

EXPLANATORY MEMORANDUM TO

THE NATIONAL MINIMUM WAGE (OFFSHORE EMPLOYMENT) (AMENDMENT) ORDER 2020

2020 No. 779

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This Order amends article 2 of the National Minimum Wage (Offshore Employment) Order 1999 (S.I. 1999/1128). The purpose is to extend the provisions of the National Minimum Wage Act 1998 (“the Act”) to all seafarers working in UK territorial waters or (in connection with certain activities) in the UK sector of the continental shelf, except where they are working on a ship exercising the right of innocent passage or the right of transit passage as defined in the United Nations Convention on the Law of the Sea 1982 (“UNCLOS”).

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.

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, the territorial waters of the United Kingdom and the United Kingdom sector of the continental shelf.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State, Kelly Tolhurst MP has made the following statement regarding Human Rights:

“In my view the provisions of the National Minimum Wage (Offshore Employment) (Amendment) Order 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Section 1 of the Act provides for the national minimum wage to be paid to individuals who (subject to other requirements of the Act) are working, or ordinarily work, in the UK under their contracts. References in the Act to the UK include UK internal waters but not UK territorial waters or areas of the sea beyond UK territorial waters. The internal waters of the UK are the waters landside of the low water mark, with some

exceptions. In this context “UK territorial waters” does not include UK internal waters and refers, generally speaking, to the belt of sea around the UK extending out 12 nautical miles from the low water mark.

- 6.2 Specific provision about employment outside the UK is made by section 40 of the Act and the National Minimum Wage (Offshore Employment) Order 1999 (“the 1999 Order”) made under section 42.
- 6.3 Section 40 provides that an individual employed to work on a ship registered under Part 2 of the Merchant Shipping Act 1995 (a “UK-registered ship”) is treated as ordinarily working in the UK, provided that the individual is ordinarily resident in the UK and is employed to at least some extent in the UK. Such an individual therefore qualifies for the national minimum wage under section 1 (subject to the other requirements of the Act) irrespective of where the ship is at any given time – whether in UK territorial waters or beyond. As explained above, references to the UK do not include UK territorial waters or areas of the sea beyond UK territorial waters.
- 6.4 Section 40 (and indeed the Act in general) is subject to section 43, which provides that share fishers described in that section do not qualify for the national minimum wage in respect of their employment as such.
- 6.5 The 1999 Order extends the Act to cover individuals who, in effect, meet two conditions (referred to in this Memorandum as the conditions in article 2(1) of the 1999 Order). The first condition is that they are in “offshore employment” (as defined in section 42(1)). The second condition is that they are working, or ordinarily work, in UK territorial waters or the UK sector of the continental shelf. In this context, the “UK sector of the continental shelf” is the area designated under section 1(7) of the Continental Shelf Act 1964: see the Continental Shelf (Designation of Areas) Order 2013 (SI 2013/3162). “Offshore employment” is employment for the purposes of activities in UK territorial waters or particular activities referred to in section 42(1)(b) and (c) of the Act, which include activities connected with such matters as the exploitation of natural resources in the UK sector of the continental shelf. There is no requirement in the 1999 Order that the individual must be ordinarily resident in the UK or that the vessel on which they work must be a UK-registered ship, or that they must be employed to some extent in the UK. However, there is currently a wide exception in article 2(2) and (3) of the 1999 Order. The effect of that exception is that the 1999 Order does not apply the Act to individuals working on ships in the course of navigation, or on fishing vessels or ships engaged in certain dredging activity. The reference to a ship in the course of navigation is wide, covering navigation for any purpose (domestic or otherwise) and irrespective of where the ship has set out from or is headed. Therefore, although the 1999 Order applies the Act to offshore workers such as those working on oil and gas rigs or offshore renewable installations, it does not currently apply the Act to seafarers more generally. The 1999 Order is without prejudice to section 40 which operates in parallel; but, as explained above, section 40 has significant limitations.

7. Policy background

What is being done and why?

- 7.1 This Order replaces the current wide exception in article 2(2) and (3) of the 1999 Order with a narrower exception. The 1999 Order will continue to provide that the Act applies to individuals who are in “offshore employment” (as defined in section

42(1)) and who are working or ordinarily work in UK territorial waters or the UK sector of the continental shelf, as explained above. However, as a result of the amendments made by this Order, there will no longer be a wide exception for employment in connection with a ship in the course of any kind of navigation, or for workers on fishing vessels or dredgers. Instead, there will be a much narrower exception covering only individuals employed for the purposes of activities on a ship exercising the “right of innocent passage” or the “right of transit passage”.

- 7.2 In the amended Order, the “right of innocent passage” and the “right of transit passage” are defined by reference to UNCLOS. Article 19 of UNCLOS defines a vessel’s passage through a State’s territorial sea as being innocent if it is not prejudicial to the peace, good order, or security of the coastal state (recognising the coastal country’s territorial sea claim). Article 18 defines “passage” for this purpose. It means navigation through the territorial sea for the purpose of:
- (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
 - (b) proceeding to or from internal waters or a call at such roadstead or port facility.
- 7.3 Passage must be continuous and expeditious. Passage does include stopping and anchoring, but only in so far as the same are incidental to ordinary navigation, or are rendered necessary by force majeure or distress or for rendering assistance to persons, ships, or aircraft in danger or distress.
- 7.4 Under Article 21 of UNCLOS, a coastal State may adopt laws, for various specified purposes, that apply to innocent passage. However, this does not include legislation imposing a minimum wage for workers on such vessels.
- 7.5 On the other hand, vessels entering UK territorial waters as part of an international voyage are considered to be exercising the right of innocent passage, and will not therefore be affected by this Order. Examples of voyages not affected by this Order include ferry services operating between the UK and mainland Europe (including the Republic of Ireland) and voyages calling at a British port as part of a longer international, multi-port voyage.
- 7.6 The right of transit passage is defined by Article 38 of UNCLOS. It includes the exercise of the freedom of navigation for the purposes of continuous and expeditious transit of a strait used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. This includes the Dover Strait. Article 42 permits States bordering such straits to adopt laws, for various specified purposes, that apply to transit passage. However, as in the case of innocent passage, this does not include legislation imposing a minimum wage for workers on such vessels.
- 7.7 The amendments made by this Order mean that the 1999 Order will apply the Act to a range of individuals meeting the conditions in article 2(1) of the 1999 Order who are not currently covered by the Act by virtue of the 1999 Order or by virtue of section 40. For example, an individual seafarer employed on a ship engaged in a purely domestic voyage in UK territorial waters may in practice not meet the conditions in section 40 (for example because the ship is not a UK-registered ship) and will currently not be covered by the 1999 Order because of the wide exception for employment on ships in the course of navigation. The narrowing of the exception in the 1999 Order means that the 1999 Order will apply the Act to such an individual,

since the new exception in the 1999 Order will only cover employment on ships exercising the right of innocent passage or the right of transit passage. The narrowing of the exception by this Order means, in particular, that workers on fishing vessels in UK territorial waters (other than share fishers), workers on dredgers in UK territorial waters and the UK sector of the continental shelf and other seafarers working domestically in UK territorial waters will be entitled to the national minimum wage, irrespective of whether they are ordinarily resident in the UK or are employed to any extent in the UK, and irrespective of where the vessel on which they are employed is registered (or whether it is registered at all). The UK does not have flag restrictions (the flag of the State where the vessel is registered) for vessels operating domestically in UK territorial waters and therefore vessels registered in other States operate domestically in UK territorial waters.

- 7.8 Currently, it is difficult for Her Majesty’s Revenue and Customs to enforce the requirement to pay at least the minimum wage to seafarers benefiting from section 40 as it is difficult to establish, or be sure about, whether a particular seafarer is employed to at least some extent in the UK. The amendment will allow Her Majesty’s Revenue and Customs to focus enforcement on seafarers working domestically in UK territorial waters and irrespective of where the vessel on which they are employed is registered.
- 7.9 The Order also amends the 1999 Order to provide expressly that the operation of section 40 of the Act is not affected. This does not import the restrictions in section 40 (for example, the requirement for a seafarer to be ordinarily resident in the UK) into the 1999 Order. It simply makes clear that the provisions of the amended 1999 Order and section 40 continue to operate in parallel. Section 40 will continue to operate (without any express or implied modification being made to it by the 1999 Order) to provide that the individuals to whom it applies are treated as ordinarily working in the UK with the result that they qualify for the national minimum wage under section 1.
- 7.10 The Order cannot modify or exclude section 43 of the Act, so it remains the case that share fishers described in that section do not in any circumstances qualify for the national minimum wage in respect of their employment as such.
- 7.11 Section 1 of the Act provides for workers to be paid in respect of work in any “pay reference period” at a rate which is not less than the national minimum wage. As a result of this Order, many workers will become entitled to the national minimum wage during the course of an ongoing pay reference period. The entitlement will apply in respect of all work done from the date on which this Order comes into force.

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

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 The 1999 Order has not previously been amended and this Order makes only limited textual changes to it. Consolidation of the 1999 Order is therefore not necessary at this stage. Legal subscription services publish unofficial consolidated versions.

10. Consultation outcome

- 10.1 A legal working group was formed in 2017, encompassing government and industry to explore this issue, which had been raised by industry stakeholders for more than ten years.
- 10.2 The legal working group was chaired by the Department for Transport, with policy and legal representation from the Department for Business, Energy, and Industrial Strategy (BEIS), the Foreign and Commonwealth Office (FCO), and Her Majesty's Revenue and Customs (HMRC). Also represented were the maritime unions (the National Union of Rail, Marine, and Transport Workers (RMT) and Nautilus International), the UK Chamber of Shipping, and individual shipping companies.
- 10.3 The legal working group recommended that the existing legislation should be amended to extend the protection of the minimum wage to all seafarers working on any vessel working domestically in the UK territorial waters or on one port voyages, from UK ports to the UK Continental Shelf or the UK Exclusive Economic Zone. This Order seeks to implement those recommendations to the territorial sea and to those working to support the offshore sector of the UK Continental Shelf. A one port voyage is where a vessel leaves and returns to the same port without stopping at another port. Examples would be offshore supply vessels servicing UK offshore installations or a fishing vessel landing its catch in the same port from which it sailed.
- 10.4 Due to the nature of the issue in question, and the extensive industry representation involved in the working group itself (including the UK Chamber of Shipping – the representative body for the UK shipping industry), all of whom were in support of the proposed changes, wider public consultation was not considered to be necessary in this instance.

11. Guidance

- 11.1 The Department for Business, Energy, and Industrial Strategy (BEIS), who administer the wider national minimum wage legislation, will issue guidance on any changes in advance of the new statutory instrument coming into force.

12. Impact

- 12.1 The impact on business is that those companies who are not already paying the national minimum wage to their employees will see an increase in their staff costs.
- 12.2 Dependant on the number of seafarers who would fall under the proposed amendments but are not already being paid in accordance with the UK minimum wage, the total cost to business could be as high as £3.2m per annum. However, it is important to note that there is no robust data as to exactly how many employees are in this position, and a lack of concurrence amongst sources which are available.
- 12.3 In terms of absorbing this cost, there could be a number of outcomes. Additional employment costs could be passed onto 'end users' of services provided, although no modal shift is expected. Shipowners have stated that certain services may no longer be viable, but have been unable to identify any that may be impacted.
- 12.4 In addition to the anticipated staff cost to business, there is the potential for extra costs as a result of proceedings in employment tribunals and the courts.

- 12.5 There is no, or no significant, impact on the public sector. In certain cases, there may be short term additional cost for HMRC while employers adjust to the new requirements.
- 12.6 An Impact Assessment has not been prepared for this instrument because the amounts involved fall below the threshold for producing one. The total annual gross cost to businesses of this measure is estimated at up to around £3.2m per annum.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 As per the scope of the parent Act, no specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The national minimum wage is the minimum pay per hour almost all workers are entitled to. It does not matter how small an employer is, they still must pay the correct minimum wage. Initially, while a business is familiarising itself with the new regulations, small and micro businesses will be affected more significantly because they will need to spend the same amount of labour on the task of familiarisation, despite having fewer resources overall. Therefore, in the first instance it is proportionately more of a burden, the smaller the company is. However, beyond this initial step, the costs of paying some staff the additional amount to bring them up to the minimum wage will be proportionate to the size of the firm, and as a result, small businesses will not be disproportionately affected overall. It is important to note that micro businesses will sometimes consist of self-employed people, and this may include share fishers. Share fishers are excluded from entitlement to the national minimum wage by section 43 of the Act; and self-employed people running their own business are not entitled to the minimum wage.

14. Monitoring & review

- 14.1 The regulation does not include a statutory review clause.

15. Contact

- 15.1 John Cousley at the Department for Transport (07775 026882, john.cousley@dft.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Rod Paterson, Deputy Director for Safety, People, Technology, and Infrastructure, at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kelly Tolhurst MP, Parliamentary Under Secretary of State at the Department for Transport, can confirm that this Explanatory Memorandum meets the required standard.