

EXPLANATORY MEMORANDUM TO

THE ELECTRONIC MONEY, PAYMENT SERVICES AND PAYMENT SYSTEMS (AMENDMENT AND TRANSITIONAL PROVISION)(EU EXIT) REGULATIONS

2018 No. 1201

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Her Majesty's Treasury and is laid before Parliament by Act.

2. Purpose of the instrument

- 2.1 This instrument is being made in order to ensure that the Payment Services Regulations 2017¹ (PSRs) and the Electronic Money Regulations 2011² (EMRs) can continue to operate effectively after the UK's withdrawal from the EU. This instrument will achieve this by using the EU (Withdrawal) Act Section 8 powers to fix deficiencies in these regulations.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The PSRs implement the second Payment Services Directive (PSD2) into UK law. The PSRs set out the rights and obligations for Payment Service Providers (PSPs) to comply with when making payments on behalf of a Payment Service User (PSU). The PSRs also set out the authorisation and registration requirements for a number of financial services institutions: Payment Institutions (PIs) and registered Account Information Service Providers (rAISPs). These requirements include rules regarding capital requirements; safeguarding of client funds to protect them in the event of insolvency; and the use of agents.
- 2.3 The EMRs implement the second Electronic Money Directive (EMD2) into UK law. The EMRs set out the regulatory regime for the issuance of electronic money (money that is stored electronically – such as that on prepaid cards, or in an online wallet). The EMRs set out the authorisation requirements for Electronic Money Institutions (EMIs). These requirements include rules regarding capital requirements; safeguarding of client funds to protect them in the event of insolvency; and the use of agents.

Why is it being changed?

- 2.4 Once the UK has left the European Union, UK law will no longer operate effectively after exit day. This instrument seeks to fix the deficiencies in the PSRs and EMRs to ensure an effectively operating payments and e-money regime from exit day. If these deficiencies are not addressed at Exit then significant aspects of the Regulations would become legally inoperable, rendering the UK regime ineffective.

¹ SI 2017/752

² SI 2011/99

What will it now do?

- 2.5 This SI makes amendments to ensure that the UK's payments and e-money regime continues to operate effectively at the point at which the UK leaves the EU. These amendments include required changes to safeguarding of client assets, reducing the scope of the Regulations to reflect Exit, enabling continued access to the Single Euro Payments Area (SEPA), the creation of a Temporary Permissions Regime (TPR), the transfer of functions currently carried out by the European Supervisory Authorities, and links to other EU dossiers. More detail on the specific changes being made in these areas can be found at Section 7.

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 and Northern Ireland.
- 3.1 The powers under which this instrument is made cover the entire United Kingdom (see European Union (Withdrawal) Act 2018) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

- 4.1 The extent of this instrument is to the whole United Kingdom.
- 4.2 The territorial application of this instrument is to the whole United Kingdom.

5. European Convention on Human Rights

- 5.1 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding Human Rights:

“In my view the provisions of the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provision) (EU Exit) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This SI amends the Payment Services Regulations 2017 and the Electronic Money Regulations 2011 to correct deficiencies arising from the UK's exit from the European Union.

7. Policy background

What is being done and why?

- 7.1 The UK will leave the EU on 29 March 2019. The UK and the EU have agreed the terms of an implementation period that will start on 29 March 2019 and last until 31 December 2020. This will provide time to introduce the new arrangements that will underpin the UK-EU future relationship, and provide valuable certainty for businesses and individuals. During the implementation period, common rules will continue to apply. The UK will continue to implement new EU law that comes into effect and the

UK will continue to be treated as part of the EU's single market in financial services. This will mean that access to each other's markets will continue on current terms and businesses, including financial services firms, will be able to trade on the same terms as now until 31 December 2020. UK firms will need to comply with any new EU legislation that becomes applicable during the implementation period.

- 7.2 The government is seeking a deep and special future partnership with the EU, which should be greater in scope and ambition than any such agreement before and encompass financial services. Given the highly regulated nature of financial services, the volume of trade between UK and EU markets, and a shared desire to manage financial stability risks, the UK proposes a new economic and regulatory arrangement that will preserve mutually beneficial cross-border business models and economic integration for the benefit of businesses and consumers. Decisions on market access would be autonomous in our proposed model, but would be underpinned by stable institutional processes in a bilateral agreement and continued close regulatory and supervisory cooperation.
- 7.3 While the government has every confidence that a deal will be reached and the implementation period will be in place, it has a duty to plan for all eventualities, including a 'no deal' scenario. The government is clear that this scenario is in neither the UK's nor the EU's interest, and the government does not anticipate it arising. To prepare for this unlikely eventuality, HM Treasury intends to use powers in the European Union (Withdrawal) Act 2018 (EUWA) to ensure that the UK continues to have a functioning financial services regulatory regime in all scenarios.
- 7.4 The EUWA repeals the European Communities Act 1972 and converts into UK domestic law the existing body of directly applicable EU law (including EU Regulations). It also preserves UK laws relating to EU membership – e.g. legislation implementing EU Directives. This body of law is referred to as "retained EU law". The EUWA also gives ministers a power to prevent, remedy or mitigate any failure of EU law to operate effectively, or any other deficiency in retained EU law, through SIs. These contingency preparations for financial services legislation are sometimes referred to as 'onshoring'. These SIs are not intended to make policy changes, other than to reflect the UK's new position outside the EU, and to smooth the transition to this situation. The scope of the power is drafted to reflect this purpose and is subject to further restrictions, such as the inability to use the power to impose or increase taxation, or establish a public authority. The power is also time-limited and falls away two years after exit day.
- 7.5 Wherever practicable, the proposed approach is that the same laws and rules that are currently in place in the UK would continue to apply at the point of exit, providing continuity and certainty as we leave the EU. However, if the UK does not enter an implementation period, some changes would be required to reflect the UK's new position outside the EU from 29 March 2019.
- 7.6 In the unlikely scenario that the UK leaves the EU without a deal, the UK would be outside the EU's framework for financial services. The UK's position in relation to the EU would be determined by the default Member State and EU rules that apply to third countries at the relevant time. The European Commission has confirmed that this would be the case.
- 7.7 In light of this, the approach in this scenario cannot and does not rely on any new, specific arrangements being in place between the UK and the EU. As a general

principle, the UK would also need to default to treating EU Member States largely as it does other third countries, although there are cases where a different approach would be needed including to provide for a smooth transition to the new circumstances.

- 7.8 HM Treasury published a document on 27 June 2018, which sets out in more detail HM Treasury’s approach to financial services legislation under the European Union (Withdrawal) Act. (<https://www.gov.uk/government/publications/financial-services-legislation-under-the-eu-withdrawal-act>).
- 7.9 This SI makes amendments to aspects of the domestic payments and electronic money legal regimes (which in turn implement EU directives) to ensure that they continue to operate effectively once the UK has left the EU. These changes include:

A Temporary Permissions Regime:

- 7.10 After the UK leaves the EU, the use of the EEA financial services passport—which allows firms in EEA states the right to offer services in any other EEA state on the basis of their home state authorisation—would not operate effectively without a negotiated agreement with the EU. As a consequence, EEA firms undertaking business in the UK via an EEA financial services passport would suddenly lose their right to carry out regulated activities in the UK, which would cause notable disruption for the firms, the UK customers they serve and to the UK financial services sector more broadly.
- 7.11 This instrument assumes that such an agreement is not negotiated. Its purpose is to:
- minimise consumer detriment and financial disruption caused by the sudden loss of ‘passporting rights’;
 - maximise certainty, stability, and confidence in the UK as a global financial centre; and
 - help ensure the UK has a functioning domestic financial services regime after the UK leaves the EU, regardless of the outcome of the negotiations.
- 7.12 This instrument mirrors for payments and electronic money the provisions made for a Temporary Permissions Regime for Financial Services and Markets Act (FSMA) authorised firms through the EEA Passport Rights (Amendment, etc., and Transitional Provisions)(EU Exit) Regulations 2018 laid before Parliament in draft on 5th September 2018. It does this by amending the PSRs and EMRs such that EEA firms who notify the FCA that they wish to enter Temporary Permissions will be able to continue to issue new business in the UK and will be treated as authorised in the UK (“deemed authorisation”).

Safeguarding of client assets:

- 7.13 Under the PSRs, Payment Institutions (and electronic money institutions providing payment services) have to safeguard client funds such that these funds are returned to these clients in the event the firm becomes insolvent. Currently, this is generally done by having segregated accounts: with firms keeping their own funds separate from their clients’ funds, and many of these accounts are in the EU. This SI amends the regulations such that Payment Institutions will be able to hold safeguarding accounts at an approved foreign credit institution’ anywhere in the world. This is in line with the approach to safeguarding of client assets in asset management.

Access to the Single Euro Payments Area (SEPA):

- 7.14 The SEPA payment schemes enable quick and efficient cross-border EU payments across the EU and a number of third countries. SEPA is underpinned by a number of pieces of payments legislation, including that regulations 40, 63, and 85 of the PSRs apply in full to euro transactions made through the SEPA payment scheme. This SI continues to apply these regulations in full to euro transactions within the “qualifying area” (EEA plus the UK) so as to maximise the prospects of the UK remaining within the geographical scope of the SEPA payment schemes.
- 7.15 To cater for a scenario where the UK is unable to continue to participate within SEPA, and PSPs are therefore unable to fulfil the above regulatory obligations, this SI provides HM Treasury with a power to reduce the application of these regulations only to to the part of the transaction carried out in the UK.

Transfer of Functions:

- 7.16 Under the PSRs, the responsibility for the Regulatory Technical Standards sits with the European Banking Authority. In line with the Government’s cross-cutting approach on the transfer of functions, this SI ensures that these functions are transferred to the appropriate UK bodies – in this case, the Financial Conduct Authority (FCA).
- 7.17 Where regulatory action is taken on or before exit day by a competent authority in another EEA state, under the domestic instruments that implement EMD2 or PSD2 in that state, such actions or decisions are ‘saved’ post exit day by this SI.
- 7.18 There are a large number of minor amendments which fix deficiencies occurring from the scope of the Regulations reducing from EEA coverage to solely the UK.

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 European Union (Withdrawal) Act 2018 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 There are currently no plans to consolidate the relevant legislation.

10. Consultation outcome

- 10.1 HM Treasury has not undertaken a consultation on the instrument, but has engaged with relevant stakeholders on its approach to Financial Services legislation under the European Union (Withdrawal) Act 2018, including on this instrument, in order familiarise them with the legislation ahead of laying.
- 10.2 The instrument was also published in draft, along with an explanatory policy note, on the 5th September 2018, in order to maximise transparency ahead of laying.
(<https://www.gov.uk/government/publications/eu-exit-sis-for-payment-services-e-money-and-the-sepa-regulation>)

11. Guidance

- 11.1 No further guidance is being published alongside this instrument. The Financial Conduct Authority intends to consult on changes to their Handbook to reflect changes made through this SI.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies will primarily consist of one-off familiarisation costs for PSPs.
- 12.2 There will be a small one-off burden for firms looking to enter the Temporary Permissons Regime as they are required to notify the Financial Conduct Authority of this. The Temporary Permissions Regime will place no impact on charities or voluntary bodies.
- 12.3 PSPs may face more significant costs as a result of the scope of the regulations reducing to UK-only, but this is a function of the UK leaving the EU, as opposed to the onshoring approach taken in this instrument.
- 12.4 Should the UK lose access to SEPA, the ability for HM Treasury to amend the regulations to prevent firms from facing regulatory obligations which they cannot comply with will ensure that PSPs do not face potential regulatory costs from breaching the obligations.
- 12.5 There is no significant impact on the public sector.
- 12.6 An Impact Assessment will be published in due course on the legislation.gov.uk website.
- 12.7 The Treasury's decision to publish the regulations without a final Impact Assessment aims to ensure that industry and regulators have as much time as possible to familiarise themselves with the regulatory changes.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses if they currently fall within the scope of the PSRs or EMRs.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses. The intention of this SI is to ensure that the payments and e-money regimes within the UK continues to operate as intended when the UK leaves the EU. This SI is therefore aimed at minimising the impact of these regulatory changes on all firms, including small businesses.

14. Monitoring & review

- 14.1 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

- 15.1 Andrew Clemo at HM Treasury Telephone: 0207 270 1187 or email: Andrew.clemo@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 David Raw, Deputy Director for Banking and Credit, at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Economic Secretary to the Treasury, John Glen, 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 offences | Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7 | Ministers of the Crown exercising sections 8(1), 9, and | Set out the 'good reasons' for creating a criminal offence, and the penalty attached. |

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| | | 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence | |
| 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 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provision) (EU Exit) Regulations 2018 does no more than is appropriate.”

- 1.2 The changes to the law made by these Regulations are limited to those that fix deficiencies arising out of EU Exit, or those that provide for the revocation of otiose legal provisions, or which provide for the stability of the financial system.”

2. Good reasons

- 2.1 The Economic Secretary to the Treasury (John Glen) 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.”

- 2.2 This is because the instrument is necessary to ensure the UK payments and electronic money regimes can continue to operate effectively from Exit day.

3. Equalities

- 3.1 The Economic Secretary to the Treasury (John Glen) has made the following statement(s):

“The 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.

- 3.2 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Economic Secretary to the Treasury (John Glen) 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.

5. Legislative sub-delegation

- 5.1 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- “In my view it is appropriate to create a relevant sub-delegated power in the Electronic Money, Payment Services and payment Systems (Amendment and Transitional Provision (EU Exit) Regulations 2018.”
- 5.2 Sub-delegation under the Regulations is either to the regulators (the FCA) or to HM Treasury.
- 5.3 The instrument sub-delegates to the FCA the power to make directions which is considered appropriate to direct firms to enter the Temporary Permissions Regime. This will also give the FCA the responsibility for ensuring that the Regulatory Technical Standards associated with the PSRs operate effectively after exit from the European Union. It is necessary for the regulators to perform this task, given that the required corrections for BTS and regulator rules will be of a highly technical nature.
- 5.4 In respect of HM Treasury the power is being taken to extend the time the regulators have to determine applications for permission to carry out regulated activities in the UK in certain specific circumstances, and as a consequence, the duration of the Temporary Permissions Regime. The power is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament. This is considered appropriate should it transpire that, given the number and complexity of applications, they cannot all be dealt with in time; and that if a determination of an application was to not be completed in time, there would be resulting detrimental effects on UK consumers, firms, and financial markets.
- 5.5 It also gives the Treasury the power to amend a number of regulations which relate to access to the SEPA. They enable HM Treasury to amend a number of regulations in the event that the UK is no longer a member of SEPA at a point in time after Exit day. The power is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament. This is considered appropriate because, should it transpire that UK PSPs can no longer access SEPA, then they will no longer be able to comply with some of the requirements in this legislation. HM Treasury would therefore need to amend these requirements to prevent the detrimental effects on UK PSPs of having a regulatory requirement which they cannot meet.