

**EXPLANATORY MEMORANDUM TO**

**THE BILATERAL INVESTMENT AGREEMENTS (TRANSITIONAL ARRANGEMENTS AND FRAMEWORK FOR MANAGING FINANCIAL RESPONSIBILITY FOR DISPUTES) (REVOCATION) (EU EXIT) REGULATIONS 2019**

**2019 No. 506**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department for International Trade and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

**2. Purpose of the instrument**

- 2.1 This SI revokes, on the day of the UK's withdrawal from the EU, two EU regulations relating to the administration of the relationship between the EU and Member States on matters relating to EU investment agreements and the Member States' bilateral investment treaties and any related investor-state dispute settlement (ISDS) cases. Following the UK's withdrawal from the EU these Regulations will become EU retained law, unless this SI revokes them.
- 2.2 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishes transitional arrangements for bilateral investment agreements between Member States and third countries (the "Grandfathering Regulation") and Regulation (EU) 912/2014 of the European Parliament and of the Council of 23 July 2014 establishes a framework for managing financial responsibility for ISDS claims where the EU or a EU Member State is a party to a bilateral investment agreement (the "Financial Responsibility Regulation").

*Explanations*

What did any relevant EU law do before exit day?

- 2.3 Both EU Regulations were made following the entry into force of the Treaty of Lisbon which brought foreign direct investment within EU exclusive competence. They deal with the administrative arrangements between the EU and the Member States. They do not deal with the limits of application or substance of any current or future investment agreements or bilateral investment treaties.
- 2.4 The Grandfathering Regulation makes transitional arrangements to address the status of the Member States' existing bilateral investment agreements. It requires Member States to notify the Commission of all such agreements, and confirms that such agreements would remain in force without prejudice to the division of competencies under the Treaty for the Functioning of the European Union. It provides terms for ensuring such agreements do not constitute an obstacle to the EU negotiating new bilateral investment agreements with third countries, with a view to replacing Member State bilateral investment agreements. It also requires Member States to notify and seek authorisation from the Commission before entering into negotiations to amend an existing bilateral investment agreement, or to conclude a new bilateral investment

agreement.

The Financial Responsibility Regulation applies where an international agreement contains ISDS provisions and the EU is a party or the EU and Member States are parties. Where an investor brings a claim against the Union and/or a Member State under such an agreement, the Regulation sets out how financial responsibility is to be apportioned between Member States and the EU. It also provides terms for the conduct of disputes, settlement of disputes and payments of final awards or settlements.

*Why is it being changed?*

- 2.5 These two EU Regulations are being revoked because they make provision for arrangements between the EU and the UK which depend on the UK being a member of the EU and therefore will no longer be appropriate. This will ensure that the UK is no longer bound by them.
- 2.6 With respect to the Grandfathering Regulation it would be inappropriate for the EU to govern the maintenance of the UK's existing bilateral agreements and for the UK to need to seek authorisation from the Commission to amend or negotiate new bilateral investment agreements. With respect to the Financial Responsibility Regulation, it would be inappropriate for the UK to be required to contribute and be held responsible for costs in relation to investment disputes in circumstances where the EU would not have reciprocal financial responsibility to the UK.

*What will it now do?*

- 2.7 The SI entirely revokes the Regulations and does not make provision for replacement arrangements. This is because the Regulations deal with the relationship between the EU and its Member States and cannot be replaced by domestic legislation.

### **3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 The Bilateral Investment Agreements (Transitional Arrangements and Framework for Managing Financial Responsibility for Disputes) (Revocation) (EU Exit) Regulations 2019 instrument was laid for sifting by the Sifting Committees on 11<sup>th</sup> February 2019. Both the European Statutory Instruments Committee and Secondary Legislation Scrutiny Committee agreed that the negative procedure was appropriate for this instrument. The Government agrees with this assessment.

*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 England and Wales, Scotland, and Northern Ireland.

4.2 The territorial application of this instrument is England and Wales, Scotland, and Northern Ireland

## **5. European Convention on Human Rights**

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **6. Legislative Context**

6.1 There is no relevant UK domestic legislation.

6.2 If they are not revoked, both EU Regulations will form part of UK law as “Retained EU Law” of the European Union (Withdrawal) Act 2018 (EUWA). Powers under section 8 of the EUWA enable the Minister to make secondary legislation to deal with deficiencies in retained EU law. The EU Regulations give rise to a number of deficiencies, in particular they confer functions on EU entities which will no longer have functions in relation to the United Kingdom; they make provision for reciprocal arrangements between the United Kingdom and the EU which will no longer be appropriate; they make provision for arrangements which are dependent upon the United Kingdom’s membership of the EU; and they contain EU references which are no longer appropriate.

## **7. Policy background**

### *What is being done and why?*

7.1 These EU Regulations are being revoked so that the UK, from the day of its withdrawal from the EU, is no longer bound by them.

7.2 With respect to the Grandfathering Regulation it would be inappropriate for the EU to govern the maintenance of existing bilateral agreements and for the UK to need to seek authorisation from the Commission to amend or negotiate new bilateral investment agreements. With respect to the Financial Responsibility Regulation, it would be inappropriate for the UK to be required to contribute and be held responsible for costs in relation to investment disputes in circumstances where the EU would not have reciprocal financial responsibility to the UK.

## **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 No consolidation is required.

## **10. Consultation outcome**

10.1 The two EU Regulations deal with the administrative arrangements between the EU and its Member States and do not have an impact on individuals or businesses.

Therefore, it was considered that there were no policy questions to subject to consultation and it would not be meaningful.

**11. Guidance**

11.1 In the absence of any impact on individuals or business, guidance is not required.

**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.

**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 Vanessa Montgomery at the Department for International Trade Telephone: 020 7215 8018 or email: [vanessa.montgomery@trade.gov.uk](mailto:vanessa.montgomery@trade.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Lola Fadina, Deputy Director for Investment Policy, at the Department for International Trade can confirm that this Explanatory Memorandum meets the required standard.

15.3 George Hollingbery at the Department for International Trade 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

- 1.1 The Minister of State for Trade Policy, George Hollingbery, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Bilateral Investment Agreements (Transitional Arrangements and Framework for Managing Financial Responsibility) (Revocation) (EU Exit) Regulations 2019 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure).

This is the case because the two EU Regulations which this instrument revokes deal with the relationship between the EU and its Member States. As the UK withdraws from the European Union these EU Regulations will, under the European Union (Withdrawal) Act 2018, become retained EU law. However, application to the UK when it is no longer a Member State would be wholly inappropriate. The SI does not make any new arrangements, as none are required.

These Regulations are minor and deal with what would be clear failures and deficiencies in the application of EU retained law. As such they are suitable for the negative procedure”.

#### 2. Appropriateness statement

- 2.1 The Minister of State for Trade Policy, George Hollingbery, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Bilateral Investment Agreements (Transitional Arrangements and Framework for Managing Financial Responsibility) (Revocation) (EU Exit) Regulations 2019 does no more than is appropriate”.

- 2.2 This is the case because after the UK leaves the EU, the UK will no longer be a Member State and accordingly these two EU Regulations will be redundant.

#### 3. Good reasons

- 3.1 The Minister of State for Trade Policy, George Hollingbery, 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 These are because the UK is no longer a Member State of the EU it should no longer be bound by these EU Regulations.

- 3.3 With respect to the Grandfathering Regulation it would be inappropriate for the EU to govern the maintenance of existing bilateral agreements and for the UK to need to seek authorisation from the Commission to amend or negotiate new bilateral

investment agreements. With respect to the Financial Responsibility Regulation, it would be inappropriate for the UK to be required to contribute and be held responsible for costs in relation to investment disputes in circumstances where the EU would not have reciprocal financial responsibility to the UK.

#### **4. Equalities**

4.1 The Minister of State for Trade Policy, George Hollingbery, 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.”

4.2 The Minister of State for Trade Policy, George Hollingbery, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, George Hollingbery, 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.