EXPLANATORY MEMORANDUM TO

THE SCOTTISH NATIONAL INVESTMENT BANK ACT 2020 (CONSEQUENTIAL PROVISION) ORDER 2020

2020 No. 483

1. Introduction

1.1 This explanatory memorandum has been prepared by the Office of the Secretary of State for Scotland and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Scottish National Investment Bank Act 2020 ("the 2020 Act") placed a duty on Scottish Ministers to create the Scottish National Investment Bank ("the Bank") as a public limited company. The 2020 Act sets out provisions to be included and entrenched in the Bank's Articles of Association. These provisions of the articles may be amended or repealed only in accordance with section 31 of the 2020 Act. The procedure set out in Section 31 of the 2020 Act requires the relevant provisions of the articles may be amended or repealed only by a special resolution of the Bank's members and only if a draft of the special resolution has been approved by a resolution of the Scottish Parliament.

2.2 The Scottish Ministers will be the sole member of the Bank. An Order under Section 104 of the Scotland Act 1998 is required in consequence of the Act in order to disapply section 22(3)(a) of the Companies Act 2006 ("the 2006 Act") in relation to the Bank. This ensures that the provisions of the Bank's Articles of Association which may only be amended or repealed in accordance with the procedure set out in Section 31 of the 2020 Act cannot be amended or repealed under section 22(3)(a) of the 2006 Act, without the Scottish Parliament's consent.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Under the Scotland Act 1998, Type G negative procedure applies to this instrument. This does not fall within the Schedule 7 Paragraph 3 special cases exceptions in the Scotland Act 1998 which would require affirmative procedure as it does not textually amend the text of the Companies Act 2006. The Secretary of State for Scotland considers it appropriate that this instrument should be made by way of negative procedure.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of this instrument includes Scotland.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England, Scotland, Wales and Northern Ireland.

4.2 The territorial application of this instrument is Scotland.

5. European Convention on Human Rights

5.1 The Secretary of State for Scotland has made the following statement regarding Human Rights:

"In my view the provisions of the Scottish National Investment Bank Act 2020 (Consequential Modification) Order 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 Section 104 of the Scotland Act 1998 allows provision to be made which is necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament. This includes provision for the UK Parliament to pass a section 104 Order which can amend UK primary legislation in reserved areas.

6.2 This Order effectively disapplies section 22(3)(a) of the 2006 Act in relation to the Bank, a public limited company established in accordance with the 2020 Act.

6.3 Section 22 of the Companies Act allows for provisions of a company's articles of association to be entrenched, meaning that they cannot be amended or repealed unless certain conditions are met or procedures complied with. Subsection (3)(a), however, allows an entrenching provision to be overridden if all members of a company agree to override it.

6.4 Section 31 of the 2020 Act requires the Scottish Parliament's agreement to the amendment or repeal of certain provisions of the Bank's articles.

6.5 The effect of this Order is therefore that the Bank's members cannot rely on section 22(3)(a) of the Companies Act to override that requirement for the Scottish Parliament's consent.

7. Policy background

What is being done and why?

7.1 In September 2017 the Scottish Government announced its intention to establish a Scottish National Investment Bank. Former CEO of Tesco Bank, Benny Higgins led the work on developing an Implementation Plan for the Bank which was published in February 2018. The Scottish National Investment Bank Bill was introduced to the Scottish Parliament in February 2019 to support the establishment of the Bank in 2020. The Scottish Government intends for the Bank to provide loan and equity investment for start-ups and SMEs, including patient capital, while also investing in mission-led projects.

7.2 The 2020 Act guarantees Scottish Parliamentary oversight of key aspects of the Bank's constitution. However, the Scottish Government consider that the Scottish Parliament would currently only be able to exercise this oversight to a limited extent. This is because section 22(3)(a) of the 2006 Act provides that provisions for entrenchment of the Articles of Association of a company can be overridden by a resolution of all of the members. The 2020 Act provides that the Scottish Ministers will be the sole member of the company, and would in theory therefore be able to amend the Articles of Association without following the procedure set out in Section 31 of the 2020 Act. This in itself would detract from the intentions of the 2020 Act.

7.3 The Scottish Government therefore consider that a section 104 Order is required, disapplying section 22(3)(a) of the 2006 Act in respect of the provisions of the Bank's

Articles of Association which may only be amended or repealed in accordance with the procedure set out in Section 31 of the 2020 Act, because in the case of this Bank, the Scottish Ministers will be the sole member.

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

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 Consolidation is not relevant to this Order as it makes a non-textual amendment.

10. Consultation outcome

10.1 There has been no consultation exercise specific to this Order. However, a public consultation on the Scottish Government's proposals for the Bank was completed in October 2018. An analysis of the consultation responses was published on the Scottish Government's webpages in February 2019[1].

10.2 The Economy, Energy and Fair Work Committee ("the Committee") led on the Scottish Parliament's scrutiny of the 2020 Act. During its Stage 1 scrutiny the Committee raised section 22(3)(a) of the 2006 Act, and its impact in respect of the Scottish Government's proposed legislative approach. In response the Scottish Government indicated that it was proposing to bring forward this Order to address the issue. This was accepted by the Committee.

11. Guidance

11.1 This Order stands alone and guidance is not necessary.

12. Impact

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

12.2 There is no impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because no impact on business is expected.

13. Regulating small business

13.1 The legislation does not regulate the activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Order is consequential upon the 2020 Act. No formal monitoring or review is considered necessary.

14.2 The Order does not include a statutory review provision and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Secretary of State for Scotland has made the following statement: "There is no need for review or monitoring as the Order does not regulate businesses."

[1] https://www.gov.scot/publications/scottish-national-investment-bank-consultation-analysis-responses/

15. Contact

15.1 Eleanor Morrell at the Office of the Secretary of State for Scotland, Telephone: 0207 270 6759 or email: ella.morrell@scotlandoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Rachel Irvine or Alison Evans (job share), Deputy Directors for Constitutional Policy, at the Office of the Secretary of State for Scotland confirm that this Explanatory Memorandum meets the required standard.

15.3 The Secretary of State for Scotland at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.