

EXPLANATORY MEMORANDUM TO
THE EUROPEAN PUBLIC LIMITED-LIABILITY COMPANY (AMENDMENT
ETC.) (EU EXIT) REGULATIONS 2018

2018 No. 1298

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.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is being made using powers in the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. It will ensure that European Public Limited-Liability Companies (often referred to by their Latin name, Societas Europaea (SEs)) registered in the UK on exit day have a clear legal identity and a domestic framework within which to operate.

Explanations

What did any relevant EU law do before exit day?

- 2.2 Regulation (EC) No 2157/2001 ‘on the Statute for a European company’ (the EC regulation) establishes an EU framework within which SEs in different Member States operate; the European Public Limited-Liability Company Regulations (SI 2004/2326) (the SE regulations) make provision for the effective application of the EC regulation and implement parts of that regulation which permit or oblige Member States to make certain provisions in national law. This is supplemented by Council Directive No 2001/86/EC (the SE directive) (which establishes rules regarding the involvement of employees in the SE), implemented by the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 (SI 2009/2401) and the European Public Limited-Liability (Northern Ireland) Regulations 2009 (2009/2402) (together, the employee involvement regulations).

Why is it being changed?

- 2.3 As a result of the UK leaving the EU, the European legislation referred to in section 2.2 will become retained EU law, under the European Union (Withdrawal) Act 2018. As the UK will no longer be a Member State it will not be able to operate within the SE framework. Accordingly, this retained EU law would, without changes, contain deficiencies which will have no practical application, and contain reciprocal arrangements and EU references which are no longer appropriate, for those SEs which remain registered in the UK.
- 2.4 To avoid uncertainty in respect of the identity of such SEs on exit day, amendments made by this instrument to retained EU law in this area will convert any such entities on exit day to a new UK corporate form: a UK Societas.

What will it now do?

- 2.5 The amendments to this retained EU law provide a domestic framework for any SEs registered in the UK to operate as UK Societates on and after exit day.
- 2.6 As much of the existing SE framework as is possible is retained for the domestic entity framework. The parts of the framework which no longer have practical application or are no longer appropriate have been removed.
- 2.7 Amendments to the employee involvement regulations are in line with these changes and maintain employee rights where possible and practicable.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This statutory instrument was laid for sifting as required under the European Union (Withdrawal) Act 2018. The European Statutory Instruments Committee (ESIC) considered the instrument on the 13th November 2018 and agreed that the instrument should follow the negative procedure. The Secondary Legislation Scrutiny Committee (SLSC) considered the instrument on the 20th November 2018 and agreed that the instrument should follow the negative procedure.

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 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom, save that in respect of the employee involvement regulations, where the amendments to the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 (SI 2009/2401) relate only to Great Britain, and the European Public Limited-Liability (Northern Ireland) Regulations 2009 (2009/2402) relate only to Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst has made the following statement regarding Human Rights:

“In my view the provisions of the European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 SEs are registered in individual Member States. Matters not governed by the EC regulation are governed by national law provisions adopted by Member States in implementing Community measures relating specifically to SEs (in the UK the SE regulation and the employee involvement regulations) and provisions of national law

which would apply to a public limited-liability company formed in the UK (including as regards the provisions of its statutes).

- 6.2 The EC regulation covers general provisions such as the capital requirements for an SE, its registration in a Member State, and the fact that its registered office must be within the Community (albeit that it can be transferred with relative ease between Member States without requiring the company to wind up). It also deals with the formation of the SE, which must involve at least two companies operating in different Member States, and includes different ways of achieving this, such as a merger or the formation of a holding SE. Finally, it sets out the structure of the SE, including the ability to adopt either a one or two-tier system and also provisions on accounts, winding up, liquidation, insolvency and cessation of payments.
- 6.3 The SE regulations contain provisions on the registration of the SE on the register; the exercise of options under the EC regulation, such as the power of competent authorities to oppose a transfer; provisions required by the EC regulation, such as publication of the completion of a merger; and provisions relating to the effective application of the EC regulation, such as those relating to protected information. It also sets out the application process that must be made to the registrar if an SE wishes to convert to a public limited company.
- 6.4 The employee involvement regulations provide for information and consultation, and in some cases participation, rights for employees of an SE. These regulations govern this process during the establishment of an SE and once the SE has been registered; they cover the formation of, and election or appointment of members to, a special negotiating body with the aim of reaching an employee involvement agreement, together with the negotiation of that agreement and standard rules on employee involvement. They make provision for disputes about that agreement. There is also provision for the treatment of confidential information and protection for employees where they are involved in that process (such as rights to time off to be part of the employee involvement process and pay for that time off). Although these regulations mainly govern SEs registered within the UK, some parts also provide protection for UK employees of SEs registered in other Member States.

7. Policy background

What is being done and why?

- 7.1 There are approximately 49 SEs registered in the UK. The type and size of these companies vary quite considerably. Many are holding companies with no employees. Others have large operations elsewhere in Europe with only the head office in the UK. A significant proportion of SEs in the UK are in the insurance sector.
- 7.2 There are currently options available to SEs that they can take in advance of exit day. They can transfer their registered office to another Member State or, if they have been registered for a minimum of 2 years, or that the first two sets of annual accounts have been approved, convert to a public limited company. However, we cannot guarantee that all SEs will take such action. If the entities do not take action the lack of clear legal identity on exit day would impact not only on the corporate entity itself but also possibly its employees and its supply chain (e.g. staff could not be paid because bank accounts were frozen or contracts could be declared invalid).
- 7.3 By inserting the automatic conversion process into the EC regulation and the SE regulations this instrument provides for this eventuality. It also makes amendments to

those regulations to deal with resulting changes, such as those relating to registration and name. As it will not be possible to register new SEs in the UK after exit the instrument also omits provisions on formation (and with any associated publication requirements) together with those relating to transfer of a UK registered office to another Member State. EU references have also been amended.

- 7.4 Otherwise, the instrument retains the structure of the SE and provisions relating to accounts, winding up, liquidation, insolvency and cessation of payments in order to retain the current framework for UK Societates as appropriate. Any options exercised by the UK under the EC regulation have also, where appropriate, been retained.
- 7.5 The combination of automatic conversion and the retention of many of the elements of an SE will minimise the burden on these entities and ensure that the appropriate changes are made on day 1 to reduce any possible confusion or doubt over the companies' status.
- 7.6 The intention is that a UK Societas will be a temporary stage for entities rather than a long-term corporate UK choice, allowing them more time to take appropriate action of their own. Without the European features, and with so few UK Societates, we do not believe it will be an attractive long-term corporate vehicle. The regulations do not include a sunset provision (the intention is to give any remaining entities the time they need to make their own arrangements).
- 7.7 In line with this intention, the provisions in the EC regulation and the SE regulations which provide for the conversion of an SE into a public company have been adopted to allow the conversion of a UK Societas into a public limited company. The current requirement that an SE be registered for a minimum period of 2 years, or that the first two sets of annual accounts have been approved, before it can convert has not been retained. This requirement is being removed to make it easier for UK Societates to take appropriate permanent action without delay.
- 7.8 There are also transitional provisions in respect of registration, dissolved SEs, SEs that converted to public limited-liability companies and names and trading disclosures.
- 7.9 In order to retain as many of the employee rights as practicable for UK Societates, provisions relating to confidentiality have been maintained, as has protection for employees where they are involved in the employee involvement process. However, this instrument has omitted provisions relating to the establishment of the special negotiating body and employee involvement agreement for UK Societates because generally employee involvement agreements will have had to have been in place prior to registration of these entities as an SE, and there will be no new formations.
- 7.10 Similarly, as regards the rights that exist for UK employees employed by SEs registered in other Member States, protection has been maintained where there remains the possibility that such employees could continue to be involved in the employee involvement process. Again, this does not include, for example, rights where such employees are members of a special negotiating body, as they will no longer be in a Member State.
- 7.11 Transitional provisions have also been provided in respect of protection for employees who were members of a special negotiating body and in respect of where a special negotiating body may reconvene in a UK Societas after exit, where practicable.
- 7.12 Minor amendments have also been made to the Registrar of Companies (Fees) (European Economic Interest Grouping and European Public Limited-Liability

Company) Regulations 2012 (2012/1908) and the European Public Limited-Liability (Register of People with Significant Control) Regulations 2016 (2016/375), to reflect the fact that there will be no new registrations of SEs. Full consequential amendments will follow in a future statutory instrument.

- 7.13 This instrument applies to Company Law which is a transferred matter for Northern Ireland under section 4 of the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With exit day less than one year away, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

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 This is not a consolidation.

10. Consultation outcome

- 10.1 We have not been able to publicly consult in order to minimise sensitivities in advance of negotiations with the EU. Informal consultation has taken place with some representatives of SEs registered in the UK in the form of one to one discussions, to gather information about the plans of SEs and explore the appropriateness of automatic conversion. On the basis of these discussions, it seems likely that many of these entities will have made their own their preparations (either leaving the UK or converting to a plc) in advance of exit day.
- 10.2 The stakeholders we spoke to believed that automatic conversion, while not appropriate for the particular circumstances of their entities, could be useful for those SEs that did not take any action, and that there was probably no existing UK form that would be suitable for all entities.

11. Guidance

- 11.1 Guidance on SEs was published in 2014 and can be found here.

<https://www.gov.uk/government/publications/european-companies-in-the-uk-registration-and-administration>

This guidance will be updated and made available before exit day.

12. Impact

- 12.1 The impact on business has been assessed as small due to the limited number of businesses in scope (as noted, approximately 49 SEs registered in the UK). The direct impacts of this policy on SEs registered in the UK can be considered as arising from the familiarisation costs of understanding what an automatic conversion to another corporate form involves, costs of changing the details of SE's notepaper, websites, logos etc and the costs of informing relevant parties about the change. There is no significant impact on charities or voluntary bodies.
- 12.2 There is no impact on the public sector.
- 12.3 An impact assessment has not been prepared for this instrument because the impacts are below the threshold required to carry out a full impact assessment.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses
- 13.2 Any administrative impacts following automatic conversion, such as the change of corporate name on notepaper, are expected to be commensurate with the size and scale of the business. We therefore do not expect any disproportionate impact to small businesses.

14. Monitoring & review

- 14.1 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. Contact

- 15.1 Sarah Pooley Dod at the Department for Business, Energy and Industrial Strategy Telephone: 020 7215 4326 or email: sarah.pooleydod@beis.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Andrew Death, Deputy Director at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kelly Tolhurst, Minister for Small Business, Consumers and Corporate Responsibility 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 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.

		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. Sifting statement(s)

- 1.1 The Minister for Small Business, Consumers and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy, Kelly Tolhurst has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

- 1.2 This is the case because the instrument does not amount to a policy change but operates to maintain the status quo as far as is possible by providing for an automatic conversion of entities registered in the UK that would no longer fulfil the requirements of the EU framework.

2. Appropriateness statement

- 2.1 The Minister for Small Business, Consumers and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy, Kelly Tolhurst has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2018 does no more than is appropriate”.

- 2.2 This is the case because the instrument does not amount to a policy change but operates to maintain the status quo as far as is possible. It remedies a failure of retained EU law to operate effectively in that the legal status of entities registered in the UK would be unclear as the UK would no longer be within the Community. This is further detailed in sections 2 and 7 of the explanatory memorandum.

3. Good reasons

- 3.1 The Minister for Small Business, Consumers and Corporate Responsibility of State at the Department for Business, Energy and Industrial Strategy, 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 this instrument, and I have concluded they are a reasonable course of action”.

- 3.2 Without this instrument, SEs registered in the UK would have no clear legal identity on and after exit day. This instrument aims to ensure they have legal certainty whilst maintaining the status quo as far as possible.

4. Equalities

4.1 The Minister for Small Business, Consumers and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy, Kelly Tolhurst 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.

4.2 The Minister for Small Business, Consumers and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy, Kelly Tolhurst has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Kelly Tolhurst, Minister for Small Business, Consumers and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy 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.”

4.3 This legislation complies with the requirements of the Public-Sector Equality Duty (PSED) requirements.

5. Explanations

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