relation to its other European partners. This has been to rely upon a definition of “EEA State” which is linked to ratification of the EEA Agreement and related expressions (“EEA company” and “EEA undertaking”). The term “EEA”, as defined, is then used in a number of places in that legislation to achieve the desired legal effect.

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 definitions in the relevant companies legislation. There is no Community instrument dealing with this matter. The position needs to be regularised as rapidly as possible and the only

means of achieving this is through the legislative changes made by the present Regulations.

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 There is no impact on the public sector.

8.3 It is normal practice to make available to Parliament, alongside primary or secondary legislation giving effect to European legislation, a transposition note that sets out how the Government will transpose the main elements of that legislation into UK law. However, in the present case a transposition note has not been made available. Ian McCartney, Minister of Trade, Investment and Foreign Affairs, has made the following statement:

“In the Government’s view, the resources required to produce a transposition note in respect of The Companies (EEA State) Regulations 2007 are significantly greater than can be justified by the resulting added benefit to the reader.”

9. Contact

9.1 Mike Edbury at the Department of Trade and Industry (telephone number: 0207 215 0231 or e-mail: Michael.Edbury@dti.gsi.gov.uk) can answer any queries regarding this instrument.