

EXPLANATORY MEMORANDUM TO
THE ELECTRICITY AND GAS (MARKET INTEGRITY AND TRANSPARENCY)
(AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 534

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument is one of a package of statutory instruments that will ensure that legislation governing the UK's energy systems will function effectively in the event that the UK leaves the European Union ('EU') without a withdrawal agreement in place. It makes technical modifications to Regulation (EU) No 1227/2011 on wholesale energy market integrity and transparency¹ ('REMIT'), Commission Implementing Regulation (EU) No 1348/2014² (the REMIT Implementing Regulation) and Regulation (EU) No 543/2013 on submission and publication of data in electricity markets³ (the Transparency Regulation) in order to ensure that they are operable when incorporated into domestic law by the European Union (Withdrawal) Act 2018. It also amends domestic legislation which confers investigation and enforcement powers on the energy regulators in relation to breaches of REMIT requirements.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The REMIT regime, as set out in REMIT and the REMIT Implementing Regulation, aims to prevent market manipulation and insider trading in the gas and electricity markets. It sets out arrangements for market monitoring, which includes registration of market participants, reporting of energy market data, to aid market surveillance, and the publication of inside information (market information which would have an impact on prices). It also requires Member States to provide regulators with appropriate investigatory and enforcement powers, which are set out in the implementing domestic legislation.

The Transparency Regulation provides for the central collection and publication of additional information relating to the generation, transportation and consumption of electricity.

Why is it being changed?

- 2.3 On 29 March 2019, the European Union (Withdrawal) Act 2018 will incorporate into UK law directly applicable EU law and EU derived legislation as it applies immediately before exit day. If unamended, this retained EU law would contain

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R1227&from=EN>

² <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R1348&from=EN>

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:163:0001:0012:EN:PDF>

numerous inoperabilities. These inoperabilities range from, for example, references to EU Member States, to more significant issues, such as obligations for UK bodies to accept binding decisions from the European Commission. Failure to remedy these inoperabilities could create significant uncertainty around energy market regulation, the role and functions of UK and EU bodies in the market, and requirements for market participants. This uncertainty could threaten the continued secure and efficient operation of energy markets across the UK, including the Single Electricity Market in Northern Ireland and Ireland. Further detail on the deficiencies resolved by this instrument can be found in Section 7.

What will it now do?

- 2.4 The amending instrument will amend retained EU law relating to energy to make it ‘workable’ by remedying deficiencies whilst retaining regulatory functions and frameworks needed to keep energy markets working effectively. The amending instrument will ensure the operability and integrity of UK energy legislation and promote continuity for UK industry and consumers.

Specifically, under the REMIT regime, market participants are currently required to register with and report market data to EU institutions. The amending instrument amends that requirement so that participants in UK markets will be required to register with and report energy market data to the appropriate national regulator. This will be the Gas and Electricity Markets Authority (represented by Ofgem) in relation to Great Britain or the Northern Ireland Authority for Utility Regulation (the Utility Regulator) in relation to Northern Ireland.

The requirement to register will commence approximately 4 weeks after exit day, to allow regulators sufficient time to communicate arrangements to market participants and for participants to complete administrative steps. This is not expected to have any impact on the regulators’ ability to maintain effective market surveillance. Further to this, to avoid duplication and unnecessary regulatory burden, the UK regulators are able to issue a notice stating that the requirement to register will not apply to those already registered with a UK regulator or with a National Regulatory Authority (NRA) of an EU Member State.

The requirement to publish inside information and certain transparency data will continue as currently required, except without onward transmission to European transparency platforms. However, other forms of reporting (such as data relating to transactions in the wholesale markets), will not be commenced until national regulators have reviewed their data requirements for market surveillance. In the event that national regulators choose to implement full data reporting, as originally set out in the EU law, they will provide at least 3 months’ notice of commencement. During the review period, national regulators will rely on alternative sources of market surveillance data and domestic powers.

Prohibitions on insider trading and market manipulation will remain unchanged, as will domestic enforcement powers and penalties.

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 the amending instrument is the United Kingdom.

4.2 The territorial application of the amending instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 Claire Perry MP has made the following statement regarding Human Rights:

“In my view the provisions of the Electricity and Gas (Market Integrity and Transparency) (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights”

6. Legislative Context

6.1 On 29 March 2017 the Prime Minister triggered Article 50 of the Treaty on European Union and started the UK’s exit from the European Union. To ensure business and legislative continuity for the UK, following over 40 years of EU membership, the European Union (Withdrawal) Act 2018 will incorporate directly applicable EU legislation into domestic law as it applied immediately before exit day.

6.2 This instrument is one of a series of statutory instruments laid by the Department for Business, Energy and Industrial Strategy which will ensure that domestic and retained EU legislation governing the UK’s electricity and gas markets will function effectively in the event that the UK leaves the European Union without a deal.

6.3 REMIT is also amended with effect from exit day by the Electricity and Gas (Powers to Make Subordinate Legislation) (Amendment) (EU Exit) Regulations 2018 (S.I. 2018/1286).

7. Policy background

What is being done and why?

7.1 The retained EU laws modified by the amending instrument concern the integrity and transparency of energy markets. Prohibitions and obligations contained within REMIT, the REMIT Implementing Regulation and the Transparency Regulation are aimed at minimising opportunities for energy market participants to manipulate prices within markets or trade with the advantage of inside information. Where those behaviours exist, the regime increases the likelihood of detection and successful enforcement action by regulators. On that basis, it is important that domestic regimes in the UK continue to function effectively, post-exit, to maintain confidence in wholesale energy market price formation. To facilitate this, prohibitions on insider trading and market manipulation remain unchanged, as do domestic enforcement powers and penalties.

7.2 To maintain a regime as similar to the one currently operating as possible, systems and administrative processes, currently operated centrally by EU institutions, will need to be replaced domestically. Replacement systems for secure transfer of sensitive market data will not be available at exit. Additionally, market participants will need time to register with the relevant national regulator and adapt their own

reporting procedures. On that basis, the registration and market data reporting requirements will not be commenced until additional implementation work is completed. In the interim, national regulators will use alternative sources of data for market surveillance purposes. The amending instrument provides the national regulators with a degree of freedom in how they implement registration and market data reporting requirements. Where regulators are satisfied that the same level of market integrity can be achieved, registration and reporting requirements can be relaxed to avoid duplication or unnecessary regulatory burden on industry.

- 7.3 The amending instrument applies to energy, which is a transferred matter for Northern Ireland under the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With exit day approaching, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

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

- 8.1 This amending 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 Not relevant.

10. Consultation outcome

- 10.1 Statutory instruments made under the powers in the European Union (Withdrawal) Act 2018 do not require consultation, and a consultation has not been conducted for this instrument. Technical and factual input relevant to this instrument has been provided by the UK's energy regulators, Ofgem and the Utility Regulator, and by the Northern Ireland Department for the Economy. A letter notifying the Northern Ireland Department for the Economy, detailing the intention to legislate and the content of the statutory instruments, has been sent, and a response from the Department noting the intention to legislate has been received.

11. Guidance

- 11.1 Guidance has not been produced for this instrument.

The regulators will provide appropriate guidance to market participants, in relation to on-going compliance with requirements, in the event those requirements change.

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 While costs and benefits have been assessed, a full Impact Assessment has not been prepared for this instrument because the impacts are below the threshold where one is deemed necessary. The amending instrument transposes the current EU regulation, maintaining the status quo, but will require equivalent systems to be set up in the UK post-exit to be functional. Establishing a domestic REMIT reporting system, similar to current arrangements, is estimated to impose a one-off cost to Ofgem of approximately £1.9m and an ongoing cost of £500k per annum. These estimates are based on the Swiss experience of developing such a system. Costs may be lower, if Ofgem choose to establish a more limited surveillance system. There are no direct costs imposed on the Utility Regulator who will rely on existing data sources. Key stakeholders including Ofgem, National Grid, the Department for the Economy Northern Ireland, the Utility Regulator and the Northern Ireland gas transmission system operator (Premier Transmission Limited) have been consulted and concluded that all further impacts are considered to be negligible (less than £100,000 per year in total).

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 regulatory burdens on small businesses.
- 13.3 The basis for this decision is that the scale of the impacts identified in connection with this instrument is small and they do not fall disproportionately on small businesses.

14. Monitoring & review

- 14.1 The Department does not intend to monitor this instrument.
- 14.2 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. Contact

- 15.1 Joe Parsons at the Department for Business, Energy and Industrial Strategy (Telephone: 030 0068 5337 or email: joseph.parsons@beis.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Jane Walker, Deputy Director for Energy Markets and Affordability, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Minister of State, the Rt Hon Claire Perry MP at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

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

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

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

Part 2

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

1. Appropriateness statement

1.1 The Minister of State, The Rt Hon Claire Perry MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Electricity and Gas (Market Integrity and Transparency) (Amendment) (EU Exit) Regulations 2019 do no more than is appropriate”.

1.2 This is the case because:

- All amendments made by this instrument resolve deficiencies as defined in Article 8 of the Withdrawal Act, such as removing the role of the Agency for Cooperation of Energy Regulators in collecting UK market surveillance data.
- The vast majority of amendments made by this instrument resolve minor deficiencies in the legislation, such as references to EU institutions.

2. Good reasons

2.1 The Minister of State, The Rt Hon Claire Perry MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

2.2 These are:

- Legislation revoked by this instrument would be inoperable if retained, potentially disrupting the efficient operation of the UK’s energy systems.
- The amendments to retained legislation made by this instrument are necessary to remedy deficiencies which would otherwise disrupt the efficient operation of the UK’s energy systems.

Further information about the reasons for the provisions in this instrument is provided in Section 7 above.

3. Equalities

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

“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 Minister of State, The Rt Hon Claire Perry MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Minister of State, the Rt Hon Claire Perry 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.”

3.3 This instrument has no, or no significant, differential impact on those with protected characteristics under the Equality Act 2010.

4. Explanations

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