

EXPLANATORY MEMORANDUM TO
THE ONLINE INTERMEDIATION SERVICES FOR BUSINESS USERS
(AMENDMENT) (EU EXIT) REGULATIONS 2020

2020 No. 796

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.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument is required to help ensure that the UK has a functioning statute book at the end of the Transition Period. Under section 3 of the European Union (Withdrawal) Act 2018 (“the Withdrawal Act 2018”), directly effective EU legislation will be retained in UK law at the end of the Transition Period. This instrument makes amendments to the retained version of *Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services* (“the Online Intermediation Services Regulation”) to ensure that it functions correctly in domestic law at the end of the Transition Period.

Explanations

What did any relevant EU law do before the end of the Transition Period?

- 2.2 The Online Intermediation Services Regulation is an EU Regulation which applies directly in all EU Member States from 12 July 2020. This Regulation also applies directly in the UK during the Transition Period, by virtue of the UK’s obligations under Part 4 of the Withdrawal Agreement with the EU. The Regulation aims to promote fairness and transparency between internet platforms (or “providers of online intermediation services”) and businesses who sell their products or services through these platforms. This is achieved through rules regulating the relationship between platforms and businesses as well as transparency requirements requiring the provision of information about the way that these platforms operate. For example, platforms are required to provide their terms and conditions in plain language and to ensure transparency in the way they rank businesses. Requirements relating to transparency about rankings and differentiated treatment also apply to providers of online search engines.

Why is it being changed?

- 2.3 At the end of the Transition Period, the Online Intermediation Services Regulation will become part of UK law under section 3 of the Withdrawal Act 2018. This instrument is made under section 8 of the Withdrawal Act 2018, to correct deficiencies arising from the UK’s withdrawal from the EU. This involves making the

necessary and appropriate amendments to the Regulation so that the law continues to function effectively after the UK has left the EU.

What will it now do?

- 2.4 The rules and requirements applying to platforms and businesses under the Online Intermediation Services Regulation will remain substantively the same as before the end of the Transition Period. As such, this instrument is not expected to have any economic impact. Amendments to the retained Regulation under this instrument will ensure that the Regulation becomes a clear and functioning part of the UK statute book. This includes removing or amending references to EU Member States, EU institutions and procedures that will no longer be relevant or appropriate to retain following the end of the Transition Period.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument was laid for sifting on 2 July 2020 as a proposed negative instrument as required by the European Union (Withdrawal) Act 2018. It was considered by the House of Lords Secondary Legislation Scrutiny Committee and House of Commons European Statutory Instruments Committee on 14 July 2020. Both committees agreed that the instrument should follow the negative resolution procedure.

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

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The Online Intermediation Services Regulation will apply in EU law from 12 July 2020. This Regulation has direct effect in UK law during the Transition Period by virtue of Part 4 of the UK's Withdrawal Agreement with the EU (as implemented in UK law by the European Union (Withdrawal Agreement) Act 2020). At the end of the Transition Period this Regulation will become retained EU law under section 3 of the Withdrawal Act 2018. Section 8 of the Withdrawal Act 2018 gives Ministers the power to remedy any deficiency or mitigate any failure of retained EU law arising from the withdrawal of the UK from the EU. This instrument will amend the Online Intermediation Services Regulation so that it functions effectively in UK law when it is retained at the end of the Transition Period.

7. Policy background

What is being done and why?

- 7.1 There will be no substantive impact on businesses as a result of this instrument.
- 7.2 As explained above, the Withdrawal Act 2018 retains the Online Intermediation Services Regulation in UK law at the end of the Transition Period. Following the end of the Transition Period several deficiencies will arise, as the retained Regulation will contain a number of references that will no longer make sense in a domestic context. This instrument will amend references to, for example, Member States, Union law and the European Commission; omitting them or, where appropriate, replacing them with references that will operate correctly in domestic law.
- 7.3 For example, the instrument will amend the scope of the retained Regulation so that it applies where businesses and their consumers are located within the UK rather than within the EU. This instrument will also amend the mediation provision of the retained Regulation to align with changes to the scope so that there are restrictions on when platforms may identify mediators outside of the UK rather than outside of the EU.
- 7.4 Under Article 14 of the Online Intermediation Services Regulation, Member States may choose to designate organisations which meet requirements to bring enforcement proceedings on behalf of business users against platforms who have failed to comply with the requirements of the Regulation. If they choose to designate any organisations, Members State are required to communicate designation to the Commission and the Commission shall publish a list of these organisations. The effect of designation is that courts are required to accept inclusion on this list as proof of an organisation's capacity to bring proceedings. This instrument will adapt the designation provisions so that they work within the UK after the end of the Transition Period. The Secretary of State will have the power to designate and publish a list of organisations meeting the relevant requirements. The requirement to communicate designation to the Commission will be omitted as this will no longer be appropriate. There are no current plans for the UK to designate as the Government continues to monitor this policy area closely and plans to review the approach to it after the end of the Transition Period.
- 7.5 The Online Intermediation Services Regulation is directly effective in UK law. The measures for enforcement of the Regulation within the UK are set out in the Online Intermediation Services for Business Users (Enforcement) Regulations 2020 which were laid before Parliament on 19 June 2020 and come into force on 12 July 2020. Requirements for the Commission to monitor the Regulation, encourage platforms to draw up codes of conduct and review the Regulation will be omitted by this instrument as they will no longer be applicable after the end of the Transition Period.

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 Withdrawal Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the UK from the EU. 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 no plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

10.1 A decision was taken not to pursue a formal consultation process for this instrument. This is because the substantive rules will remain the same and the deficiencies it addresses are minor. BEIS engaged with several stakeholders which had been involved in the formulation of the policy at EU level, or which were otherwise interested in the Online Intermediation Services Regulation.

10.2 Officials from BEIS approached various stakeholders¹ regarding the policy in June 2020. It should be noted that the number of stakeholders interested in engaging with officials was limited due to the extraordinary circumstances stemming from the Covid-19 emergency.

11. Guidance

11.1 No guidance is to be issued in relation to this instrument.

12. Impact

12.1 There is no significant impact on business, charities, or voluntary bodies as a result of this instrument. The substantive rules this instrument relates to will largely remain the same as before the end of the Transition Period.

12.2 There is no, or no significant, impact on the public sector. Costs to the justice system are also not expected to be significant.

12.3 An Impact Assessment has not been prepared for this instrument because, as noted above, we do not foresee any significant impact on businesses, charities, voluntary bodies or the public sector. The minimal expected economic impacts of this instrument renders the development of a *De Minimis* Assessment inappropriate in this case.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 The legislation does not introduce new requirements on small businesses. Instead it corrects deficiencies arising from the UK's withdrawal from the EU. No disproportionate impact on small business is therefore expected.

13.3 Articles 11 (internal complaint-handling system) and 12 (mediation) of the Online Intermediation Services Regulation do not apply to small enterprises.

14. Monitoring & review

14.1 The changes made by this instrument are limited to ensuring the legislation will be operable at the end of the Transition Period. The Government continues to monitor this policy area closely and plans to review the approach to it after the end of the Transition Period.

¹ Google, Apple, Facebook, Amazon, Microsoft, Federation of Small Businesses

14.2 As this instrument is made under the Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Terrence De Souza at the Department for Business, Energy and Industrial Strategy (Telephone: 020 7215 0476 or email: terrence.desouza@beis.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Anthony Miller, Deputy Director for Services – Mobility, Digital and Data at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Callanan, Parliamentary Under Secretary of State 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. Sifting statement(s)

- 1.1 The Parliamentary Under Secretary of State, Lord Callanan has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Online Intermediation Services for Business Users (Amendment) (EU Exit) Regulations 2020 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: it does not meet the criteria for an affirmative procedure in the European Union (Withdrawal) Act 2018. The instrument contains only minor amendments to UK secondary legislation to ensure that the law continues to operate effectively at the end of the Transition Period as the substantive rules will remain largely the same.

2. Appropriateness statement

- 2.1 The Parliamentary Under Secretary of State, Lord Callanan has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Online Intermediation Services for Business Users (Amendment) (EU Exit) Regulations 2020 does no more than is appropriate”.

- 2.2 This is the case because: this instrument corrects legislative deficiencies arising from EU exit so that the law continues to function effectively post Transition Period within the UK. References to the EU that will become redundant are omitted or replaced with UK equivalents.

3. Good reasons

- 3.1 The Parliamentary Under Secretary of State, Lord Callanan has made the following statement:

“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: that the instrument ensures that there is clarity and certainty in retained EU law following the end of the Transition Period, by making technical corrections or removing provisions of EU legislation which are redundant or otherwise inappropriate to retain. This enables the retained EU law to operate effectively whilst addressing failures arising from withdrawal of the UK from the EU. Further information is set out in section 7 of the main body of this Explanatory Memorandum.

4. Equalities

- 4.1 The Parliamentary Under Secretary of State, Lord Callanan has made the following statement:

“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 Parliamentary Under Secretary of State, Lord Callanan has made the following statement regarding the use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, Lord Callanan have had a 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.