

EXPLANATORY MEMORANDUM TO
THE ELECTRICITY AND GAS (POWERS TO MAKE SUBORDINATE
LEGISLATION) (EU EXIT) REGULATIONS 2018

2018 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 Act.

2. Purpose of the instrument

- 2.1 This instrument partially amends four EU Regulations relating to electricity and gas to correct deficiencies arising from the United Kingdom's exit from the EU. It amends provisions of each Regulation which confer powers on the European Commission to make tertiary legislation, substituting powers for authorities in the United Kingdom to make regulations by statutory instrument.

Explanations

What did any relevant EU law do before exit day?

- 2.2 Regulation (EC) No 714/2009 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity ("the Electricity Regulation") and Regulation (EC) No 715/2009 of the European Parliament and of the Council on conditions for access to the natural gas transmission networks ("the Gas Regulation") form part of the Third Energy Package of EU legislation. They aimed to further integrate the Internal Energy Market by liberalising European energy markets, encouraging cooperation between actors in European energy markets, and by establishing EU-level frameworks for regulating electricity and gas markets. The Electricity Regulation and Gas Regulation confer powers on the European Commission to adopt and amend further Regulations, known as European Network Codes and Guidelines, to supplement their provisions or to amend their Annexes. Twelve such Regulations have been adopted. They are detailed, technical tertiary legislation regulating various aspects of electricity and gas networks and markets.

Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency ("REMIT") establishes prohibitions on market abuse in wholesale electricity and gas markets, and a requirement for public disclosure of inside information by market participants. REMIT also requires market participants to report certain details of electricity and gas market transactions to a European central database. It confers powers on the European Commission to make tertiary legislation to update certain definitions, and to supplement the provisions about reporting of transactions.

Regulation (EU) 2017/1938 of the European Parliament and of the Council concerning measures to safeguard the security of gas supply ("the Security of Gas Supply Regulation") creates common standards and indicators to measure serious threats to gas supply in the EU and defines how much gas EU countries need to be able to supply to protected customers. Annexes to the Regulation contain templates

for risk assessments, preventive action plans and emergency plans, and the Regulation confers powers on the Commission to adopt further Regulations amending those templates.

Why is it being changed?

- 2.3 All of the retained EU legislation amended by this instrument contains legislative powers delegated to the European Commission. In order for this legislation to function effectively once incorporated into domestic law, it is necessary to transfer these powers to a domestic authority. In addition, as set out in more detail in paragraphs 6.3 and 7.2, without a power to create certain provisions of Energy Network Codes and Guidelines, several Codes which are already in force will only partially be incorporated into domestic law.

What will it now do?

- 2.4 As set out in paragraphs 7.1-7.7 this instrument transfers these delegated legislative powers from the European Commission to UK authorities, with amendments to account for domestic legislative processes and limit the powers to those appropriate.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments and the Sifting Committees

- 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.

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.

5. European Convention on Human Rights

- 5.1 The Minister of State, The Rt Hon Claire Perry MP has made the following statement regarding Human Rights:

“In my view the provisions of the The Electricity and Gas (Powers to Make Subordinate Legislation) (EU Exit) Regulations are compatible with the Convention rights.”

6. Legislative Context

- 6.1 On the 29 March 2017 the Prime Minister triggered Article 50 of the Treaty on European Union and started the UK’s exit from the European Union. To ensure business and legislative continuity for the UK, following over 40 years of EU membership, the European Union (Withdrawal) Act 2018 (“the Act”) will incorporate directly applicable EU legislation into domestic law at the moment of EU exit.
6.2 It is intended that further regulations under section 8(1) of the Act (which the Secretary of State proposes should be subject to negative resolution) will be made

before exit day to amend other provisions of each of the four EU Regulations amended by this instrument.

6.3 Provisions of the European Network Codes and Guidelines which are operative, within the meaning given in section 3(3) of the Act, on 29th March 2019 (“exit day”) will become retained direct EU legislation by virtue of section 3(1) of the Act. However, some of those instruments contain provisions which are in force before exit day but are stated to apply from dates after exit day. These provisions will not be retained direct EU legislation because of section 3(3)(a) of the Act. The European Network Codes and Guidelines affected by this issue are:

- Commission Regulation (EU) 2016/631 establishing a network code on requirements for grid connection of generators;
- Commission Regulation (EU) 2016/1388 establishing a network code on demand connection;
- Commission Regulation (EU) 2016/1447 establishing a network code on requirements for grid connection of high-voltage direct current system and direct current-connected power park modules;
- Commission Regulation (EU) 2017/460 establishing a network code on harmonised transmission tariff structures for gas;
- Commission Regulation (EU) No 312/2014 of 26 March 2014 establishing a network code on Gas Balancing of Transmission Networks
- Commission Regulation (EU) 2017/2195 establishing a guideline on electricity balancing; and
- Commission Regulation (EU) 2017/2196 establishing a network code on emergency and restoration.

6.4 In some of the cases where certain provisions of a European Network Code or Guidelines will become retained direct EU legislation and others will not (for example, the network code on requirements for grid connection of generators), the Secretary of State considers that the provisions which will become retained direct EU legislation are not capable of operating in isolation from the rest of the instrument. It is therefore intended to revoke those provisions from exit day by regulations under section 8(1) of the Act. Those revocations will be made in a separate instrument.

7. Policy background

What is being done and why?

7.1 This instrument amends provisions of the Gas and Electricity Regulations to substitute for the European Commission’s powers to adopt European Network Codes and Guidelines more limited powers for authorities in the United Kingdom to make regulations establishing in domestic law provisions corresponding to those of European Network Codes and Guidelines which are in force immediately before exit day. This is limited to provisions that are not incorporated into domestic law by the Act for the reason described in paragraph 6.3, or which have been revoked by regulations under section 8(1) of the Act for the reason described in paragraph 6.4.

7.2 Without a power to make regulations introducing these provisions into domestic law, several of the European Network Codes and Guidelines would be only partially incorporated, rendering them inoperable. Modifications are already underway to implement the relevant Network Codes and Guidelines through the domestic Industry

Codes, as are preparations by companies in the UK energy sector to comply with the requirements of the Network Codes and Guidelines. Failure to make these provisions part of domestic law could therefore harm industry confidence and render these investments already made wasted.

- 7.3 The limitations on the scope of these powers described in paragraph 7.1 mean that these powers cannot be used to make substantive policy changes to the body of UK energy regulation. They are intended solely to remedy issues presented by the incomplete incorporation of the Network Codes and Guidelines into domestic law.
- 7.4 In addition, this instrument will transfer to authorities in the United Kingdom powers to make regulations amending provisions of European Network Codes and Guidelines incorporated into domestic law by the Act or created under the power set out above. Without a delegated power to amend European Network Codes and Guidelines after exit day, amendments would require primary legislation. Given the highly technical and tertiary nature of the European Codes and Guidelines, amendments to them are likely to be minor technical changes which would not be appropriate to provide for through primary legislation.
- 7.5 The powers described in paragraphs 7.1 and 7.4 will be exercisable by regulations subject to affirmative procedure, made by the Secretary of State in relation to Great Britain, and by the Secretary of State (subject to a requirement to consult the Department for the Economy) or the Department for the Economy in relation to Northern Ireland. The Secretary of State only intends to exercise these powers in relation to Northern Ireland in the circumstances described in paragraph 7.12 below.
- 7.6 Use of the amending power is subject to a requirement to consult with the relevant energy regulators (the Gas and Electricity Markets Authority for Great Britain, and the Northern Ireland Authority for Utility Regulation for Northern Ireland), transmission system operators and other appropriate parties. The limited power to create provisions is not subject to a consultation requirement because it cannot be used to make substantive policy changes, as outlined above.
- 7.7 In addition to the legislative functions relating to Network Codes and Guidelines, this instrument amends powers for the European Commission to adopt tertiary legislation amending elements of REMIT and the Security of Gas Supply Regulation, to transfer those powers to authorities in the United Kingdom.
- 7.8 The powers to amend provisions of REMIT are to enable the following changes:
- amendment of the definition of insider trading and market manipulation;
 - amendments to the list of contracts and derivatives to which REMIT transaction reporting requirements apply;
 - changes to procedures, form and timing of transaction reporting requirements.
- 7.9 This instrument confers those powers on the Secretary of State in relation to Great Britain, and on the Secretary of State (subject to a requirement to consult the Department for the Economy) or the Department for the Economy in relation to Northern Ireland. The Secretary of State only intends to exercise the powers in relation to Northern Ireland in the circumstances described in paragraph 7.12 below.
- 7.10 The powers to amend provisions of the Secretary of Gas Supply Regulation are to enable changes to be made to templates in the Annexes to that Regulation, in order to ensure the templates are kept up to date and are relevant. This instrument confers those powers on the Secretary of State for the whole of the United Kingdom.

Although gas is a transferred matter in relation to Northern Ireland, the current arrangement is for the United Kingdom government to produce a UK wide risk assessment. As Northern Ireland receives 100% of its gas from Great Britain there continues to be a need for a UK wide assessment which identifies the critical risks to gas supply for both Northern Ireland and Great Britain.

- 7.11 The powers to amend REMIT and the Security of Gas Supply Regulation will be exercisable by regulations subject to negative procedure. The negative procedure is considered appropriate since the scope of these powers is narrow and clearly defined.
- 7.12 This instrument applies to energy which is a transferred matter for Northern Ireland under 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.
- 7.13 Where EU Regulations, as amended by this instrument, confer powers on the Secretary of State or the Department for the Economy to make subordinate legislation in relation to Northern Ireland, the Secretary of State's intention is only to exercise those powers in cases where the Department for the Economy is constrained in doing so, for instance if there is no Northern Ireland Executive. In each case this occurs, the exercise of the power and the rationale for so doing will be clearly set out in a Ministerial Statement.

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 Annex 1.

9. Consolidation

- 9.1 Not relevant.

10. Consultation outcome

- 10.1 Statutory instruments made under the powers in the European Union (Withdrawal) Act 2018 do not require consultation, and a consultation has not been conducted for this instrument. Technical input relevant to this instrument has been provided by the Gas and Electricity Markets Authority and the Northern Ireland Authority for Utility Regulation.

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 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. This SI itself will not create any direct costs to business; its immediate impacts are limited to determining the legislative procedure for exercising those functions. Any direct costs to businesses will be a result of future SIs exercising the functions. Effectively this legislation enables the UK to maintain the status quo, and further SIs would be needed to change network codes in the future and any costs or benefits would be identified at that stage.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by 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 EU Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Matthew Austin or Josh Watts at the Department for Business, Energy and Industrial Strategy Telephone: 020 7215 0283 / 020 7215 0280 or email: matthew.austin@beis.gov.uk / josh.watts@beis.gov.uk can be contacted with any queries regarding the instrument.

15.2 Steph Hurst, Deputy Director for Energy Markets and Affordability 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 Claire Perry MP 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. Appropriateness statement

1.1 The Minister of State, The Rt Hon Claire Perry 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 (Powers to Make Subordinate Legislation) (EU Exit) Regulations do no more than is appropriate”.

1.2 This is the case because:

- The scope of all of the powers delegated to the Secretary of State or devolved administrations by this instrument is equivalent to, or narrower than, the scope of corresponding powers currently exercised by the European Commission.
- The power to create new provisions of European Network Codes and Guidelines is limited to those which will not be incorporated into domestic legislation by the European Union (Withdrawal) Act 2018.
- Powers to amend the REMIT Regulation and the Security of Gas Supply Regulation are limited to technical provisions and do not exceed those currently held by the European Commission.

2. Good reasons

2.1 The Minister of State, The Rt Hon Claire Perry 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”.

2.2 These are that it is important to maximise continuity for businesses by preserving where possible the current body of European Network Codes and Guidelines, as set out in more detail in paragraphs 7.2 and 7.3 of the main body of this explanatory memorandum. In addition, the power to amend provisions of the REMIT Regulation, the Security of Gas Supply Regulations and European Network Codes and Guidelines will ensure the UK’s body of energy regulations remain fit for purpose amidst future changes in technology and the wider industry, as set out in more detail in paragraphs 7.4 to 7.8.

3. Equalities

3.1 The Minister of State, The Rt Hon Claire Perry MP has made the following statement:

“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.”

3.2 The Minister of State, The Rt Hon Claire Perry 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, Claire Perry 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.”

- 3.3 This instrument has no, or no significant, impact on those with protected characteristics 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.