

EXPLANATORY MEMORANDUM TO
THE FINANCIAL SERVICES (GIBRALTAR) (AMENDMENT) (EU EXIT)
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.

2. Purpose of the instrument

- 2.1 This instrument is being made in order to address deficiencies in domestic legislation in relation to financial services passporting rights between the United Kingdom and Gibraltar, arising from the withdrawal of the United Kingdom (UK) from the European Union (EU). This instrument ensures authorised financial services firms in Gibraltar will continue to be able to provide services and establish branches in the UK market after exit day on current terms.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The Financial Services and Markets Act 2000 (Gibraltar) Order 2001 ('the Gibraltar Order 2001') (2001 No. 3084) has one key objective: to provide access for authorised UK and Gibraltar-based financial services firms between UK and Gibraltar markets.
- 2.3 EU law allows authorised financial services firms to access markets across EU member states. However, for the purposes of EU law, the UK and Gibraltar are in effect considered as the same EU member state.
- 2.4 Section 409 of the Financial Services and Markets Act (FSMA) 2000 (c.8) enables HM Treasury to modify Schedule 3 of FSMA to authorise Gibraltar-based financial services firms to operate in the UK within specified circumstances.
- 2.5 On this basis, HM Treasury made the Gibraltar Order 2001 which modified Schedule 3 of FSMA so that rights equivalent to passporting rights under the European Economic Area (EEA) also applied to authorised Gibraltar-based financial services firms which operate between the UK and Gibraltar.
- 2.6 Since its introduction, the Order has been subject to subsequent and consequential amendments to ensure that authorised financial services firms comply under the specified EU directives, which have included the: Capital Requirements Regulations 2013 (S.I 2014/1292) , Markets in Financial Instruments Directive 2014 (2014/65/EU), Financial Services Act 2012 (Consequential Amendments and Transitional Provisions) Order 2013 (S.I 2013/472), Alternative Investment Fund Managers Order 2014 (S.I 2014/1292), Mortgage Credit Directive Order 2015 (S.I 2015/910), and Insurance Distribution (regulated Activities and Miscellaneous Amendments) Order 2018 (S.I 2018/546).

Why is it being changed?

- 2.7 Along with the UK, Gibraltar will be undertaking its own parallel withdrawal from the EU. Since references to EU directives and EEA rights will no longer be appropriate after exit day, references in domestic financial services legislation that currently apply to the UK and Gibraltar will become deficient.
- 2.8 This instrument makes technical amendments to existing domestic legislation, including the Gibraltar Order 2001 and the Financial Services and Markets Act 2000, so that authorised Gibraltar-based financial services firms continue to have access to UK markets in a no deal scenario.

What will it now do?

- 2.9 The amendments through the Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2019 will ensure that financial services firms incorporated and headquartered in Gibraltar will be able to provide services and establish branches in the UK as they do now.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of this instrument includes Scotland and Northern Ireland.
- 3.3 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 MP, has made the following statement regarding Human Rights:

“In my view, the provisions of the Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument amends Section 409 of the Financial Services and Markets Act 2000, the Financial Services and Markets Act 2000 (Gibraltar) Order 2001, and EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (2018 No.1149) to address deficiencies arising from the UK’s exit from the European Union.

7. Policy background

What is being done and why?

- 7.1 The UK will leave the EU on 29 March 2019. The UK and the EU negotiating teams have agreed the terms of an implementation period that will start on 29 March 2019 and last until 31 December 2020. This will provide time to introduce the new arrangements that will underpin the UK-EU future relationship, and provide valuable certainty for businesses and individuals. During the implementation period, common rules will continue to apply. The UK will continue to implement new EU law that comes into effect and the UK will continue to be treated as part of the EU's single market in financial services. This will mean that access to each other's markets will continue on current terms and businesses, including financial services firms, will be able to trade on the same terms as now until 31 December 2020. UK firms will need to comply with any new EU legislation that becomes applicable during the implementation period.
- 7.2 The government is seeking a deep and special future partnership with the EU, which should be greater in scope and ambition than any such agreement before and encompass financial services. Given the highly regulated nature of financial services, the volume of trade between UK and EU markets, and a shared desire to manage financial stability risks, the UK proposes a new economic and regulatory arrangement that will preserve mutually beneficial cross-border business models and economic integration for the benefit of businesses and consumers. Decisions on market access would be autonomous in our proposed model, but would be underpinned by stable institutional processes in a bilateral agreement and continued close regulatory and supervisory cooperation.
- 7.3 While the government has every confidence that a deal will be reached and the implementation period will be in place, it has a duty to plan for all eventualities, including a 'no deal' scenario. To prepare for this, 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 (c.68) 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>).

UK-Gibraltar relationship in financial services following EU exit

- 7.9 In March 2018, at the Joint Ministerial Council with the government of Gibraltar, the UK government announced that Gibraltar's authorised financial services firms will continue to be able to access the UK as now until 2020 in a no-deal scenario. UK firms will also continue to be able to exercise their passport rights as now in Gibraltar.
- 7.10 Gibraltar is a British Overseas Territory and is in the EU as part of the UK's membership. Gibraltar applies EU law under provisions in its own European Communities Act 1972. Following the result of the EU referendum, Gibraltar will be leaving the EU in parallel with the UK. The government of Gibraltar will undertake its own contingency preparations for Gibraltar's withdrawal from the EU in order to ensure a functioning financial services regime.
- 7.11 Since Gibraltar and the UK are considered under EU law as a single member state territory, the EU passporting rights that exist between member states have no application between the UK and Gibraltar. The rights of Gibraltar and UK headquartered firms to respectively access the UK and Gibraltar on the basis of authorisation in their home jurisdiction are provided for separately in UK and Gibraltar law, via a modified passport, under Schedule 3 of FSMA.
- 7.12 Specifically, market access for authorised financial services firms between the UK and Gibraltar is provided by the Financial Services and Markets Act 2000 (Gibraltar) Order 2001 ('the Gibraltar Order 2001'). The passport for Gibraltar payment service providers (payment institutions, authorised e-money institutions and registered account information service providers) is provided for separately in domestically implemented EU legislation in the UK – the Payment Services Regulations 2017 (S.I 2017/752) and Electronic Money Regulations 2011 (S.I 2011/99).
- 7.13 HM Treasury is onshoring to ensure authorised financial services firms in Gibraltar will continue to be able to provide services and establish branches in the UK market after exit day on current terms.
- 7.14 Parts 2 and 3 of the instrument fix deficiencies in the section 409 of the Financial Services and Markets Act 2000 (FSMA) , the Gibraltar Order 2001 and related provisions on authorisations, which together allow Gibraltar-based financial services firms to access the UK market under the modified financial services passport.

- 7.15 Specifically, Part 2 of this instrument amends the powers under Section 409 of FSMA to ensure that their application after exit day have the same effect as they did immediately before exit day. Part 3 amends the modified passport under Schedule 3 to FSMA to substitute references to EEA firms with references to Gibraltar-based firms. Part 3 also fixes deficiencies to maintain modified passporting rights for: Gibraltarian insurers, insurance intermediaries, re-insurance undertakings, investment fund management firms, Collective Investment Scheme operators, Undertakings for Collective Investment in Transferable Securities management companies, Alternative Investment Fund Managers, mortgage intermediaries, mortgage providers and credit and financial institutions that have established branches or provide services between the UK and Gibraltar.
- 7.16 EU exit deficiencies relating to Gibraltar-based payment service providers have been addressed separately in The Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (S.I 2018/1201).
- 7.17 Regulation 7 in Part 3 of this instrument does not make provision for EEA-based firms conducting regulated activities in the UK and Gibraltar via a financial services passport. EEA firms currently passporting into the UK, whether or not they also passport into Gibraltar, will be eligible to join the UK temporary permissions regime, and if they do not do so, may be eligible to run-off their pre-exit business contracts through the Financial Services Contracts Regime.
- 7.18 Part 4 of the instrument prohibits financial services firms incorporated and headquartered in Gibraltar, from entering the temporary permissions regime established by the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018 (S.I 2018/1149), as this instrument makes alternative provision to preserve UK access for Gibraltar-based financial services firms, and so is not necessary for them to enter the temporary permissions regime.

Further Statutory Instrument on the UK-Gibraltar financial services framework

- 7.19 A further statutory instrument on Gibraltar will seek to preserve the overall pre-exit regulatory position in relation to Gibraltar notwithstanding amendments made to other financial services legislation under the European Union (Withdrawal) Act 2018, to support market access between the UK and Gibraltar. This will include maintaining existing treatments for depositor and policyholder protection, and clarifying home-host powers of intervention in respect of incoming firms, amongst others. This will include preserving enactments under which many types of Gibraltar firms (including credit institutions, but not all types of firms e.g. not insurers or certain fund managers) passporting into the UK are excluded from being relevant persons for the purpose of Part XV (the Financial Services Compensation Scheme) of the Financial Services and Markets Act 2000 (unless they elect to become relevant persons pursuant to FSMA (Compensation Scheme: Electing Participants Regulations 2001)).
- 7.20 The government of Gibraltar will be adopting a similar and reciprocal approach to the UK in its own EU Exit legislation to ensure that authorised financial services firms incorporated and headquartered in the UK are able to continue to provide services and establish branches in Gibraltar.

Long-term permanent framework for the UK-Gibraltar relationship

- 7.21 The UK government will work closely with the government of Gibraltar to design a long-term permanent framework for market access, beyond 2020, similarly based on

shared, high standards of regulation, enforcement of this regulation, and underpinned by modern arrangements for information-sharing, transparency and regulatory co-operation.

- 7.22 This instrument will be superseded by the long-term permanent framework, which has yet to be legislated for, and therefore the instrument will cease to have effect on 31 December 2020, unless HM Treasury extends its application by one-year at a time, under Part 5 of the instrument. Since this decision will be contingent on the permanent framework, HM Treasury must support the extension with a Ministerial statement, published and laid before Parliament, that details the progress towards the permanent framework between the UK government and the government of Gibraltar.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 There are currently no plans to consolidate the relevant legislation.

10. Consultation outcome

- 10.1 HM Treasury has not undertaken a consultation on the instrument, but has engaged with relevant stakeholders on its approach to Financial Services legislation under the European Union (Withdrawal) Act 2018, including on this instrument, in order to familiarise them with the legislation ahead of laying. The instrument was published in draft on 14 January 2019, with the explanatory policy note published on 19 December 2018, in order to maximise transparency ahead of laying.
(<https://www.gov.uk/government/publications/draft-eu-exit-legislation-relating-to-the-financial-services-framework-between-the-uk-and-gibraltar/the-financial-services-gibraltar-amendment-eu-exit-regulations-2019-explanatory-information>)
- 10.2 The Bank of England are undertaking public consultation 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. This can be found at:
<https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/consultation-paper/2018/cp3218-complete.pdf?la=en&hash=AE219BEE6FE9984D6D5898B0B45876F1A16C2CC7>
- 10.3 The FCA have published a statement on the treatment of Gibraltar and have invited comments on this statement as well as the savings provision in the General Provisions sourcebook. This can be found at:
<https://www.fca.org.uk/news/statements/statement-treatment-gibraltar-our-handbook-after-brexit>

11. Guidance

11.1 No further guidance is being published alongside 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 in line with Better Regulation guidance, HM Treasury considers that the net impact on businesses will be less than £5 million a year. Due to this limited impact, a de-minimis impact assessment has been carried out.

13. Regulating small business

13.1 This instrument 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 business. This instrument is designed to maintain existing passporting rights for Gibraltar-based financial services firms to continue access into UK markets, and therefore there should be no, or significant, impact on small businesses in Gibraltar that provide services into the UK.

14. Monitoring & review

14.1 Regulation 12 in Part 5 provides a power for HM Treasury to extend the time limit on the regulations in this instrument. HM Treasury will be able to make a statutory instrument that extends the effect of the regulations beyond 31 December 2020, by one year at a time. The statutory instrument would be subject to annulment by a resolution of either House of Parliament.

14.2 Regulation 12(3) in Part 5 states that HM Treasury's decision to extend the regulations must also be supported by a Ministerial statement, published and laid before Parliament, that details progress towards the long-term permanent framework between the UK government and the government of Gibraltar. Further policy background can be found in section 7.22.

15. Contact

15.1 Manmeet Narula at HM Treasury. Telephone: 0207 270 2450 or email: Manmeet.Narula@HMTreasury.gov.uk can be contacted with any queries regarding the instrument.

15.2 Dashiell Caldwell, Deputy Director for Financial Services EU Strategy at HM Treasury, can confirm that this Explanatory Memorandum meets the required standard.

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

“In my view the Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate.

- 1.2 This instrument goes no further than to mitigate the disruption to UK consumers and Gibraltar-based financial services firms who have activity in the UK, and will maintain the existing financial services passport rights between the UK and Gibraltar (see section 2). This instrument will apply until the introduction of a new permanent framework between the UK and Gibraltar by the end of 2020. To mitigate the possibility that this is not the case, this instrument provides HM Treasury with a power to extend the instrument to apply until the introduction of the permanent framework.”

2. Good reasons

- 2.1 The Economic Secretary to the Treasury, John Glen 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 Without this instrument, Gibraltar-based financial services firms operating in the UK via the financial services passport, would not be able to continue their access into the UK after exit day. This would cause notable disruption to these firms and UK consumers with existing contracts with Gibraltar-based financial services firms.”

3. Equalities

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

“In relation to the instrument, I, Economic Secretary to the Treasury, John Glen MP, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

4. Explanations

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