

EXPLANATORY MEMORANDUM TO

THE BANK OF ENGLAND (AMENDMENT) (EU EXIT) REGULATIONS 2018

2018 No. 1297

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by HM Treasury and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments and the Sifting Committees.

2. Purpose of the instrument

- 2.1 This instrument is being made in order to address deficiencies in UK domestic law arising from the UK's withdrawal from the EU. Amendments made through this SI ensure that the constitution, responsibilities and functions of the Bank of England continue to be clearly defined after exit day in a no-deal scenario. Certain definitions and activities in primary and secondary legislation cross-refer to current EU legislation which will become deficient once the UK withdraws from the EU. This instrument makes consequential amendments in line with changes in the versions of these EU regulations which will become retained EU law. Without this instrument, aspects of existing legislation in relation to the Bank of England's constitution and functions would not be operable after exit.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The Bank of England Act 1998 sets out the constitution, responsibilities and functions of the Bank of England as the central bank of the United Kingdom. This legislation outlines the Bank's financial arrangements and the duties of its board of directors, and further sets out the objectives of the committees responsible for the different functions of the Bank. It includes provisions on: the Monetary Policy Committee's (MPC) function in overseeing the UK's monetary policy; the Financial Policy Committee's (FPC) role in monitoring and reporting on UK financial stability; and the Prudential Regulation Authority's (PRA) responsibility for regulating and supervising certain financial services firms. The Bank of England Act 1998 also outlines the Bank's responsibility for complying with macro-prudential measures set under the EU Capital Requirements Regulation (CRR) (EU Regulation No. 575/2013) which are intended to mitigate risks to financial stability in the EU.
- 2.3 The Financial Services Act 2012 further sets out the functions of the PRA and Financial Conduct Authority (FCA) as the UK's financial services regulators. It also imposes obligations on the Bank to notify HM Treasury of the need for public funds or if there is systemic risk to the UK's financial system. In the Bank of England Act 1998 and the Financial Services Act 2012, there are requirements for the Bank of England, FCA and HM Treasury to share information with EU authorities in relation to financial system risks and macro-prudential measures. This legislation also contains requirements for the Bank, FCA and HM Treasury to enter into cooperation

agreements with European Supervisory Authorities (ESAs) and other EU bodies about how they carry out their relevant functions.

- 2.4 Related secondary legislation sets out more technical requirements for some financial institutions that the Bank of England supervises. These include provisions on capital buffers and amounts of cash ratio deposits that certain financial services firms must hold with the Bank.

Why is it being changed?

- 2.5 This instrument forms part of HM Treasury's contingency planning in the event that the UK leaves the EU without a deal. To prepare for a no-deal scenario, it is necessary to address deficiencies in domestic law to ensure that the legislation continues to operate effectively at the point at which the UK leaves the EU.
- 2.6 When the UK leaves the EU, references to EU law in UK legislation will need to be amended so that they continue to operate effectively after exit day. Some of these references will need to be amended to reflect changes in the versions of EU regulations which will become retained EU law when the UK leaves the EU.
- 2.7 This instrument will also introduce changes to information sharing and cooperation obligations between the UK and EU authorities. When the UK is no longer a member of the EU single market for financial services, it would not be appropriate for UK authorities to be obliged to share information or cooperate with the EU on a unilateral basis, with no guarantee of reciprocity.

What will it now do?

- 2.8 Amendments introduced through this instrument 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. This instrument will amend certain provisions in the Bank of England Act 1998, the Financial Services Act 2012, and related secondary legislation. Amendments introduced through this instrument make only technical changes to existing legislation to ensure that it continues to operate effectively once the UK leaves the EU.
- 2.9 To reflect the UK's new status when the UK leaves the EU, information sharing and cooperation obligations in respect of EU authorities will be removed. It is more appropriate for UK authorities to rely on the existing domestic framework for cooperation and information sharing with non-EU countries, which allows UK authorities to cooperate with relevant authorities outside the UK on a discretionary basis.
- 2.10 The instrument removes requirements imposed by the EU CRR on the Bank of England to notify EU authorities where there is systemic risk to the financial system of an EU Member State. It also removes requirements which relate to the notification process under Article 458 of the CRR before certain macro-prudential measures can be taken by the Bank. This is because the retained CRR which will form part of domestic law in a no-deal scenario will remove this notification process, which would not be appropriate when the UK will no longer be an EU Member State. The retained CRR will not include specific requirements for UK authorities to share information with EU authorities, as EU authorities will be treated as any other third-country authority.

- 2.11 The instrument also amends certain definitions so that they work in the UK after exit day. For example, the definition of a reinsurance undertaking in the Bank of England Act 1998 (Macro-prudential Measures) Order 2013 (S.I. 2013/644) is being amended so that it no longer refers to the authorisation process under the EU reinsurance directive, and instead refers to a new definition inserted into the Financial Services and Markets Act 2000 (FSMA).
- 2.12 Similarly, the definition of a “countercyclical capital buffer rate” is being amended so that it no longer refers to the existing definition in the EU Capital Requirements Directive (CRD) (Directive 2013/36/EU). The amendment will no longer refer to the CRD, and will only include the rates of UK banks and investment firms within the scope of the definition. Technical amendments of this type are necessary because references to EU directives would no longer function appropriately after the UK leaves the EU. Some of these amendments should be read in conjunction with other instruments being prepared as part of the government’s no-deal contingency planning, including those which amend the CRR and the Financial Services and Markets Act 2000 (FSMA).

3. Matters of special interest to Parliament

Matters of special interest to the Sifting Committees

- 3.1 This instrument was laid for sifting by the European Statutory Instruments Committee and the Secondary Legislation Scrutiny Committee under Schedule 7 to the EU (Withdrawal) Act 2018 (c.16). It was considered by the European Statutory Instruments Committee on 20 November 2018, who recommended it for the negative procedure. It was considered by the Secondary Legislation Scrutiny Committee on 21 November 2018, and no recommendation to update to the affirmative procedure was made.

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

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

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the whole of the United Kingdom.
- 4.2 The territorial application of this instrument is the whole of the 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 Bank of England (Amendment) (EU Exit) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 To address the deficiencies in retained EU law that arise from the UK’s exit from the EU, this instrument amends the Bank of England Act 1998, the Banking Act 2009, the Financial Services Act 2012, and the Bank of England and Financial Services Act

2016. It also amends related subordinate legislation, which includes the Cash Ratio Deposits (Eligible Liabilities) Order 1998 (S.I. 1998/1130), the Scottish and Northern Ireland Banknote Regulations 2009 (S.I. 2009/3056), the Bank of England Act 1998 (Macro-Prudential Measures) Order 2013 (S.I. 2013/644), the Bank of England Act 1998 (Macro-prudential Measures) (No 2) Order 2015 (S.I. 2015/905) and the Bank of England Act 1998 (Macro-prudential Measures) Order 2016 (S.I. 2016/1240).

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 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. The government is clear that this scenario is in neither the UK's nor the EU's interest, and the government does not anticipate it arising. To prepare for this unlikely eventuality, HM Treasury intends to use powers in the European Union (Withdrawal) 2018 Act (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 In the unlikely scenario that the UK leaves 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 The Bank of England Act 1998, the Financial Services Act 2012, and related secondary legislation, relate to the constitution and functions of the Bank of England and UK financial services regulators. The instrument addresses deficiencies in this UK legislation arising from the withdrawal of the UK from the EU, ensuring the legislation continues to operate effectively in the unlikely event that the UK leaves the EU without a deal.
- 7.10 Amendments introduced through this instrument 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. Certain provisions in the current legislation relating to the functions of the Bank of England assume that the UK is a member of the EU, and treats countries in the EEA differently to other third countries, which will no longer be appropriate after exit day.
- 7.11 To reflect the UK's new status when the UK leaves the EU, cross-references to EU regulation will be amended to refer to the relevant domestic legislation as EU legislation will no longer apply to the UK after exit day. These changes ensure that technical amendments introduced in this instrument reflect changes made elsewhere in other EU Exit SIs as part of the government's contingency planning, and reflect the UK's new position outside the EU.
- 7.12 Certain definitions will also be amended so that they no longer include EEA countries in their scope after exit day. Sections 2.10 to 2.12 of this Explanatory Memorandum further set out some of the amendments to existing definitions that this instrument will make. Amendments of this type are only technical in nature and are not intended to change how the domestic legislation operates.

- 7.13 The obligations to provide EU authorities with certain information (such as the need to take stricter national measures to address macroprudential or systemic risk) are removed from the Bank of England Act 1998. This does not affect the ability of the Bank of England or the regulators to share information with EU authorities and other authorities outside the UK when they consider this appropriate.
- 7.14 Further details about the changes introduced through this instrument can be found in section 2 of this Explanatory Memorandum.

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.

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 The legislation does not apply to activities that are undertaken by small businesses.

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 Michael Sole at HM Treasury (Telephone: 020 7270 5508 or email: Michael.Sole@HMTreasury.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Katie Fisher, Deputy Director for EU Exit Financial Services Domestic Preparation, at HM Treasury, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Economic Secretary to the Treasury at HM Treasury, John Glen, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement(s)

1.1 The 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 the Bank of England (Amendment) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure).”

1.2 This is the case because this instrument complies with the requirement for the negative procedure under Schedule 7 to the EU (Withdrawal) Act 2018. The instrument contains only technical amendments to UK primary and secondary legislation. Sections 2 and 7 of this Explanatory Memorandum further explain the legislative reasons for this instrument.

2. Appropriateness statement

2.1 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 the Bank of England (Amendment) (EU Exit) Regulations 2018 do no more than is appropriate.”

2.2 This is the case because the instrument does no more than to correct deficiencies in UK law resulting from the UK’s withdrawal from the EU in relation to the constitution of the Bank of England. Sections 2 and 7 of this Explanatory Memorandum further explain the legislative reasons for this instrument.

3. Good reasons

3.1 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 provisions in this instrument, and I have concluded they are a reasonable course of action.”

3.2 Without the provisions in this instrument, domestic law in relation to the constitution and functions of the Bank of England would no longer operate appropriately once the UK withdraws from the EU. Sections 2 and 7 of this Explanatory Memorandum further explain the policy intentions of this instrument.

4. Equalities

4.1 The Economic Secretary to the Treasury, John Glen, has made the following statement(s):

“The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

- 4.2 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 relation to the draft 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 2010.”

5. Explanations

- 5.1 The explanations statement has been made in section 2 of the main body of this Explanatory Memorandum.