



14 August 2018

Dear colleague,

I am writing to inform you of my Department's plans to lay in draft, after the summer recess a statutory instrument (SI), to be made under the European Union (Withdrawal) Act 2018, transferring limited energy-related legislative functions from the European Commission to the Secretary of State in relation to Great Britain, and to the Secretary of State and the Northern Ireland Department for the Economy in relation to Northern Ireland.

When the UK leaves the EU, the Withdrawal Act will integrate EU law into domestic law. SIs made under the Withdrawal Act will amend retained EU law to ensure it is operable after EU exit. As amended, retained EU law will match closely the form and operation it held before EU Exit to provide continuity for businesses in the United Kingdom. This includes transferring functions from EU public bodies to UK public bodies, as is intended by one of my Department's planned SIs. More detail on this SI is provided below. The SI will be subject to the affirmative parliamentary procedure.

#### *Transfer of Network Codes, REMIT, and the Security of Gas Supply Regulation functions*

The planned SI will transfer several legislative functions from the European Commission to the Secretary of State and, in Northern Ireland, the Department for the Economy. This is the first of a number of planned energy related SIs, which will need to be laid to ensure retained EU law is operable following EU Exit. The SI includes powers to create, in limited circumstances, new Network Codes (a body of tertiary EU legislation setting out detailed rules governing the Electricity and Gas markets, which will become retained EU law), and to amend where necessary aspects of the Network Codes in response to future developments in the energy sector. Both the creating and amending function will be exercised through future SIs and, given the breadth of content covered by the Network Codes, will be subject to the affirmative legislative procedure in Parliament or the Northern Ireland Assembly.

The function to 'create' Network Codes will be limited to bringing into UK law the limited number of provisions which, although they are contained in instruments which have already been adopted and come into force, are stated to apply from a date after exit day and will therefore not automatically become retained EU law under section 3 of the Withdrawal Act. In

some cases absence of such provisions after exit day will render other provisions inoperable in turn, the instrument will also permit the 'creation' of these provisions in domestic legislation. The power is limited to 'recreating' these specific provisions, found in six network codes, through future SIs so that all Network Codes, essential to the proper operation of the UK's energy market, continue to operate as intended. It could not be used to create wholly new Network Codes, but rather provides a means of avoiding unexpected disruption to the energy regulatory framework and wasting of efforts and investments already undertaken to comply with the Codes and Guidelines which are already in force. The power is time limited to two years after exit day.

The second set of Commission legislative functions which this SI transfers to the Secretary of State, in Northern Ireland alongside the Department for the Economy, allows amendments to definitions and reporting requirements under the Regulation on wholesale Energy Market Integrity and Transparency (REMIT). The third set of functions, transferred to the Secretary of State alone, allows amendments to reporting templates under the Security of Gas Supply Regulation. The ability to update all of these is necessary to ensure the UK's market abuse prevention mechanisms and plans and risk assessments for ensuring security of gas supply can be kept up-to-date. Any amendments made using these powers, which are not time limited, are likely to be of a minor and technical nature. Reflecting the limited scope of the content which could be amended by these functions, they will be exercisable through the negative parliamentary procedure.

Without this SI, the Commission functions in the Regulations would remain in place when the UK leaves the EU, but would be inoperable. Without this instrument it would be necessary to introduce new domestic powers through primary legislation to enable changes to be made to the statute book. Achieving this through exercise of a delegated function instead is appropriate given the highly technical nature of the Codes, templates and provisions and the context of existing pressures on parliamentary time.

This SI, developed with input from the Northern Ireland Department for the Economy, contains provisions which will apply in Northern Ireland and includes powers for the Secretary of State which are exercisable there, where appropriate in parallel with the Northern Ireland Department for the Economy. Reflecting the current lack of a devolved government in place to make these changes, this ensures that necessary amendments to prepare the statute books for EU exit can be made in good time for all parts of the UK.

The powers onshored by this SI can be exercised in respect of Northern Ireland either by the Northern Ireland Executive or by the Secretary of State, unless they fall into a category of powers reserved by Westminster. It is anticipated that some SIs made under these powers will relate to excepted matters reserved to Westminster, in particular where they contain provisions which relate to international relations or are capable of extra-territorial effect, and may therefore not be capable of being made by the Northern Ireland Department for the Economy. This may

be the case in respect of amendments being made to network codes and the Gas Security of Supply Regulations in so far as they affect cross-border trade with Ireland. However, other uses of the powers could fall within the Northern Ireland Executive's devolved competence in respect of energy.

The default position for matters falling within devolved competence is that these powers should be exercised by the Executive, in line with the Government's overriding priority to secure the restoration of devolved government in Northern Ireland. It would therefore be anticipated that the powers would be exercised by the Secretary of State in respect of devolved matters only where that had been agreed with a restored Executive or, in the absence of devolved government, where it would otherwise not be possible for legislative amendments necessary to retain a functioning statute book to be made. In those circumstances, the powers would be exercised only following consultation with the Northern Ireland Department for the Economy. In each such case, the exercise of the power and the rationale for so doing will be clearly set out in a Ministerial Statement.

Timing of SI laying and relation to UK-EU negotiations

This SI is not dependent on the outcome of the ongoing UK-EU negotiations as it will be necessary to transfer the relevant legislative functions from the EU under any exit scenario. The functions transferred by this SI will be exercised at the earliest necessary point to bring Network Code provisions into application near to their scheduled application dates. If, as per the political agreement between the UK and the EU, the UK enters an implementation period from exit day until the end of December 2020, and the Network Codes take direct effect during this period, this function will be necessary for technical amendments and to create certain provisions of the Emergency and Restoration Code which, though already in force, apply from 2022. In the unlikely scenario in which no mutually satisfactory agreement can be reached, these functions will be required soon after exit day, in the absence of an implementation period.

Yours sincerely,



**THE RT HON CLAIRE PERRY MP**  
Minister of State