

EXPLANATORY MEMORANDUM TO
THE FINANCIAL REGULATORS' POWERS (TECHNICAL STANDARDS)
(AMENDMENT ETC.) (EU EXIT) REGULATIONS

2018 No. 1115

1. Introduction

- 1.1 This explanatory memorandum has been prepared by Her Majesty's Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument is being made in order to ensure that Binding Technical Standards (BTS) and rules made by the UK's financial services regulators under the Financial Services and Markets Act 2000 (FSMA) continue to operate effectively after the UK's withdrawal from the EU. This instrument will achieve this by delegating use of the EU (Withdrawal) Act Section 8 power to UK financial services regulators so they can fix deficiencies in BTS and regulators' rules in advance of exit day; and by establishing the statutory basis on which those regulators will continue to maintain BTS after exit.

Explanations

What did any relevant EU law do before exit day?

- 2.2 Binding Technical Standards (BTS) set out very specific requirements and standards in order to ensure that financial services institutions are able to comply with the EU's financial regulation. European Supervisory Authorities are currently responsible for drafting BTS. An appropriate UK body will need to take on responsibility for these standards after exit. Having played a major role in developing these standards, UK regulators are the most appropriate bodies to take on that responsibility.

Why is it being changed?

- 2.3 Once the UK has left the European Union, the European Supervisory Authorities' functions will not cover the UK. It is important that BTS, which will become part of UK law after exit day, continue to operate effectively in the UK, and that UK financial services regulators are able to take on responsibility for BTS once the UK has left the European Union.

What will it now do?

- 2.4 UK financial services regulators will be responsible for fixing deficiencies in BTS so that they operate effectively from exit day and will have ongoing responsibility for making any technical standards required under retained EU law on financial services, and amending these standards so they remain fit for purpose in the future.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee of Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders No. 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 includes Scotland and Northern Ireland

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is to the whole United Kingdom.

4.2 The territorial application of this instrument is to the whole United Kingdom.

5. European Convention on Human Rights

5.1 The Economic Secretary to the Treasury (John Glen) has made the following statement regarding Human Rights:

“In my view the provisions of the Financial Regulators’ Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

6.1 "This instrument amends sections 1A, 1B, 2AB and 2J of the Financial Services and Markets Act 2000 (FSMA), to ensure that the functions of the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) include the function of making EU Exit Instruments under these Regulations, and that the function of making technical standards is one of their general functions. It also amends Part 9A of FSMA by inserting section 138P to 138S to set out the procedure for standards instruments, which will enable the FCA, the PRA and the Bank of England to make technical standards post exit, and amends the Financial Services (Banking Reform) Act 2013 by inserting new sections 97A to 97D (and making consequential amendments to section 39(10) and 71 of that Act) to make the same provision for the Payment Systems Regulator. It amends Schedule 4 to the 2013 Act to provide for the way in which the Payment Systems Regulator’s functions are to be funded."

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 would need a stable process for maintaining equivalent regulatory outcomes as legislation evolves – including a system to resolve disagreements at regulatory and supervisory levels – alongside an open, collaborative relationship between supervisors that protects UK and EU financial systems and UK and EU taxpayers from financial stability risks.

- 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) Act 2018 (EUWA) to ensure that the UK continues to have a functioning financial services regulatory regime in all scenarios.
- 7.4 The EUWA repeals the European Communities Act 1972 and converts into UK domestic law the existing body of directly applicable EU law (including EU Regulations). It also preserves UK laws relating to EU membership – e.g. legislation implementing EU Directives. This body of law is referred to as “retained EU law”. The EUWA also gives ministers a power to prevent, remedy or mitigate any failure of EU law to operate effectively, or any other deficiency in retained EU law, through SIs. These contingency preparations for financial services legislation are sometimes referred to as ‘onshoring’. These SIs are not intended to make policy changes, other than to reflect the UK’s new position outside the EU, and to smooth the transition to this situation. The scope of the power is drafted to reflect this purpose and is subject to further restrictions, such as the inability to use the power to impose or increase taxation, or establish a public authority. The power is also time-limited and falls away two years after exit day.
- 7.5 Wherever practicable, the proposed approach is that the same laws and rules that are currently in place in the UK would continue to apply at the point of exit, providing continuity and certainty as we leave the EU. However, if the UK does not enter an implementation period, some changes would be required to reflect the UK’s new position outside the EU from 29 March 2019.
- 7.6 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 For certain EU ‘Level 2’ technical rules on financial services, known as Binding Technical Standards (BTS), HM Treasury proposes to transfer ongoing responsibility

from the European Supervisory Authorities to the UK financial regulators – the Bank of England, the Prudential Regulation Authority (PRA), the Financial Conduct Authority (FCA) and the Payment Systems Regulator (PSR). BTS, running to several thousand pages, do not set overall policy direction but fill out the technical detail of how the requirements set in parent legislation (referred to as Level 1 legislation) are to be met. Having played an important role in the EU to develop these standards, through their membership of the Boards and working groups of the European Supervisory Authorities, UK regulators have the necessary expertise and resource to maintain BTS after the UK's exit from the EU. This allocation of responsibility would be consistent with the general rule-making responsibilities already delegated to the FCA and PRA by Parliament under FSMA.

- 7.10 The Treasury would be required to approve the regulator instruments that make or amend BTS after exit. But the Treasury approval function would only be used to refuse to approve a proposed BTS change if it appeared to the Treasury that a proposed BTS change would have implications for public funds, or would prejudice any negotiations for an international agreement.
- 7.11 As HM Treasury proposes to transfer ongoing responsibility for BTS to the UK regulators, it also makes sense that the regulators perform the task of making corrections to deficiencies in existing BTS so that these rules operate effectively in the UK at exit. HM Treasury therefore proposes to delegate to UK financial regulators the power to correct deficiencies in BTS arising from EU withdrawal.
- 7.12 In addition, HM Treasury proposes to delegate the EU (Withdrawal) Act deficiency-fixing power to UK financial regulators so as to allow them to correct deficiencies in their existing rules that arise as a result of the UK's withdrawal from the EU. Under the existing FSMA framework, the PRA and FCA already have powers to amend these rules. However, the procedures to use these powers were not designed to deliver the volume of rule amendments that will be needed as a result of leaving the EU and these procedures may not always be appropriate for the task. Delegating the deficiency-fixing power in this way will give UK regulators the flexibility to ensure that the full set of EU-derived rules for which they are responsible will operate effectively from exit.
- 7.13 The Treasury would be required to approve all instruments which the regulators use to correct deficiencies in BTS or regulator rules. The Treasury will ensure that all corrections to BTS and regulator rules are within the Act powers sub-delegated to the regulators, and are consistent with corrections to other parts of retained EU law which Parliament has approved.

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. The instrument is also made under the powers in paragraph 1 of Schedule 4 to *the Withdrawal Act 2018*. 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 will be no consolidation of legislation through this instrument.

10. Consultation outcome

10.1 HM Treasury has not undertaken a consultation on the instrument, but the instrument was published in draft, along with an explanatory policy note, in April 2018. The instrument itself will not change any of the regulatory requirements that apply to regulated entities. The financial services regulators plan to undertake public consultation on any changes they propose to make to Binding Technical Standards or rules made under the powers conferred upon them by the Financial Services and Markets Act 2000 using the powers delegated to them by the instrument.

11. Guidance

11.1 No guidance will be updated as a result of this instrument.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 The impact on the public sector is that UK financial services regulators (the Bank of England/Prudential Regulation Authority, the Financial Conduct Authority and the Payment Systems Regulator) will be responsible for fixing deficiencies in BTS so that they operate effectively from exit day, and will have ongoing responsibility for making any technical standards required under retained EU law on financial services, and amending these standards so they remain fit for purpose in the future. Having played an important role in the EU to develop these standards, through their membership of the Boards and working groups of the European Supervisory Authorities, UK regulators have the necessary expertise and resource to maintain them after the UK's exit from the EU. This allocation of responsibility is therefore a manageable impact.

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

12.4 The Treasury's decision to publish the regulations without a final Impact Assessment aims to ensure that industry and regulators have as much time as possible to familiarise themselves with the regulatory changes.

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 Lee O'Rourke at HM Treasury (Telephone: 020 7270 6436 or email: Lee.O'Rourke@HMTreasury.gov.uk) can be contacted with any queries regarding the instrument.

- 15.2 Katie Fisher at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Economic Secretary to the Treasury at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.

Annex A

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/ESIC
Appropriateness	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 23(1) or jointly exercising	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		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, Sch 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s.2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s.2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s.2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

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

1. Appropriateness statement

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

1.2 “In my view the Financial Regulators’ Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018 do no more than is appropriate. Nothing has been done to alter the role that BTS or regulators’ rules perform in the regulation of financial services. They will continue to apply to UK firms as they do now, save for any correction of deficiencies which is necessary to ensure these rules continue to operate effectively after exit. The post-exit transfer of responsibility for BTS to UK financial regulators is necessary to ensure these standards remain fit for purpose in the future. Only the financial regulators have the necessary expertise and resource to perform this role.”

2. Good reasons

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:

2.2 “In my view there are good reasons for the provisions in this instrument, and I have concluded it is a reasonable course of action. These are that, having played an important role in the EU to develop BTS, through their membership of the Boards and working groups of the European Supervisory Authorities, UK regulators are best placed to maintain them after the UK’s exit from the EU. This allocation of responsibility would be consistent with the general rule-making responsibilities already delegated to the FCA and PRA by Parliament under FSMA. Delegation of the EU (Withdrawal) Act deficiency-fixing power to regulators is also proposed as a sensible course of action. Delegating the power is the most effective way of ensuring that BTS and regulator rules will continue to function properly at exit. Again, only the UK’s financial regulators have the necessary resource and expertise to complete this task.”

3. Equalities

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

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

4. Explanations

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

5. Legislative sub-delegation

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

5.2 “In my view it is appropriate to create a relevant sub-delegated power in the Financial Regulators’ Powers (Technical Standards) (Amendment etc.) (EU Exit) Regulations 2018. This will give UK regulators the responsibility of ensuring that the full set of EU-derived technical standards and regulator rules operate effectively after exit from the European Union. It is necessary for the regulators to perform this task, given that the required corrections for BTS and regulator rules will be of a highly technical nature. This sub-delegation is also appropriate as, as the amendments needed to correct deficiencies in BTS and regulator rules will be aligned with the changes that Parliament will be asked to approve in Level 1 legislation.”