EXPLANATORY MEMORANDUM TO

THE OVERSEAS ASSOCIATION DECISION (REVOCATION) (EU EXIT) REGULATIONS 2019

2019 No. 221

1. Introduction

1.1 This explanatory memorandum has been prepared by the Foreign and Commonwealth Office 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 the Overseas Association Decision (Revocation) (EU Exit) Regulations 2019 ("the Regulations") is to remedy a deficiency in retained EU law by simply removing the text of the Overseas Association Decision ("the OAD") from the UK statute book as 'retained EU law' from exit day. This is in accordance with section 8 of the European Union (Withdrawal) Act 2018 (c. 16) ("the Act"), which allows Ministers to make regulations they consider appropriate to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law arising from EU exit.

Explanations

What did any relevant EU law do before exit day?

2.2 The OAD is an EU Council Decision which sets out the scope of the relationship between the EU and the Overseas Countries and Territories ("OCTs") of its Member States. The OCTs include all British Overseas Territories ("OTs") except for Gibraltar and the Sovereign Base Areas. These are: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, South Georgia and the South Sandwich Islands, St Helena, Ascension and Tristan da Cunha, Turks and Caicos Islands, and Virgin Islands.

2.3 The OAD: (i) provides a framework for cooperation between the EU and the OCTs in a number of areas; (ii) makes provision for trade in goods and services between the EU and OCTs; and (iii) provides OCTs with a right of access to EU funding and sets the conditions for such access.

Why is it being changed?

2.4 As a result of EU Exit, the OAD will automatically cease to apply to the relevant OTs. However, under the Act, the text of the OAD would be kept on the UK statute book as retained EU law. This would not alter the fact that the OAD had ceased to apply to the relevant OTs as a matter of international law.

2.5 Retaining the text of the OAD on the UK statue book would not be appropriate, because after EU exit the OAD will relate to an association between two parties, the EU and its OCTs, neither of which will include either the UK or the OTs.

2.6 In addition, secondary legislation under the Act is not capable of applying territorially to the relevant OTs. Therefore, even if the text of the OAD were retained on the UK statute book but amended insofar as possible to reference the UK and the relevant OTs rather than the EU and the OCTs, this retained EU law would be incapable of forming the basis of any meaningful UK-OT relationship.

What will it now do?

2.7 These Regulations revoke the text of the OAD as retained EU law from exit day.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The proposed instrument was presented to the Sifting Committees for consideration on 14 January 2019, with the second of the two Committees making its recommendation on 31 January 2019. Both Sifting Committees agreed that the negative procedure should apply to this instrument.

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 a 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 negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The OAD sets out the scope of association between the EU and the OCTs. Once the United Kingdom leaves the EU the relevant British OTs will no longer be OCTs, and therefore the retained EU law contained in the OAD is no longer appropriate in respect of the UK or the relevant OTs. These Regulations revoke the text of the OAD so that, as retained EU law, it is removed from the UK statute book.

6.2 As the Act does not extend to or apply in the relevant OTs, this instrument also does not extend to or apply in those OTs, but has effect in UK domestic law only. The instrument therefore does not have any effect on the OAD as a matter of EU or international law or as a matter of the law of the relevant OTs.

6.3 On the commencement of the Taxation (Cross-border Trade) Act 2018 (c. 22), certain provisions of the Treaty of the Functioning of the European Union and the OAD concerning EU customs duties cease to have effect to the extent that they relate to such duties as a result of the operation of section 29 and Schedule 7, paragraph 1 of that Act. Those OAD provisions are: Articles 43 (*free access for originating goods*), 45 (*measures adopted by the OCTs*), 48 (*temporary withdrawal of preferences*) and

49 (*safeguard and surveillance measures*) and Annexes VI (*concerning the definition of the concept of 'originating products' and methods of administrative cooperation*), VII (*temporary withdrawal of preferences*) and VIII (*safeguard and surveillance procedures*). This is also the case in relation to Article 200(1) of the Treaty on the Functioning of the European Union, which concerns a prohibition on the imposition of customs duties on goods originating in the relevant British overseas territories. It is intended that arrangements will be put in place between the relevant OTs and the UK concerning the rates of import duty applicable to goods originating from those OTs which will be given effect by way of regulations under section 9 of the Taxation (Cross-border Trade) Act.

7. Policy background

What is being done and why?

7.1 As a result of EU Exit, the OAD will automatically cease to apply to the OTs from exit day, irrespective of the laying of these Regulations. However, under the Act, the text of the OAD will automatically become 'retained EU law', and will therefore form part of domestic UK law from exit day.

7.2 Removing the text of the OAD from the UK statute book is appropriate for two main reasons. Firstly, after EU exit, the OAD will relate to an association between two parties, the EU and its OCTs, neither of which will include either the UK or the OTs: post-exit the text of the OAD would therefore make no sense on the UK statue book.

7.3 Secondly, the territorial application of the Act does not extend to the relevant OTs. As such, even if the text of the OAD were retained on the UK statute book, but amended insofar as possible to reference the UK and the OTs rather than the EU and the OCTs, it would only apply legally to the UK and consequently not be capable of forming the basis of any meaningful UK-OT relationship. Furthermore, we consider that seeking to use retained EU law to define the UK-OT constitutional relationship is unnecessary because it is already set out in the constitutions of the OTs and in the 2012 White Paper on the Overseas Territories (available at https://www.gov.uk/government/publications/the-overseas-territories-security-success-and-sustainability). This relationship is also developed on a regular and ongoing basis in Joint Ministerial Councils (JMCs) between the elected leaders of the OTs and UK Government Ministers and in other fora.

7.4 Moreover, there is a risk that retaining the text of the OAD, which references the OCTs of other EU member states, and which enumerates a number of entitlements to be conferred on them, could create a lack of legal clarity on a domestic level as to the rights and status of those OCTs with respect to the UK.

7.5 The UK Government recognises the OTs' long-standing relationship with the EU and the importance of OT-EU collaboration in a number of key areas, including environmental protection. The UK Government is committed to supporting the OTs as the UK leaves the EU, and for this reason provisions in the OAD which are presently of value to the OTs are being preserved separately insofar as possible on a bilateral UK-OT basis.

7.6 Tariff-free access to the UK market, which is currently provided for via the OAD, is intended to be implemented by secondary legislation under the Taxation (Cross-Border Trade) Act 2018. Existing projects under EU funding streams including EDF, BEST and Horizon 2020 will be guaranteed by HM Treasury for the lifetime of those

projects in the event of a no deal, in accordance with the guidance published in October 2018 at https://www.gov.uk/government/publications/funding-for-british-overseas-territories-if-theres-no-brexit-deal/funding-for-british-overseas-territories-if-theres-no-brexit-deal. Future funding and programming arrangements for the post-2020 period will be considered as part of the UK Government's next Spending Review in 2019, taking account of OT Governments' views.

7.7 The OAD also contains a large number of legally non-binding or purely aspirational provisions. The substance of almost all of these provisions is already reflected either in the 2012 White Paper on the Overseas Territories, or in other bilateral arrangements between the UK and the OTs. The UK Government has made clear to the British overseas territories that it is committed to maintaining the effects of as many as possible of these legally non-binding provisions, which are not already the subject of other existing arrangements, on a bilateral basis.

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 This instrument does not involve consolidation.

10. Consultation outcome

10.1 The governments of Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, South Georgia and the South Sandwich Islands, St Helena, Ascension and Tristan da Cunha, Turks and Caicos Islands, and Virgin Islands were consulted in the preparation of these Regulations. The draft Regulations were shared with the Governors/Commissioners and Attorneys General of those British overseas territories and comments invited. One substantive reply was received with a number of questions which the Foreign and Commonwealth Office addressed in writing and those explanations as to how the Regulations would operate were accepted. No other substantive responses or concerns were raised following the consultation.

11. Guidance

11.1 No guidance has been prepared for these Regulations because they deal with deficiencies in retained EU law.

12. Impact

12.1 These regulations deal with deficiencies in retained EU law and do not alter the fact that the OAD will cease to apply - as a matter of international law - to the OTs from exit day. There is therefore no, or no significant, impact on business, charities or voluntary bodies.

12.2 For the same reason, there is no, or no significant, impact on the public sector.

12.3 Accordingly, an Impact Assessment has not been prepared for this instrument.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses in the UK.

14. Monitoring & review

14.1 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required. In addition, as the text of the OAD is being revoked, no subsequent monitoring is required.

15. Contact

15.1 David Thompson at the Foreign & Commonwealth Office, Telephone: 020 7008 5856 or email: david.thompson@fco.gov.uk can be contacted with any queries regarding the instrument.

15.2 Ian Ascough at the Foreign & Commonwealth Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Lord Ahmad at the Foreign & Commonwealth Office 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 clauses 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/ESIC
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising clauses 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 clauses 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 clauses 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 77	Ministers of the Crown exercising clauses 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 clauses 8(1), 9, and 23(1) or jointly exercising	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising clauses 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, Sch 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) Act 2018

1. Sifting statement

1.1 The Minister of State for for the Commonwealth and the UN has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Overseas Association Decision (Revocation) (EU Exit) Regulations 2019 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure). This is the case because these Regulations satisfy the conditions under paragraph 1(3) of Schedule 7 to the European Union (Withdrawal) Act 2018."

1.2 This is the case because none of the affirmative triggers specified in Schedule 7 of the European Union (Withdrawal) Act 2018 apply to this instrument.

2. Appropriateness statement

2.1 The Minister of State for for the Commonwealth and the UN has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Overseas Association Decision (Revocation) (EU Exit) Regulations 2019 do no more than is appropriate. This is the case because, from exit day, the British overseas territories concerned will no longer be overseas countries or territories which are associated with the European Union. In addition, as the European Union (Withdrawal) Act 2018 does not extend to the relevant British overseas territories, it is considered that the Regulations would not be an appropriate vehicle through which to develop any system of mutual commitments between the UK and the British overseas territories. From exit day the retained EU law contained in the Overseas Association Decision is therefore no longer appropriate in respect of the United Kingdom and it is therefore appropriate that the Overseas Association Decision be deleted. See further paragraphs 2, 6 and 7 of the explanatory memorandum."

2.2 This is the case because the instrument will revoke the OAD from retained EU law in order to correct deficiencies in the UK statute book.

3. Good reasons

3.1 The Minister of State for for the Commonwealth and the UN 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 the Overseas Association Decision (Revocation) (EU Exit) Regulations 2019, and I have concluded they are a reasonable course of action. These are that from exit day the retained EU law contained in the Overseas Association Decision is no longer appropriate in respect of the United Kingdom given that the British overseas territories concerned will no longer be overseas countries and territories associated with the European Union. In

addition, as the European Union (Withdrawal) Act 2018 does not extend to the relevant British overseas territories, it is considered that the Regulations would not be an appropriate vehicle through which to develop any system of mutual commitments between the UK and the British overseas territories. See further paragraphs 2, 6 and 7 of the explanatory memorandum."

3.2 These reasons are that the instrument will correct deficiencies contained in the retained EU law arising as a result of the UK no longer being a Member State of the EU and the British overseas territories no longer being overseas countries and territories of the EU.

4. Equalities

4.1 The Minister of State for for the Commonwealth and the UN has made the following statement:

4.2 "The Overseas Association Decision (Revocation) (EU Exit) Regulations 2019 do 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."

4.3 The Minister for State for Europe and the Americas has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

4.4 "In relation to the Overseas Association Decision (Revocation) (EU Exit) Regulations 2019, I, the Minister for State for Europe and the Americas have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

5. Explanations

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