EXPLANATORY MEMORANDUM TO

THE TRADE BARRIERS (REVOCATION) (EU EXIT) REGULATIONS 2018

2018 No. 1294

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for International Trade and is laid before Parliament by Act.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument revokes the EU Trade Barriers Regulation 2015/1843 ("the TBR").

Explanations

What did any relevant EU law do before exit day?

2.2 The TBR establishes a statutory procedure for businesses to report concerns about trade barriers in non-EU ("third") countries and for the European Commission to examine those concerns. Under the TBR, businesses, trade associations and Member States can present a complaint to the Commission with evidence of the trade barrier. Where a trade barrier is deemed to have a significant impact on the EU, the Commission is tasked with investigating the barrier. The TBR will no longer apply to UK stakeholders after the UK's exit from the EU and will be superseded by new UK market access processes.

Why is it being changed?

2.3 The TBR has been used infrequently; since 1996 only 24 TBR cases have been investigated by the Commission. In 2017 70 new barriers were raised with the Commission and only one was raised as a result of the TBR. In the EU, the vast majority of trade barriers are raised via the Market Access Advisory Committee (a Commission-chaired committee attended by Member States and European-level trade associations). Most countries do not have a statutory mechanism and within the countries where one has been put in place (the US and China) it appears that they are also used rarely and that companies prefer to use informal channels. Many of the steps outlined in the TBR (information-gathering with importers and exporters, consultations with the third country and the publication of a report) can be replicated without a statutory process.

In many cases trade barriers can be resolved through negotiation with the third country. The UK can set a more constructive tone for negotiations if discussions at technical level are explored fully before resorting to mechanisms which escalate trade barriers to the political level. Where informal and technical engagement with the partner country fails to resolve the issue, the UK may decide to contest the trade barrier at the World Trade Organisation (WTO).

What will it now do?

2.4 The policy intention is to provide an accessible, non-statutory route for UK businesses of all sizes and across all sectors to report market access barriers and have them considered promptly by government. This includes exploring the provision of a digital service through which companies, trade associations, British embassies overseas and government officials can work more closely in reporting and attempting to resolve trade barriers. Many of the existing mechanisms for escalating and resolving these barriers, such as economic diplomacy, regulatory dialogues, WTO committees and dispute settlement will continue to be available to the UK following its exit from the EU.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The instrument was laid for sifting by the European Statutory Instruments Committee and the Secondary Legislation Scrutiny Committee on 27 July 2018. Sifting ended on 5 September 2018 and both committees recommended the instrument for an upgrade to the affirmative resolution procedure. The Department for International Trade accepted the recommendation.

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 is the United Kingdom.

3.3 The powers under which this instrument is made cover the entire United Kingdom (see section 24 of the European Union Withdrawal Act 2018) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

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

4.2 The territorial application of this instrument is England, Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 The Minister of State for Trade Policy, George Hollingbery, has made the following statement regarding Human Rights:

"In my view the provisions of the Trade Barriers (Revocation) (EU Exit) Regulations 2018 are compatible with the European Convention Rights."

6. Legislative Context

6.1 This instrument will revoke the TBR so that it does not become part of UK law via the EU (Withdrawal) Act.

6.2 The EU is responsible for the trade policy of its Member States; this includes working with Member States and industry to remove barriers to EU exports. The TBR establishes a procedure for businesses and EU Member States to bring complaints to the European Commission when unlawful trade barriers are imposed by third countries.

6.3 The TBR foresees two key steps:

a) An EU Industry, one or more EU companies or an EU Member State may present a written complaint to the European Commission about a trade barrier with information about any resulting injury or adverse trade effects.

b) The Commission has 45 days to decide whether the complaint will be examined. If the complaint is accepted an examination procedure will begin and is announced in the Official Journal of the EU. The examination procedure involves notifying the third country and Member States, information-gathering with stakeholders and the opportunity for concerned parties to meet and attend hearings at the Commission. When the Commission has concluded its examination, a report is presented to the Trade Barriers Committee (composed of EU Member States).

6.4 Where satisfactory steps are not taken by the third country during the examination procedure, the EU may (but is not obliged by the TBR to) take commercial policy measures provided they are compatible with existing international obligations. Such measures may include the suspension of tariff concessions, the imposition of new or increased customs duties or the introduction of quantitative restrictions on imports or exports. The EU may also decide to initiate a dispute either through the WTO or through dispute mechanisms established by bilateral agreements.

6.5 In summary, the TBR is part of the EU framework for gathering evidence about trade barriers from industry, assessing complaints and information-sharing with Member States and EU institutions. Following exit from the EU, the UK will be responsible for the activity which is covered by the TBR.

7. Policy background

What is being done and why?

7.1 The instrument revokes the TBR which establishes EU processes for reporting and assessing trade barriers. The procedure, which includes investigating and writing a report on the barrier, sharing information with the European Parliament and Council and convening a committee of Member States will be superseded by new UK market access processes. These processes will come into force when the UK leaves the EU, rendering the TBR redundant in the new UK context.

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 None.

10. Consultation outcome

10.1 There is no requirement for a formal consultation. In the interest of understanding the effect of the statutory instrument, there has been bilateral engagement with the two UK stakeholders that have used the TBR.

10.2 UK trade associations representing the full range of sectors that have been the subject of TBR cases were invited to a roundtable discussion in March 2018 to share views on mechanisms for reporting market access barriers. Sectors including food and drink, alcoholic beverages, automobiles and pharmaceuticals were represented at the roundtable.

10.3 There was mixed feedback on the TBR in the context of the bilateral engagement. One stakeholder cited a successful case study of the TBR in which lobbying by the European Commission led to a change in third country tax law. When Department for International Trade officials explained that the UK does not intend to replicate the TBR, the stakeholder was understanding and indicated it would seek to work with the Department on the new UK market access model.

10.4 Other stakeholders criticised the slow nature of the TBR process. One UK stakeholder said that its case was left open and unresolved for ten years despite a TBR report being published in its favour. A theme raised by several business representatives was that setting a more conciliatory tone with the country imposing a barrier is more constructive than automatically escalating an issue to the political level through 'name and shame' reports.

10.5 Stakeholders from across sectors advocated a forum akin to the EU's Market Access Advisory Committee in which industry associations and government departments can discuss avenues for resolution before initiating enforcement mechanisms. All stakeholders, including other government departments that the Department for International Trade has engaged with, have been supportive of the proposal to develop a digital service for reporting trade barriers.

10.6 The Department for International Trade has explained the purpose of the statutory instrument to the devolved administrations.

11. Guidance

11.1 The Department for International Trade does not propose to issue any guidance in relation to this statutory 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 An Impact Assessment has not been prepared for this instrument because neither the TBR nor this instrument regulate or deregulate business and the impact on business is expected to be minimal.

12.4 The TBR places a legal obligation on the European Commission to investigate complaints lodged by Member States or business representatives but does not oblige the European Commission to take any action to resolve reported barriers. The response of the European Commission to reported issues is determined on a case-by-case basis. This instrument will mean that the EU processes – including the Commission's role in investigating complaints about trade barriers – will no longer

apply if a UK business or trade association makes a complaint. In the future UK businesses can report market access issues to UK officials and UK government action will be determined on a case-by-case basis. Legislation is not required for this service.

13. Regulating small business

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

13.2 As outlined in section 12, neither the TBR nor this statutory instrument regulate or deregulate business. This statutory instrument has no, or no significant, impact on business.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that a review provision is unnecessary because the instrument has the effect of revoking an existing EU regulation and the successor approach is non-statutory.

14.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Zoe Grimes at the Department for International Trade. Telephone: 02072154521 or email: zoe.grimes@trade.gov.uk can be contacted with any queries regarding the instrument.

15.2 Vic Platten at the Department for International Trade can confirm that this explanatory memorandum meets the required standard.

15.3 George Hollingbery at the Department for International Trade 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 for Trade Policy, George Hollingbery has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Trade Barriers (Revocation) (EU Exit) Regulations does no more than is appropriate".

1.2 This is the case because on exit day the UK will no longer be a Member State of the European Union and EU procedures for addressing market access barriers will no longer apply to the UK.

2. Good reasons

2.1 The Minister of State for Trade Policy, George Hollingbery 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 the EU Trade Barriers Regulation Procedure will be superseded by new UK market access processes, rendering the Trade Barriers Regulation redundant in the new UK context. These reasons are explained fully in sections 2-2.4, 6-6.5 and 7-7.1 of the main body of this explanatory memorandum.

3. Equalities

3.1 The Minister of State for Trade Policy, George Hollingbery has made the following statement:

"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 for Trade Policy, George Hollingbery has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the instrument, I, George Hollingbery 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.