EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES CONTRACTS (TRANSITIONAL AND SAVING PROVISION) REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by Her Majesty's Treasury 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 will address deficiencies in retained EU law in relation to:

- The European Economic Area's (EEA) 'financial services passport' – which allows firms in EEA states to offer services in any other EEA state on the basis of their home state authorisation.
- Non-UK central counterparties (CCPs) and trade repositories (TRs) that provide certain services in the UK under the European Market Infrastructure Regulation (EMIR).

2.2 Without this instrument, where these firms do not enter the UK's temporary regimes they may not be able to meet existing contractual obligations or provide services. This could be detrimental to UK-based customers and could lead to disruption of services.

Explanations

What did any relevant EU law do before exit day?

2.3 The relevant EU law allows EEA firms and CCPs to provide regulated services in the UK on the basis of being authorised in the home member state, or recognised – in the case of non-EEA CCPs and TRs – by the EU's European Securities and Markets Authority (ESMA), or – in the case of EEA TRs – registered by ESMA.

2.4 This instrument addresses three types of provider, covered by different laws:

- EEA firms covered under the Financial Services and Markets Act 2000 (FSMA);
- EEA payments and e-money firms; and,
- Non-UK CCPs and TRs.

FSMA

2.5 The UK's participation in the passporting system for firms covered by FSMA is implemented via Section 31(1)(b) and (c), Schedule 3, and Schedule 4 of FSMA. These provisions are referenced in other pieces of legislation that concern EEA firms performing regulated activities in the UK using a passport, and UK firms that perform regulated activities in the EEA using an EEA financial services passport.

Payments & E-money

2.6 Payments and E-money firms likewise have access to the EEA passporting system, but rather than FSMA these rights are established under the second Payment Services Directive (PSD2) and the second Electronic Money Directive (2EMD), which were transposed into UK law by the Payment Services Regulations 2017 and Electronic Money Regulations 2011, respectively.

CCPs and TRs

2.7 Non-UK CCPs are not granted 'passporting' rights under EU law. However, under EMIR they are permitted to provide services to UK firms if they are EEA located and 'authorised' by their home regulatory authority, or if they are non-EEA ('third-country') located and 'recognised' by ESMA. EMIR also requires all information on European derivative transactions to be reported to TRs that are registered or recognised by ESMA.

Why is it being changed?

2.8 This instrument introduces regimes to support and amend the temporary permission and recognition regimes separately brought forward by HMG through other instruments, as set out below, to address risks from a no-deal exit. The temporary regimes provide a window to allow impacted firms to become UK authorised or recognised, and mitigate risks of disruption to UK businesses and consumers while this happens. The regimes under this instrument address those firms that do not enter the temporary regimes, or exit them without a UK authorisation or recognition.

FSMA

2.9 Section 31(1)(b) and (c), and Schedules 3 and 4 of FSMA are being repealed because without a negotiated agreement, the legal framework under which EEA firms provide FSMA-regulated services in the UK would no longer be operative. This is because the EEA financial services passport depends upon, amongst other things, a legal framework including allocating regulatory responsibilities and duties of cooperation between the authorities of the EEA home state and the authorities of the UK. As a result, EEA firms which did not notify to enter The Temporary Permissions Regime ("the TPR") – introduced through the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1149) – could be legally unable to service outstanding contracts.

Payments & E-money

2.10 Without a negotiated agreement, the legal framework under which EEA payments and e-money institutions provide services in the UK would no longer be operative, for the same reasons as for FSMA. As a result, EEA payments and e-money institutions which did not notify to enter the payments and e-money Temporary Permissions Regime ("the payments and e-money TPR") – introduced through The Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1201) – could be legally unable to service outstanding contracts.

CCPs and TRs

2.11 Without a negotiated agreement, non-UK CCPs would be unable to provides services to UK firms until they are recognised under a UK regime for third country CCPs. If non-UK CCPs do not enter (or enter and then exit) the Temporary Recognition

Regime ("the TRR for CCPs") – introduced through The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018 (SI 2018/1184) ("the CCP instrument") – without full recognition, this may introduce risks to firms and, in certain cases, to the broader financial system.

2.12 In addition, TRs registered or recognised by ESMA would no longer be able to be used by UK firms to satisfy the EMIR reporting obligation. If TRs enter and exit the Temporary Registration Regime for TRs ("the TRR for TRs") – introduced through The Trade Repositories (Amendment and Transitional Provision) (EU exit) Regulations 2018 (SI 2018/1318) ("the TR instrument") – without full registration, this may also introduce risks to firms.

<u>*What will it now do?*</u>

FSMA

2.13 This instrument will insert provisions into the TPR, enabling relevant EEA firms that do not enter the TPR, or exit it without full UK authorisation, to continue meeting their existing contractual obligations in the UK for a limited period after exit day. This will allow them to wind down in an orderly manner or transfer business to a UK entity, as necessary.

Payments & E-money

2.14 This instrument will insert provisions into the payments and e-money TPR, enabling relevant firms that do not enter the payments and e-money TPR, or exit it without full UK authorisation, to continue meeting their existing contractual obligations in the UK for a limited period after exit day. This is in order to allow them to wind down in an orderly manner, or transfer business to a UK entity, as necessary.

CCPs and TRs

2.15 This instrument will insert provisions into the CCP instrument to establish a 'CCP run-off regime'. The run-off regime allows UK firms time to wind down relevant contracts and business with non-UK CCPs that do not enter the TRR for CCPs, or are removed from it without the necessary permissions to provide services in the UK.

2.16 This instrument will insert provisions into the TR instrument to establish a 'TR run-off regime', the purpose of which is to mitigate risks faced by UK firms in the event that a TR is removed from the TRR for TRs without the necessary permissions to continue to provide services to UK firms.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Committee may be interested to note the following.

3.2 This instrument inserts provisions into previously made instruments, specifically the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018; The Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018; The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018; and The Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018, in order to facilitate orderly wind down of existing obligations and services which, without these provisions, would come to an end in a way which would cause disruption to UK consumers and businesses.

3.3 Regulation 73 provides a power for the Treasury to amend various time limits in the modifications made by the Regulations, exercisable by regulations made by statutory instrument and subject to annulment by a resolution of either House of Parliament.

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)

3.4 The territorial application of this instrument includes Scotland and Northern Ireland.

3.5 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 territorial 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 Financial Service Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument inserts provisions into previously made instruments, specifically the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (SI2018/1149); The Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1201); The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018 (SI 2018/1184); and The Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018 (SI 2018/1318), in order to facilitate orderly wind down of existing obligations and services which, without these provisions, would come to an end in a way which would cause disruption to UK consumers and businesses.

6.2 The TPR follows from a written statement made on 20 December 2017 (HCWS382) [1], where the Chancellor committed to bringing forward legislation, if necessary, to ensure contractual obligations not covered by the TPR can continue to be met.

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

[1] https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-12-20/HCWS382/

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 believes that there will be a deal and an implementation period in place, it has a duty to plan for all eventualities, including a 'no deal' scenario. 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 If the UK were to leave 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 instrument establishes run-off regimes within the temporary regimes being put in place by separate EU Exit SIs, specifically those for EEA firms passporting under the Financial Services and Markets Act 2000, EEA payment and e-money firms that currently passport into the UK under the Payment Service Regulations 2017 or the Electronic Money Regulations 2011, non-UK CCPs, and EEA TRs.

Run-off regime for EEA firms that currently passport into the UK under Financial Services and Markets Act 2000

7.10 Part 2 of this instrument establishes a regime to allow for the orderly wind down of the UK regulated activities of firms that do not enter the TPR or those that leave the TPR without full UK authorisation. This Part inserts provisions into the TPR instrument to provide for this regime.

7.11 The regime is designed to minimise the disruption faced by EEA firms and their UK businesses and consumers due to the loss of passporting rights arising from EU withdrawal. It will ensure that firms that do not gain full UK authorisation through the TPR can continue to carry out business to the extent necessary to run off pre-existing contractual obligations in the UK, but not to undertake new business.

7.12 This instrument provides for automatic entry into the regime. Within this regime those firms with a UK branch (currently operating under a freedom of establishment passport), firms who enter the TPR but exit it without UK authorisation, and firms that hold top-up permissions before the UK's exit from the EU, will be placed into a supervised run-off ("SRO"). Those firms without a UK branch (currently operating under a freedom of services passport) that do not enter the TPR or do not hold a top-up permission will be placed into a contractual run-off ("CRO").

7.13 Chapter 1 of the inserted Part 6 creates the SRO, provides for conditions of entry into the SRO for EEA firms that either do not enter the TPR, or those that exit the TPR without UK authorisation, and sets out the type of activity which is allowed within the regime. The SRO will work much in the same way as the TPR. Firms will be within the UK regulatory perimeter and will be 'deemed' Part 4A authorised for the purposes of winding down their UK regulated activities in an orderly manner. They will be regulated and supervised by the UK regulators like other Part 4A authorised firms, but they will only be allowed to carry out the regulated activities which are required to service their pre-existing contracts and wind down relevant contracts. EEA based fund managers, trustees and depositaries will not be able to continue providing those services to UK-authorised funds under the SRO. These firms should enter the TPR to continue to provide those services temporarily to UK authorised funds.

7.14 Chapter 2 of the inserted Part 6 has the same effect as Chapter 1 and sets out conditions of entry and type of activity allowed for EEA firms that hold a partial UK authorisation, either before exit, or upon a firm's exit from the TPR, but nevertheless requires wider permissions to be able to service their existing contracts in the UK.

7.15 Chapter 3 of the inserted Part 6 sets out the length of the SRO. Most financial services providers will be able to use this regime for five years after entry into the regime (whether they enter on exit day, or whether they enter after having been in the TPR for a period of time). This will allow the majority of contracts with UK customers to come to a natural conclusion, meaning there will be no significant impact for UK customers. Where providers have long-term contracts, five years will be sufficient time to allow them to take mitigating action by, for example, transferring their contracts to a UK entity, to ensure that any impact on UK customers is minimised.

7.16 The exception to this five-year time limit is for contracts of insurance. Many long-term policies, such as life insurance, may take more than five years to come to a natural end. There will therefore be a longer time limit, of 15 years, for contracts of insurance, safeguarding UK customers who purchased their policies in good faith.

7.17 Chapter 4 of the inserted Part 6 makes certain modifications to FSMA to prevent certain aspects of financial promotion rules from applying to EEA firms within the regime. In addition, this Chapter also gives the UK regulators the ability to move a firm from the SRO into the CRO if, having taken into account a number of factors, they deem it necessary. This is in order to allow for some flexibility within the regime, given the automaticity of entry. Similarly, Chapter 3 of the inserted Part 7, gives the regulators the ability to move firms from the SRO to the CRO.

7.18 Chapter 5 of the inserted Part 6 provides for requirements imposed by EEA firms' home state regulators, and requirements imposed by UK regulators, continue to have effect within the regime.

7.19 Firms in the CRO will remain supervised by their home state regulators, as is currently the case. Under the general prohibition in section 19 of FSMA 2000, no person may, by way of business, carry on a regulated activity in the UK unless authorised or exempt. Firms in the CRO are currently exempt from UK authorisation due to their EEA passport, but will lose this exemption after exit. The CRO will work on the basis of a limited exemption from the general prohibition for the purposes of winding down UK regulated activities in an orderly manner. As with the SRO, providers will not be able to enter into new contracts with UK customers; they will only be allowed to carry out the regulated activities which are required to service their pre-existing contracts and wind down relevant contracts.

7.20 The instrument amends the jurisdictional scope of this existing offence in section 19 of FSMA by expanding the number of persons who may commit the offence as a result of non-compliance of with the CRO as a result of carrying out regulated activities beyond the scope of the CRO. Indeed, if firms in the CRO were to carry out regulated activities outside the scope of the permitted activity, they would be in breach of the general prohibition and may be committing a criminal offence.

7.21 Chapter 2 of the inserted Part 7 sets out notification requirements on firms that operate within the CRO. These firms will be required to notify the FCA that they are within the regime, and they will have an ongoing obligation to notify UK regulators if certain action is taken against them.

7.22 Chapter 3 of the inserted Part 7 allows UK regulators to vary or cancel the regulated activities that a firm's exemption covers in certain circumstances, and it also allows the regulators to move a firm from the CRO to the SRO if, having taken into account a number of factors, they deem it necessary. This Chapter also sets out the procedure to be followed if this action is taken.

7.23 Chapter 3 also places restrictions on certain financial promotions rules, ensures product intervention rules apply to CRO firms, gives regulators information gathering powers, publication powers and public censure powers. These provisions ensure that certain existing powers apply to persons who are exempt under this regime.

7.24 Chapter 4 of the inserted Part 7 allows UK regulators to make rules in relation to fee charging. Chapter 5 disapplies parts of the FCA's duty to supervise firms in the CRO.

7.25 Chapter 6 of the inserted Part 7 sets out the length of the CRO. It will be the same as for the SRO, as set out in 7.15 and 7.16 above.

7.26 The inserted Part 8 provides the regulators with the discretion to choose to treat individuals to whom the Senior Managers and Certification Regime (SMCR) applies as having been granted approval. It also makes provision to treat insurance firms' existing supervisory approvals under Solvency II, originally granted by their home EEA state regulator, as granted by the relevant UK regulator whilst the firm is in the regime.

7.27 This Part also provides for provisions for the Financial Services Compensation Scheme (FSCS). All firms in the regime with an establishment in the UK will have membership of the FSCS. Like any other member of the FSCS, these firms will be required to pay FSCS levies that fund the scheme. EEA insurers that currently operate in the UK via a passport but without an establishment are already FSCS members. In the regime, these firms will retain their existing FSCS membership and will continue to be required to pay levies. Other firms in the regime without an establishment in the UK will remain outside of the scope of the FSCS.

7.28 The inserted Part 9 provides HMT the power to extend the length of the regime by up to 5 years at a time in certain circumstances. This extension can only be made where the UK regulators submit a joint assessment as to the effect of extending, and not extending, the duration of the regime. The extension can be applied to the whole regime or only parts of it. This will be of use if the regulators and HMT identify particular areas of concern which require addressing, but where it would not be beneficial to extend the regime as a whole for all firms within it.

Run-off Regime for EEA firms that currently passport to provide services under the Payment Services Regulations 2017 and Electronic Money Regulations 2011

7.29 Part 4 of this instrument makes amendments to the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018. Schedule 3 of that instrument contains 2 parts, each of which creates the TPR for EEA e-money institutions, in the case of Part 1 of Schedule 3, and for EEA payment institutions or EEA account information service providers, in the case of Part 2 of Schedule 3.

7.30 This instrument amends Schedule 3 by inserting a new Part 1A, and a new Part 3, to accompany the existing Parts 1 and 2 of Schedule 3 respectively. Part 1A will establish the SRO and CRO for EEA e-money institutions, whilst Part 3 will establish the SRO and CRO for EEA payment institutions and for EEA account information service providers. The overall effect will then be that Schedule 3 will contain four parts – Parts 1 and 1A will deal with EEA e-money institutions, whilst Parts 2 and 3 will deal with EEA payment institutions and account information service providers. Collectively, Schedule 3 will then contain a TPR in Parts 1 and 2, and SROs/CROs in Parts 1A and 3.

7.31 The inserted Parts 1A and 3 will operate in the same way – the only distinction between them is the type of firm to which they apply (just as Parts 1 and 2 operate in the same way, and only differ in terms of the type of firm to which they apply). In both cases, the new inserted Parts will establish new legal regimes for EEA firms that currently have passporting rights into the UK, but will lose those rights.

7.32 In the case of EEA firms – whether these are e-money institutions, payment institutions, or account information service providers – who are providing services to UK customers and clients without establishing a presence in the UK, the new legal regime will permit them to continue doing so, but only to the extent necessary for the satisfaction of contractual obligations that arose before exit day. These firms will have entered the CRO, under which they may continue to offer services between the UK and an EU27 country.

7.33 In the case of EEA firms – whether these are e-money institutions, payment institutions, or account information service providers – who are providing services to UK customers and clients via a branch or agent in the UK, the new legal regime will permit them to continue doing so, but only to the extent necessary for the satisfaction of contractual obligations that arose before exit day. These firms will have entered the SRO.

7.34 Firms in the SRO will also be required to comply with certain specified provisions of the Payment Services Regulations 2017 or Electronic Money Regulations 2011 (as the case may be), whilst they are providing services to UK customers and clients under the auspices of either Part 1A or Part 3 of Schedule 3 to The Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018, once these Parts have been inserted into those Regulations by this instrument.

7.35 The FCA will also be granted a power to charge fees by Parts 1A and 3. This is consistent with the powers granted to the FCA in relation to other types of financial services firm.

7.36 The FCA will also be given the power to cancel an EEA firm's right to offer services in the UK under the SRO, or to move firms between the CRO and SRO, as may be necessary to protect UK customers and clients of EEA firms.

Run-off Regime for services provided by non-UK CCPs and TRs Services provided by non-UK Central Counterparties

7.37 Part 3, regulation 8, of this instrument inserts provisions into The Central Counterparties (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018 to establish a 'CCP run-off regime'. The purpose of the regime is to allow UK firms time to wind down relevant contracts and business with non-UK CCPs in the event that such CCPs do not enter, or exit, the TRR for CCPs without the necessary permissions provide services in the UK. Without recognition for the purpose of run-off, UK firms would face 'cliff-edge' risks similar to those which the TRR mitigates, i.e. a disruption to services to UK customers introducing operational, legal, and stability risks.

7.38 Regulation 19A (as inserted into the CCP instrument) provides that non-UK CCPs shall be taken to be recognised under Article 25 of retained EMIR in the following two scenarios.

7.39 First, where a non-UK CCP was eligible for, but does not enter, the TRR for CCPs. Second, where a non-UK CCP has entered the temporary recognition regime but exits the regime without the necessary permanent recognition to allow it to continue to provide services in the UK.

7.40 CCPs as described in both scenarios will be automatically entered into the run-off regime.

7.41 Regulation 19B determines the relevant period for run-off. In the first scenario, recognition shall be provided for a period of one year (non-extendable) beginning on exit day. In the second scenario, the Bank of England shall determine a period for recognition that is no longer than one year (non-extendable) beginning on the day on which the relevant CCP ceases to be taken to be recognised under the temporary recognition regime.

7.42 Regulation 19C ensures that CCPs will only be permitted to carry on the range of services they were permitted to carry on immediately before entering the run-off regime.

7.43 Regulation 19D determines that a CCP shall be removed from the run-off regime if it makes an application and is accepted for full recognition under retained EMIR, or if the Bank of England considers it necessary for financial stability reasons.

7.44 It should be noted that CCPs in the run-off regime will not be able to enter (or re-enter) the TRR for CCPs, as per the conditions of the temporary regime set out in regulation 17 of the CCP instrument.

7.45 Part 3, regulation 9, of this instrument also makes miscellaneous amendments to the definition provisions in regulation 7 of the CCP instrument. These amendments change the numbering on the provisions, rather than make any change to the definitions themselves, to take account of changes to EMIR as a result of amendments made to EMIR by the Securitisation Regulation (Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017) which applied from 1 January 2019.

Services provided by Trade Repositories

7.46 Part 5, regulation 11, of this instrument establishes a 'TR run-off regime' by inserting Chapter 2A into the Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018. The purpose of TR run-off regime is to mitigate risks faced by UK firms in the event that a TR is removed from the TRR for TRs. The reason for providing registration to TRs for this run-off period is to allow UK firms time to make alternative arrangements with another registered or recognised TR in order to satisfy the reporting obligation set out within retained EMIR. Without run-off registration, UK firms would face 'cliff-edge' risks similar to those which the TRR mitigates, i.e. a disruption to services from registered TRs, introducing legal risks whereby UK firms are unable to fulfil their reporting requirements under EMIR.

7.47 Regulation 13A (as inserted into the TR instrument) provides that a TR in the run-off regime shall be taken to be registered under Chapter 1 of Title 6 of retained EMIR.

7.48 Regulation 13B and 13C determine that the run-off regime shall only apply to a TR if that TR is removed from the TRR without the necessary permissions to continue to provide services to UK firms. For example, the FCA can remove a TR from the temporary regime because its application for full registration has been refused.

7.49 Regulation 13B and 13D determine the period for run-off. Registration shall be provided for a period of one year (non-extendable) unless the FCA sets a shorter period, beginning with the day on which the relevant TR ceases to be registered under the temporary regime.

7.50 Regulation 13E allows the FCA to impose requirements on a TR exiting the run-off regime to ensure that the data collected by the relevant TR is transferred to another registered or recognised TR. The purpose of this is to ensure the data remains available to the regulators. Regulation 13F sets out the notification and appeals provisions for the process of the FCA imposing such requirements.

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 this instrument, but has engaged extensively with the Bank of England and the Financial Conduct Authority during the drafting process. HM Treasury 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 has also been published in draft, along with an explanatory policy note on the 17^{th} December 2018 in order to maximise transparency ahead of laying (https://www.gov.uk/government/publications/draft-financial-services-contracts-transitional-and-saving-provision-eu-exit-regulations-2019).

10.3 The financial services regulators plan to undertake public consultation in the winter on any changes they propose to make to Binding Technical Standards and rules made under the powers conferred upon them by the Financial Services and Markets Act 2000

11. Guidance

11.1 The FCA and PRA will provide further information on how they intend to use the powers conferred to them by virtue of this instrument.

12. Impact

12.1 The instrument will provide significant benefit to UK customers and businesses who have existing contracts with EEA service providers by automatically enabling firms to continue servicing these contracts. Additionally, the instrument reduces the likelihood of legal disputes between UK customers and EEA firms, as without this instrument there would be legal uncertainty as to whether firms have the necessary regulatory permissions to service their contracts.

12.2 This instrument impacts EEA passporting firms, trade repositories, CCPs (including third country CCPs), payments and e-money institutions, in total just under an estimated 8,000 firms (though the potential number in the regime will be much lower). This instrument does not have any direct regulatory impact on UK firms, though such firms would indirectly benefit as customers of EEA firms. Affected third parties include lawyers and professional services firms.

12.3 Impacted businesses may need to check or amend some back-office processes in order to comply with the legislation as they will no longer have permissions for writing new business.

12.4 Impacted businesses may also need to provide additional information to UK regulators as a result of this legislation. UK branches of EEA banks or insurers, and some firms operating under a freedom of services passport, within scope of the instrument will be supervised by UK regulators, meaning they will need to comply with some additional UK regulatory requirements in addition to existing EU standards.

12.5 The specific impact on individual business, charities or voluntary bodies is that firms that currently operate in the UK on the basis of an EEA financial services passport will require a legal expert to examine the new legislation and understand its implications.

12.6 An Impact Assessment will be published alongside the Explanatory Memorandum on the legislation.gov.uk website, when an opinion from the Regulatory Policy Committee has been received.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise the effects of this instrument in relation to small businesses. The instrument implements a Financial Services Contracts Regime, enabling EEA firms operating in the UK via a passport that do not enter the TPR, or exits the TPR without full UK authorisation, to continue meeting their existing contractual obligations in the UK for a limited period after exit day in order to allow them to wind down in an orderly manner or transfer business to a UK entity as necessary. In addition, the instrument creates a CCP run-off regime to allow UK firms time to wind down relevant contracts and business with non-UK CCPs that do not enter the temporary recognition regime, or are removed from the temporary recognition regime, without the necessary permissions to provide services in the UK. And finally, the instrument establishes a ‘TR run-off regime’, the purpose of which is to mitigate risks faced by UK firms in the event that a TR is removed from the temporary registration regime.

13.3 The design of this regime takes into consideration a firm’s size and complexity, and is structured proportionately.

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 Sari Tapio at Her Majesty's Treasury (Telephone: 020 7270 2499 or email: sari.tapio@hmtreasury.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Joshua Fleming, Deputy Director for the Financial Stability EU Team, at Her Majesty's Treasury can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Economic Secretary to the Treasury (John Glen) at Her Majesty's Treasury 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 Economic Secretary to the Treasury (John Glen) has made the following statement regarding the use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Financial Services Contracts (Transitional and Saving Provisions) (EU Exit) Regulations 2019 do no more than is appropriate."

1.2 This is the case because the instrument goes no further than to mitigate the disruption to UK consumers, firms, and the UK financial sector if non-UK firms operating in the UK (whether under the Financial Services Act 2000 EEA financial services passport, or the European Market Infrastructure Regulations 2012) were to not enter (or exit) the relevant temporary regime put in place by Her Majesty's Government by several EU exit statutory instruments laid under the European Union (Withdrawal) Act 2018.

1.3 The Financial Services Contracts Regime, implemented by this instrument, enables relevant EEA firms to wind down their UK activities in a smooth and orderly manner as they exit from the UK market. While in the regime, firms will not be permitted to conduct new business. The regime will last for fifteen years for insurance contracts and five years for all other types of contracts, which Her Majesty's Treasury, FCA, and PRA officials have judged to be an appropriate amount of time. To mitigate the possibility that this is not the case, this instrument provides Her Majesty's Treasury with a power to extend the duration of the regime.

2. Good reasons

2.1 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding use of legislative powers under 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 Without legislating for a Financial Services Contracts Regime, firms currently operating in the UK (whether under the Financial Services Act 2000 financial services passport, or the European Market Infrastructure Regulations 2012) that do not enter (or exit) the relevant temporary regime would suddenly lose their permission to operate in the UK on exit day or at the end of the relevant temporary regime where applicable. This would cause notable disruption for the UK businesses and consumers they serve and to the UK financial services sector more broadly. The Financial Services Contracts Regime provides an appropriate amount of time for these firms to wind down their UK activities in a smooth and orderly manner, ensuring the FCA and the PRA can continue to protect UK consumers and the stability of the UK's financial system.

3. Equalities

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

"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 under 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 2000."

4. Explanations

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

5. Criminal offences

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 there are good reasons for the creation of a criminal offence and for the penalty in respect of it in the Financial Services Contracts (Transitional and Savings Provision) (EU Exit) Regulations 2019".

5.2 The instrument amends the jurisdictional scope of the existing offence in section 19 of FSMA by expanding the number of persons who may commit the offence as a result of non-compliance of with the CRO as a result of carrying out regulated activities beyond the scope of the CRO. Indeed, if firms in the CRO were to carry out regulated activities outside the scope of the permitted activity, they would be in breach of the general prohibition and may be committing a criminal offence. Evidence obtained from the regulators indicates that an increase in convictions is not anticipated as a result of this change.

6. Legislative sub-delegation

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

"In my view it is appropriate to create a relevant sub-delegated power in the Financial Services Contracts (Transitional and Savings Provision) (EU Exit) Regulations 2019."

6.2 This is appropriate because sub-delegation under the Regulations is either to the regulators (the FCA and the PRA) or to Her Majesty's Treasury. Sub-delegation to the regulators is in the form of the power to cancel an EEA firm's right to offer services in the UK under the SRO, or to move firms between the CRO and the SRO, as may be necessary to protect UK customers and clients of EEA firms. In respect of Her Majesty's Treasury, the power is being taken to extend the duration of the regime where the regulators have assessed that an extension is appropriate for EEA firms to complete an orderly wind down of existing services and obligations. The power is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either Houses of Parliament. This is considered appropriate should it transpire that, given the number and complexity of outstanding services and obligations, they cannot be wound down within time, and that this would result in detrimental effects on UK consumers, firms and financial markets.