EXPLANATORY MEMORANDUM TO

THE ELECTRICITY NETWORK CODES AND GUIDELINES (MARKETS AND TRADING) (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 0000

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 amends two retained EU regulations relating to the cross-border trade of electricity to ensure that they will function effectively once incorporated in domestic law by the European Union (Withdrawal) Act 2018. It further revokes two retained EU regulations on the grounds that they would be inoperable if incorporated into domestic law.

Explanations

What did any relevant EU law do before exit day?

2.2 Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing ('the Balancing Guideline') concerns the operation of balancing markets, through which transmission system operators ('TSOs'), the companies which own and operate high voltage electricity transmission networks, purchase balancing services in order to ensure that supply and demand on the electricity system balance in real time. The Balancing Guideline was introduced in order to create a pan-EU market for balancing services. To create sufficient liquidity for this market and to enable it to operate smoothly, the Balancing Guideline introduced standardised products to be exchanged and provided for the creation of a single platform on which the balancing energy products are traded. In addition, the Balancing Guideline introduced rules regarding the financial settlement of purchases of balancing services, imbalance settlement and the relationship between TSOs and balancing service providers (the companies who sell balancing services to TSOs).

Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management ('CACM') provides for electricity 'market coupling', a pan-European trading process that improves the efficiency of trading electricity across interconnectors over shorter-term timescales. The CACM regulation has been adopted in accordance with Article 18 of Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity.

Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation ('FCA') harmonises the processes for the sale of interconnector capacity on longer-term, 'forward' timescales and sets up a single allocation platform for the sale of longer-term interconnector capacity. The FCA

regulation has been adopted in accordance with Article 18 of Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity.

Commission Regulation (EU) No 838/2010 of 23 September 2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging ('the ITC Regulation') sets out detailed guidelines on the operation of the inter-TSO compensation mechanism ('ITC mechanism'). The ITC mechanism is a programme under which TSOs from the EU and certain third countries (countries that are not EU Member States) are compensated for the costs of hosting cross-border electricity flows from a fund established and administered by the European Network of Transmission System Operators for Electricity ('ENTSO-E'). The ITC regulation also contains guidelines harmonising the regulatory approach to transmission system charging.

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 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 This instrument will amend energy legislation captured by the European Union (Withdrawal) Act 2018 to make it 'workable' by remedying deficiencies whilst retaining regulatory functions and frameworks needed to keep energy markets working effectively. This instrument will ensure the operability and integrity of UK energy legislation and promote continuity for UK industry and consumers.

The Balancing Guideline is amended in respect of Great Britain to remove provisions which would be inoperable as a result of EU Exit. Notably, provisions concerning the operation of the European platform for the exchange of balancing energy are removed as the UK would not have access to this platform in a no deal scenario. Provisions which can operate in Great Britain without a deal, such as rules concerning the financial settlement of purchases of balancing services, are retained, with minor amendments to remove references to other Member States or EU institutions.

The CACM and FCA regulations are revoked by this instrument as they provide for cross-border processes for trading electricity via interconnectors that the UK could not provide for unilaterally in domestic law in the absence of an agreement with the European Union.

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 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 The Minister for State, The Rt Hon Claire Perry MP has made the following statement regarding Human Rights:

"In my view the provisions of the Electricity Network Codes and Guidelines (Markets and Trading) (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 and EU derived legislation 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 law 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 Several of the pieces of retained EU law amended by this instrument are European Network Codes and Guidelines ('Network Codes'), produced under the enabling powers given to the European Commission by Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 ('The Electricity Regulation'), which forms part of the third energy package. The third energy package was introduced in order to further integrate and facilitate the efficient operation of the EU's Internal Energy Market. Network Codes are technical instruments which govern the operation of the EU's interconnected gas and electricity systems.

6.4 The ITC Regulation sets out detailed rules governing the ITC mechanism. The Electricity Regulation also contains provisions relating to the ITC mechanism. The Electricity and Gas (Amendment etc) (EU Exit) Regulations 2019 amend the Electricity Regulation to revoke the provisions relating to the ITC mechanism.

7. Policy background

What is being done and why?

7.1 The aim of this instrument is to remove or amend legal deficiencies in direct EU legislation to ensure the UK's energy markets continue to operate effectively should the UK leave the EU without a Withdrawal Agreement.

7.2 The pieces of retained EU law amended by this instrument predominantly concern the operation of electricity TSOs. In Great Britain the TSO with responsibility for the real-time operation of the electricity system is National Grid, the GB System Operator. In Northern Ireland the relevant TSO is SONI (System Operator for Northern Ireland).

7.3 This 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.

The Balancing Guideline - Great Britain

7.4 The Balancing Guideline is amended in respect of Great Britain to remedy a large number of deficiencies that would otherwise arise from its incorporation into domestic law. In particular, the amendments:

- Remove obligations for companies and authorities in Great Britain relating to EU institutions.
- Restrict the scope of the guideline to Great Britain and remove provisions on cross-border cooperation that it would not be possible to provide for unilaterally in domestic law.
- Amend cross-references to other EU laws.

7.5 The following specific changes are made to the Balancing Guideline:

- Provisions establishing and governing the operation of the European platform for the exchange of balancing energy are removed as the UK will not have access to this platform in a no deal scenario and provisions concerning it would therefore be deficient if incorporated into domestic law.
- Provisions intended to support the operation of this platform, such as the introduction of standardised balancing energy products to be traded on the platform, are also removed.
- Provisions that introduce rules governing the allocation of cross-border capacity on interconnectors for the exchange of balancing energy are removed as they would not operate effectively if incorporated into domestic law in the absence of an agreement with connected countries.

The Balancing Guideline - Northern Ireland

7.6 The Balancing Guideline is revoked in respect of Northern Ireland as Article 1(3) of the Balancing Guideline as it applies in EU law sets out that it does not apply to islands not interconnected with the rest of the EU. As Ireland is currently only interconnected to the UK, this will be the case for Ireland after the UK leaves the EU, and the Balancing Guideline will therefore not apply in Ireland after exit day. To support the continued secure operation of the Single Electricity Market in Ireland and Northern Ireland, it is important that rules governing electricity balancing are consistent across the market. This instrument therefore revokes the Balancing Guideline in respect of Northern Ireland in order to preserve this consistency.

The Guideline on Capacity Allocation and Congestion Management ('CACM')

7.7 The market coupling process that is provided for by CACM is a pan-European trading process which requires harmonisation of processes and cooperation of parties in all coupled markets. Therefore, the UK cannot unilaterally couple with connected markets. In the event that the UK leaves the EU without a withdrawal agreement in place, the UK will be decoupled from the EU's Internal Energy Market, and the CACM regulation would become inoperable. For this reason, the CACM regulation is revoked by this instrument. Alternative electricity trading arrangements can be put in place without this guideline.

The Guideline on Forward Capacity Allocation ('FCA')

7.8 The processes provided for by the FCA regulation require harmonisation of rules and processes across all interconnectors in the European Union. In the event that the UK leaves the EU without a withdrawal agreement, there will be no agreement in place that would continue this harmonisation for interconnectors between the UK and EU, and regulation of interconnectors will be a matter for regulators in the UK and in connected EU countries. In this event, the UK cannot unilaterally prescribe harmonised processes for all interconnectors, as any trading arrangements will require the agreement of regulators in connected countries. For this reason, the FCA regulation is being revoked.

The ITC Regulation

7.9 The ITC Regulation sets out detailed rules governing the operation of the ITC mechanism, under which TSOs pay, and are paid for, the costs of hosting cross-border flows in electricity. It is currently uncertain whether UK TSOs will be able to continue to participate in the ITC mechanism after EU Exit as this decision ultimately lies with EU bodies. This instrument therefore amends the ITC Regulation to ensure that it will operate effectively whether UK TSOs continue to participate in the ITC mechanism or not. To do this, Article 1 and Annex A, which detail the operation of the ITC mechanism, are revoked. Annex B, which sets out harmonised approaches to transmission charging, is retained with minor amendments to remedy deficiencies such as references to other EU Member States.

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 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 Northern Ireland Authority for Utility Regulation, 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.

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.

An Impact Assessment has not been prepared for this instrument because the impacts are below the threshold required to carry out a full impact assessment. This instrument will not create any significant direct costs to business. This instrument transfers obligations from European bodies such as ENTSO-E and the EU Agency for the Cooperation of Energy Regulators to UK bodies such as the GB and Northern Ireland electricity system operators, Ofgem and the Utility Regulator. This instrument also removes several obligations on UK bodies to share information or co-ordinate with EU bodies.

12.3 The removal of a current obligation on National Grid to consult with other Member states in relation to the Balancing Guideline is expected to save up to £50,000 a year. Key stakeholders including Ofgem, National Grid ESO, the Northern Ireland Department for the Economy and the Utility Regulator have been consulted and concluded that all other direct impacts that have been identified 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 Nicholl at the Department for Business, Energy and Industrial Strategy Telephone: 0300 068 5642 or email: joe.nicholl@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 Network Codes and Guidelines (Markets and Trading) (Amendment) (EU Exit) Regulations 2019 do no more than is appropriate".

1.2 This is the case because:

- The instrument makes only those changes necessary to ensure that the relevant retained direct EU law will function effectively once incorporated into domestic legislation.
- This instrument preserves wherever possible existing policy related to electricity trading, with changes limited to those unavoidable as a result of the UK's departure from the EU.

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 statements:

"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.