EXPLANATORY MEMORANDUM TO

THE TAKING ACCOUNT OF CONVICTIONS (EU EXIT) (AMENDMENT) REGULATIONS 2020

2020 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice 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 The purpose of this instrument is to implement the separation provision on taking account of convictions, set out in the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ("the withdrawal agreement"). The withdrawal agreement provides for a Transition Period ("TP") following the UK's withdrawal from the European Union ("EU") on 31 January 2020. This instrument amends domestic legislation to implement Article 62(1)(g) of Part 3, Title V of the withdrawal agreement. That Article sets out the separation provision that preserves the application of Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the member States of the European Union ("the TAC Framework Decision") in respect of any criminal proceedings instituted, but not concluded, before IP completion day (i.e. the day on which the TP ends). This instrument will come into force on IP completion day.

Explanations

What did any relevant EU law do before exit day?

2.2 The TAC Framework Decision established that any known previous conviction in an EU member State would be taken into account in any new criminal proceedings in a different member State, to the extent that national law requires that State's national convictions to be taken into account; that is, as if it were equivalent to a previous conviction in that State.

Why is it being changed?

2.3 The UK ratified the withdrawal agreement which contains a separation provision setting out that the TAC Framework Decision shall continue to apply in the UK after IP completion day, in proceedings commenced, but not concluded, before IP completion day. In order to meet this UK obligation, this instrument makes amendment to UK law, where required, to give effect in domestic law to this separation provision.

2.4 Part 6 of the Criminal Justice (Amendment etc.) (EU Exit) Regulations 2019 ("the 2019 Regulations"), which come into force on IP completion day, amend domestic legislation to reflect the position when the TAC Framework Decision ceases to apply in the UK, and places individuals with previous convictions imposed in an EU

member State in the same position as those with previous convictions imposed in any other country outside the UK. The 2019 Regulations were made to provide for an outcome where the UK left the EU without a deal. Since the 2019 Regulations were made, the UK left the EU with a deal in the form of the withdrawal agreement. Further, a number of provisions in Part 6 are now repealed following the consolidation of sentencing law in England and Wales and the introduction of the Sentencing Code by the Sentencing Act 2020 ("the 2020 Act").

2.5 As the UK left the EU under the withdrawal agreement, and to implement the separation provision on the TAC Framework Decision, amendments are being made by this instrument to (a) Part 6 of the 2019 Regulations; and, in light of the consolidation of sentencing law since the 2019 Regulations were made, (b) the 2020 Act. The effect of those provisions of the 2019 Regulations that were repealed by the 2020 Act is restated in Part 6 of Schedule 22 to the 2020 Act, which will be amended by this instrument. Schedule 22 amends certain provisions in the 2020 Act which apply to proceedings under the Armed Forces Act 2006 ("the 2006 Act"). This instrument therefore also makes amendments to Schedule 26 to the 2020 Act, which includes provisions which amend the 2006 Act, to ensure the approach towards the taking account of convictions is consistent across civilian law and service law (insofar as the relevant provisions in the 2006 Act extend to the UK).

2.6 This instrument makes the necessary amendments to the 2019 Regulations and the 2020 Act to ensure that, in accordance with Article 62(1)(g) of the withdrawal agreement, previous convictions in EU member States will continue to be taken into account in criminal proceedings, **if** the proceedings began before IP completion day.

What will it now do?

2.7 Whilst the European Union (Withdrawal Agreement) Act 2020 provides for the general implementation of the withdrawal agreement, this instrument will make the necessary further, specific amendments to domestic legislation to give full effect to the separation provision in the withdrawal agreement on taking account of convictions. In terms of the practical effect, once the TAC Framework Decision ceases to apply in the UK after IP completion day, the amendments made by this instrument will preserve its application so that previous convictions in EU member States will continue to be taken into account in cases where criminal proceedings began before IP completion day.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 In its First Special Report of Session 2013-14 (excluding the inert from secondary legislation), the Committee drew attention to the inclusion of material in statutory instruments that has no legal effect and concluded that such material, if included at all, should not be presented as if it were part of the operative text.

3.2 The Department acknowledges that this instrument contains such material in regulation 7: specifically, a cross-reference to provisions of the European Union (Withdrawal) Act 2018 ("the 2018 Act") and to the separation provision on taking account of convictions of the withdrawal agreement. It is noted that section 8B of the 2018 Act, under which this instrument is made, provides that regulations made under section 8B may (among other things) "restate, for the purposes of making the law

clearer or more accessible, anything that forms part of domestic law" by virtue of section 7A of the 2018 Act and Part 3 of the withdrawal agreement.

3.3 The Department considers it appropriate, in the exceptional circumstances of this case, to include such a provision in regulation 7 of this instrument to assist understanding how the legal framework will operate at the end of the TP (namely, the combined effect of the withdrawal agreement, the 2018 Act and the 2019 Regulations). The Department considers this makes the law clearer and more accessible, by clarifying that the relevant legislation must be read in conjunction with relevant parts of the withdrawal agreement and the 2018 Act, whilst mitigating the risk that readers or the courts will treat the provisions as operative.

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)

3.4 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 UK wide. The territorial extent of Part 2 is the same as the provisions which it amends. The territorial extent of Part 3 is England and Wales and Northern Ireland.

4.2 The territorial application of Part 1 of this instrument is UK wide. The territorial application of Part 2 is the same as the provisions which it amends. The territorial application of Part 3 is England and Wales and Northern Ireland.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State, Chris Philp MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Taking Account of Convictions (EU Exit) (Amendment) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 The UK withdrew from the EU on 31 January 2020. Prior to doing so, the UK ratified the withdrawal agreement with the EU. Under the terms of the withdrawal agreement, which have been generally implemented in the UK by the European Union (Withdrawal Agreement) Act 2020, the TAC Framework Decision continues to apply in the UK during the TP.

6.2 Article 62(1)(g) of the withdrawal agreement includes a separation provision relating to the TAC Framework Decision which will take effect at the end of the TP. This separation provision provides for the TAC Framework Decision to continue to apply in criminal proceedings commenced but not concluded before IP completion day. Whilst the European Union (Withdrawal Agreement) Act 2020 generally implemented the terms of the withdrawal agreement in the UK and provided that domestic law must be read, and given effect to, in a manner compatible with that agreement, to the extent required, this instrument makes amendments to domestic law to ensure that this separation provision is given full effect in the domestic legal system and that the law is clear and accessible. The power to do so has been provided in section 8B of the 2018 Act.

6.3 The 2019 Regulations were made in March 2019 to address deficiencies in retained EU law which would have arisen should the UK have left the EU without an agreement. As the UK withdrew with an agreement in the form of the withdrawal agreement, this instrument modifies the 2019 Regulations to give effect to the terms of the withdrawal agreement. This instrument also amends the 2020 Act in light of the sentencing consolidation, as a result of which, some of the provisions of the 2019 Regulations have been revoked.

6.4 Part 6 of the 2019 Regulations (taking account of convictions) amends provisions in the Prevention of Crime Act 1953 (regulation 21), the Magistrates' Courts Act 1980 (regulation 22), the Criminal Justice and Public Order Act 1994 (regulation 23), the Crime and Disorder Act 1998 (regulation 24), the Powers of Criminal Courts (Sentencing) Act 2000 (regulation 25), the Criminal Justice Act 2003 (regulation 26), the Coroners and Justice Act 2009 (regulation 27), the Police and Criminal Evidence (Northern Ireland) Order 1989 (regulation 28), the Police and Criminal Evidence Act 1984 (regulation 29) and the Criminal Justice Act 1988 (regulation 30), so that, in criminal proceedings in England and Wales and Northern Ireland, previous convictions imposed in EU member States are to be treated in the same way as previous convictions imposed in any country outside of the UK. By virtue of paragraph 1(1) of Schedule 1 to the European Union (Withdrawal Agreement) Act 2020, the amendments set out in the 2019 Regulations will come into force on IP completion day.

6.5 Regulation 31 of the 2019 Regulations, which is a transitional provision, currently states that the amendments made by Part 6 of the 2019 Regulations do not apply in relation to cases where criminal proceedings have begun before exit day.

6.6 As a part of the consolidation process regulations 21, 25, 26, 27 and 30 of the 2019 Regulations will be revoked. Part 6 of Schedule 22 to the 2020 Act, which will come into force on IP completion day, restates the effect of the amendments set out in the revoked provisions. However, it does not restate the effect of regulation 31 of the 2019 Regulations, namely that the amendments made by Part 6 of the 2019 Regulations do not apply in relation to criminal proceedings instituted before exit day. Therefore, this instrument makes the necessary amendments to Schedule 22 to the 2020 Act to rectify this. As Schedule 22 amends a number of provisions in the 2020 Act which apply to proceedings under the 2006 Act, this instrument also makes amendments to Schedule 26 to the 2020 Act, which includes provisions which amend the 2006 Act. These amendments will ensure the approach towards the taking account of convictions is consistent across civilian law and service law, insofar as the relevant provisions in the 2006 Act extend to the UK.

6.7 The remaining provisions of Part 6 of the 2019 Regulations, namely regulations 22, 23, 24, 28 and 29, are unaffected by the sentencing consolidation process in England and Wales and, along with the transitional provision at regulation 31 as amended by this instrument, operate to implement the separation provision on taking account of convictions.

6.8 The 2020 Act consolidated sentencing law in England and Wales into the Sentencing Code ("the Code"). This includes the sentencing provisions which apply to England and Wales which will be amended by Part 6 of the 2019 Regulations. For example, section 65 of the Code restates the court's duty to treat relevant and recent previous convictions as an aggravating factor during sentencing (previously under section 143 of the Criminal Justice Act 2003), and section 313 restates the minimum seven year

sentence that applies to offenders aged 18 or over who are convicted of a third or subsequent class A drug trafficking offence (previously under section 110 of the Powers of Criminal Courts (Sentencing) Act 2000). Schedule 26 to the 2020 Act also makes amendments to service law, as set out in the 2006 Act.

6.9 As a consolidation exercise the Code currently reflects the present law – providing for previous convictions in EU member States to be treated in the same way as UK convictions during sentencing (as Part 6 of Schedule 22 to the 2020 Act is not yet in force).

6.10 Upon IP completion day, Part 6 of Schedule 22 to the 2020 Act, which restates the amendments relating to sentencing provisions which apply to England and Wales in Part 6 of the 2019 Regulations as prospective amendments to the Code (apart from regulation 31), will come into force, meaning that previous convictions in EU member States are to be treated in the same way as convictions outside of the UK under the Code. As mentioned above, this instrument makes the necessary amendments to Schedules 22 and 26 to the 2020 Act and to the remaining provisions of the 2019 Regulations so that the TAC Framework Decision continues to apply in criminal proceedings commenced before IP completion day in England and Wales and Northern Ireland in civilian law, and UK wide in service law.

7. Policy background

What is being done and why?

7.1 The amendments made by this instrument will ensure that Article 62(1)(g) of the withdrawal agreement is implemented in domestic legislation.

7.2 As the withdrawal agreement has been ratified, the UK is required to comply with the separation provisions from the end of the TP. To not do so would mean the UK would not meet its legal obligations under the withdrawal agreement. This instrument puts the necessary amendments to domestic legislation in place to ensure that full effect is given to the separation provision on the TAC Framework Decision, and the law is clear and accessible.

7.3 This legislation ensures that previous convictions in EU member States will be taken into account where criminal proceedings have begun before IP completion day.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is not being made to address a deficiency in retained EU law but relates to the withdrawal of the United Kingdom from the European Union because it is being made under section 8B of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018. The Minister has made any relevant statements in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 None.

10. Consultation outcome

10.1 No consultation exercise was conducted.

11. Guidance

11.1 No formal guidance has been, or will be, issued in relation to this instrument.

12. Impact

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

12.2 There is no significant impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because there is no significant impact on the private, voluntary or public sector. This instrument amends domestic legislation to ensure that, in accordance with Article 62(1)(g) of the withdrawal agreement, previous convictions in EU member States will continue to be taken into account in criminal proceedings, **if** the proceedings began before IP completion day. As the withdrawal agreement has been ratified, the UK is required to comply with the separation provisions from the end of the TP.

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 Jack Hickey at the Ministry of Justice (telephone: 07971 828042 or email: Jack.Hickey@justice.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Amy Randall, Deputy Director for Bail, Sentencing and Release Policy at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Chris Philp MP at the Ministry of Justice 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 Parliamentary Under Secretary of State, Chris Philp MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Taking Account of Convictions (EU Exit) (Amendment) Regulations 2020 does no more than is appropriate".

1.2 This is the case because: this instrument does no more than is appropriate to implement Article 62(1)(g) of the withdrawal agreement in domestic legislation.

2. Good reasons

2.1 The Parliamentary Under Secretary of State, Chris Philp 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: that this instrument amends domestic legislation to ensure that, in accordance with Article 62(1)(g) of the withdrawal agreement, previous convictions in EU member States will be taken into account in criminal proceedings, if proceedings began before IP completion day.

3. Equalities

3.1 The Parliamentary Under Secretary of State, Chris Philp MP, has made the following statement:

"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."

3.2 The Parliamentary Under Secretary of State, Chris Philp MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the draft instrument, I, Chris Philp 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."

4. Explanations

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