

EXPLANATORY MEMORANDUM TO
THE FERTILISERS AND AMMONIUM NITRATE MATERIAL (AMENDMENT)
(EU EXIT) REGULATIONS 2019

2019 No. XXXX

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by the Department for Environment, Food and Rural Affairs (“Defra”) 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 amends legislation relating to fertilisers, addressing failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom (“UK”) from the European Union (“EU”). In particular, it creates a new domestic regime to replace the EU regime in the UK and ensures continuity of supply of EU fertilisers after exit day. It also in part amends domestic legislation that is out of date.

Explanations

What did any relevant EU law do before exit day?

- 2.2 Regulation EC No 2003/2003 of the European Parliament and of the Council relating to fertilisers (“the EU Regulation”) lays down rules on the designation, definition, composition, identification and packaging of ‘EC fertilisers’ which can be freely traded throughout the EU.

Why is it being changed?

- 2.3 After exit, without amendment the relevant EU law would not operate properly and it would disrupt the trade in fertilisers currently authorised under EU law. Changes must be made to maintain fertiliser standards in UK law and provide continuity to the sector and security of supply for farmers.

What will it now do?

- 2.4 This instrument replaces the ‘EC fertiliser’ regime in EU law with a new domestic regime, providing for a ‘UK fertiliser’ label which will function in the same way. It also allows a two year transitional period during which ‘EC fertilisers’ can still be sold in the UK without a requirement to be relabelled, to ensure continued supply and reduce burdens on businesses as a result of exit. The instrument also amends the rules on the import of ammonium nitrate fertilisers to uphold current safety standards at the same time as ensuring consistency.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Fertilisers and Ammonium Nitrate Material (Amendment) (EU Exit) Regulations 2018 were presented to the Sifting Committees on 1 November 2018. The Lords Sifting Committee agreed with the Government that this instrument does not have to have a debate in Parliament, though one may still occur. However, the Commons Sifting Committee disagreed with the Government and recommended that this instrument needs to be debated in Parliament; the recommendation was published on gov.uk on 22 November 2018.
- 3.2 The Commons Sifting Committee made this recommendation because it believed the effect of one regulation is to allow Ministers to charge fees to cover the cost of tests needed for official control measures. In addition, it believed the instrument confers powers to legislate, changing functions of the UK as a Member State to functions of UK public authorities. The Committee considered that both of these are sufficient to make the instrument mandatory affirmative. The Committee was also concerned about the impact of the amendments made to safety regulations governing the import of ammonium nitrate materials from outside the EU.
- 3.3 Consequently, George Eustice MP, Minister of State for Agriculture, Fisheries and Food, has agreed for this instrument to be made subject to the affirmative procedure.
- 3.4 The instrument has been amended since it was presented to the Sifting Committees. First, it contains various affirmative provisions concerning the provision of functions of the EU Commission to be exercisable instead by UK public authorities, an amendment to a domestic power to legislate and an amendment to a fee provision. Second, certain provisions have been removed from this instrument and included in another instrument (see paragraph 6.3 below). In addition, some changes have been made in response to the concerns raised in the Commons Sifting Committee's report.

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)

- 3.5 The territorial application of this instrument varies between provisions.
- 3.6 The powers under which this instrument is made cover the entire UK (see in particular section 24 of the European Union (Withdrawal) Act 2018) and the territorial application of this instrument is set out in paragraph 4.2.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the UK except for regulations 2, 3, 8 and 9 which extend to England and Wales and Scotland, and regulations 4 and 10 which extend to England and Wales.
- 4.2 The territorial application of this instrument is the UK, except for regulations 2, 3, 8 and 9 which apply to England and Wales and Scotland, and regulations 4 and 10 which apply to England and Wales.

5. European Convention on Human Rights

- 5.1 The Minister of State for Agriculture, Fisheries and Food, George Eustice MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Fertilisers and Ammonium Nitrate Material (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The EU Regulation sets out the rules which apply to fertilisers which are designated as ‘EC fertilisers’. Fertilisers are partially harmonised in that it is permissible for Member States to have domestic regimes in addition to the EU rules. The domestic regime for the UK is set out in the Fertilisers Regulations 1991 (S.I. 1991/2197) (for Great Britain (“GB”)) and the Fertilisers Regulations (Northern Ireland) 1992 (S.R. 1992/187). In addition, there are specific rules in GB concerning ammonium nitrate material in the Ammonium Nitrate Materials (High Nitrogen Content) Safety Regulations 2003 (S.I. 2003/1082) (“the AN Regulations”).
- 6.2 As a result of exit, corrections are required to the EU Regulation to convert the EU regime into a UK one, replacing the ‘EC fertiliser’ label with a ‘UK fertiliser’ label. This also requires amendment to the related domestic Regulations which currently enforce the EU Regulation (for England and Wales, the EC Fertilisers (England and Wales) Regulations 2006 (S.I. 2006/2486); amendment to Scottish and Northern Ireland legislation in this regard is being made separately). Finally, amendment to the domestic regime is also required to reflect these changes.
- 6.3 In addition, there are some changes to out of date references in the domestic legislation. These need to be amended to ensure clarity for users of the legislation. Some changes to out of date references in the AN Regulations are being made in a separate instrument (the Pesticides and Fertilisers (Miscellaneous Amendments) (EU Exit) Regulations 2019 – see <https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments/the-pesticides-and-fertilisers-miscellaneous-amendments-eu-exit-regulations-2019>) because they are subject to the negative procedure. These will come into force before exit day.

7. Policy background

What is being done and why?

- 7.1 Fertilisers are materials that provide nutrients to plants and are essential yearly inputs for the UK agricultural, horticultural and amenity sectors. The manufacturing and marketing of fertilisers are regulated by legislation that provides for their definition, composition, labelling and packaging. The UK imports the majority of its fertiliser requirement to supplement domestic production.
- 7.2 Manufacturers can currently choose which legislative framework (EU or UK) they want their products to comply with but, having chosen, their products must comply with the relevant rules. This will continue to apply but there will be two options under the UK framework for marketing of fertilisers in the UK.
- 7.3 The new option under the UK framework provides for the replacement of the ‘EC fertiliser’ label (and all the rules that have to be complied with to allow the use of that label) with a ‘UK fertiliser’ label that will ensure that the same rules apply. It will further allow ‘EC fertilisers’ to continue to be sold in the UK for a two year transitional period, without the need for relabelling. This is to ensure essential business continuity and predictability for manufacturers and distributors, as well as for farmers.

- 7.4 The instrument makes amendments to the relevant pieces of domestic and EU legislation to allow them to operate properly after exit. For example, references to Member States and the EU Commission are amended to refer instead to UK authorities; and a requirement as to the language to be used on labels is also amended. There are also amendments to the domestic regime, in particular to remove out of date references to ‘EEC fertilisers’ and ‘EC fertilisers’.
- 7.5 Amendments to Articles 6, 15 and 29 of the EU Regulation include provision that preserves the possibility of certain action by the relevant bodies in the UK which they previously had when the UK was a Member State. These relate to options for prescribing how specified fertilisers should be identified; the possibility of temporarily prohibiting the placing on the market of a fertiliser or making it subject to special conditions if there are justifiable grounds for believing that it constitutes a risk to safety or health of humans, animals or plants or a risk to the environment; and finally the option of subjecting fertilisers to official control measures and charging for those tests. The specific powers to take such actions are found in domestic legislation (see in particular the EC Fertilisers (England and Wales) Regulations 2006, which implemented the provisions in Articles 6 and 15 in regulations 5(1)(c), 6(c)(ii), 7(d) and 19).
- 7.6 The instrument also amends the AN Regulations which regulate fertilisers with high nitrogen content, since they can be misused as improvised explosives and pose safety risks if mishandled in manufacture, transport or storage. Currently the rules for imports from the EU are different from those for imports from outside the EU. Following the UK’s exit from the EU, the rules need to be consolidated so that the import requirements apply consistently to all imported material. The critical safety aspects of the AN Regulations (in particular detonation resistance tests) will apply the more stringent third country regime to all imports. There are transitional arrangements (for two years) for imports from the EU in relation to the time limit for valid detonation resistance test certificates (60 days between testing of the material and its arrival in GB) and also the competent laboratories that can conduct detonation resistance tests (those in the EU as well as in the UK). These arrangements mean that the current rules for EU imports in this regard will continue to apply for two years. This is to give manufacturers time to prepare for compliance with the new import rules and to ensure continuity of supply for the next two years.
- 7.7 Fertilisers are a devolved matter in Scotland and Wales and a transferred matter in Northern Ireland. However, decisions regarding ammonium nitrate are reserved in GB insofar as the subject matter of those decisions relates to health and safety and in Northern Ireland insofar as it relates to explosives. The corrections being made by this instrument to the fertilisers domestic and EU legislation provide for a common UK approach to fertilisers designated as ‘UK fertiliser’. This will ensure a consistent and clear policy, without the need for a different set of rules for each Devolved Administration. It has been agreed that the Secretary of State will be empowered to make regulations with regard to ‘UK fertilisers’ for the UK only with the consent of the Devolved Administrations.

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 UK from the EU. The instrument is also made under paragraph 21(b) of Schedule 7 to that Act. 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.

- 8.2 Alongside the European Union (Withdrawal) Act 2018 powers, the instrument is also being made under section 2(2) of the European Communities Act 1972. This relates to the amendments to out of date references in domestic legislation.

9. Consolidation

- 9.1 This instrument is not consolidating any provisions.

10. Consultation outcome

- 10.1 This instrument was not subject to formal consultation. However, there were discussions with key stakeholders (the fertiliser manufacturers' representative body (the Agricultural Industries Confederation) and the farmers' representative body (the National Farmers' Union)) about their concerns regarding exit in relation to fertiliser policy. Their main concerns were that there should be uninterrupted fertiliser supply and no added cost burdens to manufacturers and importers. This has been addressed through allowing for a time-limited adjustment period to allow time for relabelling and compliance with the new rules.
- 10.2 The changes to the rules on ammonium nitrate materials have also been developed in conjunction with the Health and Safety Executive.
- 10.3 This instrument and the policy reflected in it has been developed in collaboration with Devolved Administration officials.

11. Guidance

- 11.1 A Technical Notice has been published on the gov.uk website (see <https://www.gov.uk/government/publications/manufacturing-and-marketing-fertilisers-if-theres-no-brexit-deal/manufacturing-and-marketing-fertilisers-if-theres-no-brexit-deal>). Further more detailed guidance will be published for stakeholders.

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 the instrument relates to the maintenance of existing regulatory standards and no significant impacts are expected. There will be a time-limited period during which 'EC fertilisers' can be placed on the UK market as now, to ensure continued supply and minimise disruption. In addition, there will be a time-limited period during which importers of ammonium nitrate materials from the EU can operate as they do now.
- 12.4 In a scenario where an agreement with the EU is not reached, UK manufacturers of fertilisers would need to comply with the EU Regulation if they want to continue exporting to the EU after exit day, which means that they will need to send samples to EU laboratories for testing. This change is a result of EU exit and 'EC fertiliser' requirements, not because of changes made by this instrument. UK laboratories will still be recognised as competent testing bodies under UK law.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The basis for the final decision on what action to take to assist small businesses was that no disproportionate impacts are expected to affect small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that Defra and its agencies, as well as the Devolved Administrations in relation to devolved matters, will monitor and review the impact of the instrument as part of their standard policy-making procedures, and will ensure that the provisions are adhered to.
- 14.2 In respect of provisions in Part 2 of the instrument, the Regulations do not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Minister of State for Agriculture, Fisheries and Food, George Eustice MP, has made the following statement. The Minister considers that inserting a review provision is not appropriate, because there is not expected to be a significant annualised net impact on business (greater than +/- £5 million net annualised). It would not be proportionate to undertake a review, given the costs of doing so and the limited scope for change, particularly in relation to out of date references.
- 14.3 In respect of provisions of this instrument which are made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. Contact

- 15.1 Henry Webber at Defra Telephone: 020 8026 9863 or email: henry.webber@defra.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Maggie Charnley, acting as Deputy Director for the fertiliser policy area, at Defra can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 George Eustice MP at Defra 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 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
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 Agriculture, Fisheries and Food, George Eustice MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Fertilisers and Ammonium Nitrate Material (Amendment) (EU Exit) Regulations 2019 do no more than is appropriate.”

- 1.2 This is the case because: the amendments to retained direct EU legislation and domestic legislation are the minimum required to make the legislation operable and they maintain current regulatory standards.

2. Good reasons

- 2.1 The Minister of State for Agriculture, Fisheries and Food, George Eustice 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: the amendments to retained direct EU legislation and domestic legislation are the minimum required to make the legislation operable. They maintain current regulatory standards and ensure the continued supply of ‘EC fertilisers’ and ammonium nitrate materials for a two year transitional period, providing continuity to the sector and security of supply for farmers.

3. Equalities

- 3.1 The Minister of State for Agriculture, Fisheries and Food, George Eustice MP, has made the following statement(s):

“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 Agriculture, Fisheries and Food, George Eustice MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the instrument, I, George Eustice 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.

5. Legislative sub-delegation

5.1 The Minister of State for Agriculture, Fisheries and Food, George Eustice MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view it is appropriate to create a relevant sub-delegated power in the Fertilisers and Ammonium Nitrate Material (Amendment) (EU Exit) Regulations 2019.”

5.2 This is appropriate because: the relevant power in Article 30 of the EU Regulation concerns the identity of approved laboratories for the purposes of testing of fertilisers. The list of approved laboratories will be published and will not be made by legislation; this reflects the current process undertaken by the EU Commission. It is therefore not appropriate for the removal of a laboratory from the list because it does not meet the required standards to be made by way of legislation.