EXPLANATORY MEMORANDUM TO

THE ELECTRICITY AND GAS ETC. (AMENDMENT) (EU EXIT) REGULATIONS 2020

2020 No. XXXX

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 ensure that the United Kingdom ('UK') has a functioning statute book at the end of the implementation period ('IP') should the UK not reach a further agreement with the EU, or should any agreement not cover the relevant policy area.

2.2 It amends six EU exit statutory instruments which amended a range of primary and secondary legislation, of both domestic and European origin, to ensure Great Britain ('GB') and Northern Ireland's ('NI') energy systems remained operable once the UK left the EU.

Explanations

What did any relevant EU law do before exit day?

2.3 The following instruments which came into force in 2009 are part of a programme of EU legislation known as the 'Third Energy Package':

- Regulation (EC) No 714/2009 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity ('the Electricity Regulation 2009')
- Regulation (EC) No 713/2009 of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators ('the Agency Regulation 2009')

2.4 They were created to further integrate European energy markets by placing an obligation on Member States to liberalise European energy markets, encourage cooperation between actors in European energy markets, and establish EU-level frameworks for regulating electricity and gas markets. To assist this process, the Agency Regulation 2009 created the Agency for the Cooperation of Energy Regulators ('ACER') to coordinate energy regulator implementation of the Third Energy Package and resolve disputes between Member State regulators.

2.5 The EU then agreed on a comprehensive update of its energy legislation known as the 'Clean Energy for all Europeans' package. As of 1 January 2020, the EU Regulations listed in Section 2.3 were repealed and recast as the following:

- Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity ('the Electricity Regulation 2019 (recast)')
- Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators ('the Agency Regulation 2019 (recast)')

2.6 Directive 2009/73 of the European Parliament and of the Council of 13 July 2009 on the internal market for natural gas ("the Gas Directive 2009") also formed part of the Third Energy package and has been amended by Directive (EU) 2019/692 ("the Gas Directive 2019") as part of the Clean Energy Package.

Why is it being changed?

2.7 The Government previously made a package of statutory instruments which amended or revoked provisions in domestic law relating to the Electricity Regulation 2009 and the Agency Regulation 2009, to address deficiencies arising from EU Exit. Following the Article 50 extension to 31 January 2020, the Electricity Regulation 2019 (recast) and the Agency Regulation 2019 (recast) entered into force on 4 July 2019 with most of the provisions of the Electricity Regulation 2019 applying from 1 January 2020. As recast regulations, they also repeal the Electricity Regulation 2009 and the Agency Regulation 2009. The Gas Directive 2019 was required to be transposed into UK law by 24 February 2020.

2.8 Therefore, this previous package of statutory instruments, now contain numerous outdated provisions which need to be amended to reflect the Clean Energy Package legislation. For example, they refer to Electricity Regulation 2009 and the Agency Regulation 2009, and Articles of those Regulations, which have now been repealed. These need to be amended to reflect the relevant provisions in the 2019 EU Regulations.

2.9 Following EU Exit on 31st January 2020, the existing EU Exit SIs are now due to come into force on IP completion day[1]. However, there are various references in the previous package of EU Exit SIs which were contingent upon 'exit day' but which are now contingent upon 'IP completion day'. It is therefore necessary to amend all of these references accordingly.

2.10 The package of EU Exit SIs extended to Northern Ireland and made changes to NI legislation to fix deficiencies which would have become 'retained EU law' on exit day.

2.11 However, as a consequence of Article 9 of, and Annex 4 to, the Northern Ireland Protocol (annexed to the Withdrawal Agreement) the EU legislation listed under that Annex will continue as 'separation agreement law' in respect of NI (in so far as it applies to the wholesale electricity market) under the European Union (Withdrawal) Act 2018 ("the Withdrawal Act").

2.12 It is therefore necessary to remove some of the changes made to NI legislation in the EU Exit SIs as this legislation will no longer be converted into retained EU law on IP completion day.

[1] See para 1 of Sch. 5 to the EU(WA) 2020.

2.13 Failure to remove these deficiencies could create uncertainty and inefficiency in the operation of GB and NI's market regulation, the role and functions of EU bodies in the markets, and requirements on market participants. This uncertainty could result in increased wholesale prices and threaten the continued efficient functioning of the Single Electricity Market (SEM) in NI and Ireland.

What will it now do?

2.14 As set out in detail in Section 7, this instrument will amend statutory instruments made under the Withdrawal Act listed in Section 6.2.

2.15 Notable changes made by this instrument include: amending definitions; substituting references to 'exit day' with 'IP completion day'; updating cross-references to EU Regulations and removing provisions in NI legislation relating to NI wholesale electricity markets.

2.16 Through these amendments, this instrument will ensure that relevant retained EU law and domestic legislation continues to have the intended effect and thereby maintain the operability and integrity of GB and NI energy legislation and maximise continuity for industry and consumers. Further legislation will be required in NI to implement the Single Electricity Market provisions of the Northern Ireland Protocol.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The instrument includes amendments which corrects errors in S.I. 2019/530, S.I. 2019/531 and S.I 2019/533. Due to the length of the instrument and the minor nature of the amendments it is not considered proportionate to provide a free issue in this case. The Department has complied with the requirement stated in paragraph 4.7.1 of Statutory Instrument Practice to consult with the SI Registrar.

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 this instrument is the United Kingdom, except regulations 5(4) and (5), and 6(3) and (4) extend to England and Wales and Scotland; and regulations 5(2)(a) and 6(2)(b) extend to Northern Ireland.

4.2 The territorial application of this instrument is the United Kingdom, except regulations 5(4) and (5), and 6(3) and (4) apply to England and Wales and Scotland; and regulations 5(2)(a) and 6(2)(b) apply to Northern Ireland.

5. European Convention on Human Rights

5.1 The Minister of State, the Rt Hon Kwasi Kwarteng MP has made the following statement regarding Human Rights:

5.2 "In my view the provisions of the Electricity and Gas etc. (Amendment) (EU Exit) Regulations 2020 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, starting the UK's withdrawal from the European Union. To ensure business and legislative continuity for the UK, following over 40 years of EU membership, the Withdrawal Act made provision to incorporate directly applicable EU legislation and EU derived legislation as it applied immediately before exit day.

6.2 Six statutory instruments were made under section 8 of the Withdrawal Act to resolve deficiencies caused by EU exit, found in over 20 pieces of legislation of domestic and EU legislation relating to gas and electricity markets[2]. These were as follows:

- The Electricity and Gas (Powers to Make Subordinate Legislation) (Amendment) (EU Exit) Regulations 2018 (S.I. 2018/1286)
- The Electricity and Gas etc. (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/530)
- The Gas (Security of Supply and Network Codes) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/531)
- The Electricity Network Codes and Guidelines (Markets and Trading) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/532)
- The Electricity Network Codes and Guidelines (System Operation and Connection) (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/533)
- The Electricity and Gas (Market Integrity and Transparency) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/534)

6.3 After securing a Withdrawal Agreement on 17 October 2019, the UK officially left the EU on 31 January 2020 and subsequently entered the Implementation Period ("IP") which will end on 31 December 2020. This has necessitated changes to be made to the six statutory instruments to take account of the IP.

6.4 The EU Exit SIs extended to Northern Ireland and made changes to NI legislation (to fix deficiencies) which would have become 'retained EU law' on exit day. However, as a consequence of Article 9 of, and Annex 4 to, the NI Protocol (annexed to the Withdrawal Agreement) the EU legislation listed under that Annex will continue as 'separation agreement law' in respect of NI (in so far as it applies to the wholesale electricity market) as a consequence of section 7A of the Withdrawal Act as inserted by the European Union (Withdrawal Agreement) Act 2020[3]. It is therefore necessary to remove the changes made to NI legislation in the EU Exit SIs, which applies to electricity, as this legislation will no longer be converted into retained EU law on IP completion day.

6.5 Section 3 of the Withdrawal Act 'domesticates' direct EU legislation (such as Regulations and tertiary legislation) incorporating it into domestic law, but only in so far as the Northern Ireland Protocol does not apply. Section 3 does not domesticate EU legislation where that legislation continues to apply under the Northern Ireland Protocol and is given effect by section 7A of EUWA.[4]

6.6 The effect being that where an EU Regulation is only partly in scope of the Northern Ireland Protocol, there will be two versions of that Regulation: one which continues as

[2] S.I. 2018/20186; S.I. 2019/530; S.I. 2019/531; S.I. 2019/532; S.I. 2019/533, S.I. 2019/534.

[3] Section 7A was inserted by section 5 of the European Union (Withdrawal Agreement) 2020.

[4] See section 3(2)(a)(bi) of the Withdrawal Act.

'separation agreement law'; and one which is domesticated into UK law and may have deficiencies that need fixing. This is particularly relevant in respect of Regulation (EU) 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency ("REMIT") as this applies to both the electricity and gas markets.

6.7 However, section 3 does not apply to NI-made legislation. For example, the Energy (Northern Ireland) Order 2003 is domestic law in its entirety and requires amendment to work properly in light of the Northern Ireland Protocol.

6.8 The approach which has been taken in respect of existing references to REMIT in S.I. 2019/534, is that those references are in respect of the 'domesticated' version of REMIT as it will apply in the law of NI (converted as such under section 3 of the Withdrawal Act). As a consequence, it has been necessary to remove exiting provisions relating to electricity markets where those references are now redundant because the EU version of REMIT will apply directly in respect of electricity.

6.9 The Electricity Regulation (EU) 714/2009 and the Agency Regulation (EU) 713/2009 2019 were part of the Third Energy Package. These EU Regulations were repealed and recast in Regulation (EU) 2019/943 and Regulation (EU) 2019/942, respectively, as part of the Clean Energy Package and entered into force on 4 July 2019 with most of the provisions of Regulation (EU) 2019/943 applying from 1 January 2020.

6.10 There are various references in the EU Exit SIs which refer to Regulation (EU) 714/2009 and to Articles within that Regulation. It is therefore necessary to amend these references, so they refer to Regulation (EU) 2019/943 and the updated cross references to the Articles in respect of that Regulation. Annex III of Regulation (EU) 2019/943 provides a correlation table between the Articles in Regulation 714/2009 and Regulation 2019/943. It has been necessary to include some transitional provisions in relation to the codes and guidelines made under Regulation 714/2009 before it was repealed on 1st January 2020 to make clear they continue to apply in domestic law after that date.

7. Policy background

What is being done and why?

7.1 The aim of this instrument is to ensure that the relevant retained EU law and domestic legislation, remains operable after the end of the IP to ensure GB and NI energy markets continue to operate effectively. The deficiencies dealt with by this instrument are numerous, and it would not be practical to list them all. The following paragraphs highlight examples of typical deficiencies described above.

7.2 The most significant amendments this instrument makes to domestic legislation listed in Section 6.2, concerning the GB energy market, are: substituting references to 'exit day' for 'IP completion day'; amending definitions of 'the Electricity Regulation' to mean the Electricity Regulation 2019 (recast); amending definitions of 'the Agency Regulation' to mean the Agency Regulation 2019 (recast); amending references to Articles in the repealed Electricity Regulation 2009 with the related Articles in the Electricity Regulation 2019 (recast) set out in its correlation table and including express reference to the Electricity Regulation 2009, where necessary, to ensure obligations included in codes and guidelines introduced under the repealed regulation continue to apply also.

7.3 For example, regulation 46(6) of the Electricity and Gas etc. (Amendment etc.) (EU Exit) Regulations 2019 contains transitional provision relating to preliminary decisions made under section 10D of the Electricity Act 1989 before exit day. The text refers to Article 3 of the repealed Electricity Regulation 2009 (Certification of transmission system operators) and 'exit day' which has already occurred. This instrument amends regulation 46(6) to refer instead to the correlating Article 51 of the Electricity Regulation 2019 (recast) (Certification of transmission system operators) and substitutes 'exit day' with 'IP completion day', ensuring the transitional provision will work as intended.

7.4 In addition to revisions listed in Section 7.2, regulation 3(9) of the Electricity (Internal Market) Regulations 2020[5] makes amendments to Schedule 6A in the Electricity Act 1989 to give effect to the provisions of the Electricity Regulation 2019 (recast). This instrument amends regulation 62 of the Electricity and Gas etc. (Amendment etc.) (EU Exit) Regulations 2019 which also amends Schedule 6A to ensure it achieves its intended effect and new deficiencies arising from implementation are fixed.

7.5 This instrument also makes changes as a consequence of the Gas Directive 2019 which amends the Gas Directive 2009. There are references in the EU Exit SIs listed in section 6.2 to Articles of the Gas Directive 2009 which have now been substituted with new provisions by the Gas Directive 2019. This has required some modification of the provisions to ensure they work properly in the EU Exit SIs.

7.6 This instrument relates to energy matters, which is a transferred matter for NI under the Northern Ireland Act 1998. The decision has been made to progress this instrument on a UK-wide basis to be laid in Westminster, given that it amends previous UK-wide legislation.

7.7 This instrument makes amendments to Part 4 (Amendment of Northern Ireland legislation) of the Electricity and Gas etc. (Amendment etc.) (EU Exit) Regulations 2019, which in turn, makes amendments to the following NI energy legislation:

- The Electricity (Northern Ireland) Order 1992[6]
- The Gas (Northern Ireland) Order 1996[7]
- The Energy (Northern Ireland) Order 2003[8]
- The Electricity (Single Wholesale Market) (Northern Ireland) Order 2007[9]
- The Electricity (Priority Dispatch) Regulations (Northern Ireland) 2012[10]

7.8 Legislation listed in 6.2, was previously made to take effect in a no deal scenario. Following the conclusion of the Withdrawal Agreement, Article 9 of, and Annex 4 to, the Northern Ireland Protocol includes provisions relating to the wholesale energy market which will take effect at the end of the IP. This instrument is therefore amending this legislation to take account of the fact that EU legislation which falls under the NI Protocol will not be converted into retained EU law on IP completion day.

[5] S.I. 2020/96.
[6] S.I. 1992/231 (N.I. 1).
[7] S.I. 1996/275 (N.I. 2).
[8] S.I 2003/419 (N.I. 6).
[9] S.I. 2007/913 (N.I. 7)
[10] S.R. 2012/385.

7.9 For example, this instrument amends the extent provision in Regulation 1 of the Electricity Network Codes and Guidelines (Markets and Trading) (Amendment) (EU Exit) Regulations 2019, to ensure that these Regulations do not apply to NI to avoid conflicting with the Northern Ireland Protocol.

7.10 An example of where this instrument omits Northern Ireland specific provisions can be found in the amendments to the Electricity Network Codes and Guidelines (System Operation and Connection) (Amendment etc.) (EU Exit) Regulations 2019. These Regulations will no longer extend to NI and therefore, specific provisions which applied to NI have been removed. For example, regulation 14 in Schedule 1 substitutes a new Article 13 into the Electricity Transmission System Operation Regulation[11] putting an obligation on NI transmission system operators to endeavour to cooperate with counterparts in Ireland on secure system operation. This instrument omits regulation 14 of Schedule 1 as the 2019 SI will no longer be extended to NI and the EU provision will apply in its original form under the Northern Ireland Protocol.

7.11 Amendments made to legislation concerning the NI gas market are consistent with those outlined in Section 7.2 and section 7.5

7.12 This instrument will also correct errors in legislation listed below, previously made under section 8(1) of the Withdrawal Act 2018:

- The Electricity and Gas etc. (Amendment etc.) (EU Exit) Regulations 2019
- The Gas (Security of Supply and Network Codes) (Amendment) (EU Exit) Regulations 2019
- The Electricity Network Codes and Guidelines (System Operation and Connection) (Amendment etc.) (EU Exit) Regulations 2019

8. European Union (Withdrawal) Act 2018/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 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 Consolidation is not required for this instrument.

10. Consultation outcome

10.1 Statutory instruments made under the powers in the Withdrawal Act do not require consultation, and a consultation has not been conducted for this instrument.

10.2 The Secretary of State for Business, Energy and Industrial Strategy has received notification from the Northern Ireland Minister for the Economy requesting that amendments in respect of NI are included as part of this instrument. These amendments are in relation to gas legislation reflecting the changed context of the IP and changes required as a consequence of the Gas Directive; and, for electricity, to

[11] Commission Regulation (EU) 2017/1485.

omit those NI provisions already made on the basis that legislative requirements in this area need to be considered afresh in light of the Northern Ireland Protocol.

11. Guidance

11.1 Guidance has not been produced for 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 A full Impact Assessment has not been prepared for this instrument because the impacts are below the threshold required to carry out a full Impact Assessment. Key stakeholders including Ofgem, National Grid, the Northern Ireland Department for the Economy, and the Utility Regulator have been informed of the Department's conclusions, set out in the De Minimis that any direct impacts on business or public bodies that have been identified are considered to be negligible (less than the £5m total De Minimis threshold).

12.4 The counterfactual used to assess the impacts of EU Exit SIs states that the impacts are to be assessed against the UK statute book prior to exit day on 31 January 2020 (the *static acquis*), as per Government analytical guidance on Impact Assessments. The guidance also states that we are to assume that all publicly announced legislation will be passed. In this assessment, it is assumed that this applies to any new legislation necessary to implement the 'to-be-agreed' free trade agreement with the EU and the implementation of the Northern Ireland Protocol, therefore by definition of the counterfactual this SI will not enter into force in its current form and will have no material impact.

12.5 When these same changes are assessed against the do-nothing counterfactual, a scenario in which an agreement on the future relationship is not reached in the relevant policy area, the SI will come into force and help ensure that the UK has a functioning statute book and that EU legislation remains operable once incorporated into domestic law at the end of the IP. This in turn will help to ensure that the regulatory framework that underpins gas and electricity markets is coherent and functions effectively.

13. Regulating small business

13.1 No specific action is proposed to minimise regulatory burdens on small businesses.

13.2 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 Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Elliot Spindler at the Department for Business, Energy and Industrial Strategy Telephone: 0207 215 4807 or email: elliot.spindler@beis.gov.uk with any queries regarding the instrument.

15.2 Angela Patel Deputy Director for Energy Security, 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 Kwasi Kwarteng 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
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.

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 Kwasi Kwarteng MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018 ('the Withdrawal Act'):

1.2 "In my view the Electricity and Gas etc. (Amendment) (EU Exit) Regulations 2020 does no more than is appropriate".

1.3 This is the case because:

- The amendments made by this instrument are necessary to resolve deficiencies as defined in Section 8 of the Withdrawal Act.
- The amendments made by this instrument are necessary to correct errors identified in previous EU Exit SIs.

2. Good reasons

2.1 The Minister of State, the Rt Hon Kwasi Kwarteng MP has made the following statement regarding use of legislative powers in the Withdrawal Act:

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

2.3 These reasons are:

- In line with the Withdrawal Act, amendments made by this instrument are necessary to ensure legislation remains operable, maintain the intended effect of previous exit instruments, correct errors and remedy deficiencies which would otherwise disrupt the efficient operation of GB and NI energy systems.

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

3. Equalities

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

3.2 "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.

3.3 The Minister of State, the Rt Hon Kwasi Kwarteng MP has made the following statement regarding use of legislative powers in the Withdrawal Act:

3.4 "In relation to the draft instrument, I, the Minister of State, the Rt Hon Kwasi Kwarteng 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."

3.5 This instrument has no, or no significant, 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.