

EXPLANATORY MEMORANDUM TO
THE MERCHANT SHIPPING AND OTHER TRANSPORT (ENVIRONMENTAL
PROTECTION) (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 311

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument ensures that environmental protection provisions relating to air pollution (specifically the sulphur content of marine fuels) and anti-fouling systems are legally operable when the United Kingdom withdraws from the European Union. It also corrects minor deficiencies in transport legislation governing environmental impact assessment for transport and works.

Explanations

What did any relevant EU law do before exit day?

- 2.2 Environmental impact assessment is a process well-established in domestic legislation and planning practice, which requires that proposals which are likely to have a significant effect on the environment by virtue of (for example) their nature, size or location are subject to an assessment of those effects before development consent for the project is granted.
- 2.3 This instrument amends the following transport-related legislation, which implements Directive 2011/92/EU on environmental impact assessments, as amended by Directive 2014/52/EU:
- provisions of Part 1 of the Transport and Works Act 1992; and
 - the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006.
- 2.4 The above legislation put in place the requirements for environmental impact assessments relating to applications for Transport and Works Act Orders.
- 2.5 The Merchant Shipping (Prevention of Air Pollution on Ships) Regulations 2008 (“the 2008 Regulations”) implement, in part, Directive 1999/32/EC (subsequently repealed and replaced by Directive (EU) 2016/802) relating to a reduction in the sulphur content of certain liquid fuels. They apply a limit to the sulphur content of marine fuel which may be used by UK ships and in UK waters and put in place requirements relating to emissions abatement technologies.
- 2.6 Commission Implementing Decision (EU) 2015/253 (“the 2015 Sulphur Decision”) laid down rules concerning the sampling and reporting of the sulphur content of marine fuels under Council Directive 1999/32/EC. Its provisions set out the frequency with which marine fuels should be sampled by Member State authorities, the methods to be used to verify the sulphur content of fuel, procedural requirements for carrying out sampling and reporting formalities.

- 2.7 Regulation (EC) 782/2003 (“the 2003 AFS Regulation”) prohibits the application of organotin compounds to inhibit the growth of organisms on ships’ hulls and sets out an enforcement regime. It is implemented, to the extent necessary, by the Merchant Shipping (Anti-Fouling Systems) Regulations 2009 (“the 2009 Regulations”). Together, these instruments prohibit the application of prohibited anti-fouling systems to the hulls of ships and put in place a survey and certification regime and enforcement provisions.
- 2.8 Commission Regulation (EC) 536/2008 (“the 2008 AFS Regulation”) governs the relationship between the 2003 AFS Regulation and the International Convention on the Control of Anti-Fouling Systems on Ships (“the AFS Convention”) which, at the time the 2003 and 2008 AFS Regulations were enacted, had not yet come into force. It clarifies that, when the AFS Convention comes into force (as it did in September 2008), compliance with the 2008 AFS Regulation could be demonstrated through compliance with the AFS Convention.

Why is it being changed?

- 2.9 The legislation on environmental impact assessments contains a number of references to Member States which will be inoperable when the United Kingdom is no longer a Member State. It also refers to provisions of EU Directives which will contain similar deficiencies.
- 2.10 The 2008 Regulations and 2015 Sulphur Decision contain a number of references to Member States which will be inoperable when the United Kingdom is no longer a Member State.
- 2.11 The 2003 AFS Regulation is stated to apply to ships flying the flag of an EU Member State; as such, without amendment, the Regulation would cease to apply to UK-flagged ships. It also contains a number of references to Member States, for example in relation to the appointment of inspectors empowered to enforce the prohibition. It also gives the European Commission the power to update the Regulation in line with the AFS Convention, and contains obligations to provide reports to the European Commission. The 2009 Regulations and 2008 AFS Regulation similarly contain a number of references to Member States and reporting obligations.

What will it now do?

- 2.12 The effect of all amendments made by this instrument is to ensure that the status quo continues to operate once the United Kingdom withdraws from the European Union. The amendments ensure that existing obligations continue to apply, that necessary functions of the European Commission can now be undertaken by the Secretary of State, and that redundant requirements are extinguished.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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 varies between provisions.

- 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). Regulations 2, 4 and 5 apply in England and Wales only. All other provisions apply in England and Wales, Scotland and Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales, Scotland and Northern Ireland.
- 4.2 The territorial application of regulations 3 and 6 to 10 is the United Kingdom and United Kingdom ships wherever they may be. The territorial application of regulations 2, 4 and 5 is England and Wales only.

5. European Convention on Human Rights

- 5.1 Nusrat Ghani, Parliamentary Under Secretary of State for Transport, has made the following statement regarding Human Rights:
- 5.2 “In my view the provisions of the Merchant Shipping and Other Transport (Environmental Protection) (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 These Regulations are made in exercise of powers in section 8 of the European Union (Withdrawal) Act 2018.
- 6.2 The European Union (Withdrawal) Act 2018 makes provision for repealing the European Communities Act 1972 and will preserve EU law as it stands at the moment of withdrawal, converting this into UK law. It enables the creation of a new body of domestic legislation by converting the text of directly applicable EU legislation into domestic instruments, as well as saving EU-derived domestic legislation which were made to implement the UK’s obligations as an EU Member State.
- 6.3 The European Union (Withdrawal) Act 2018 also contains powers to make secondary legislation to enable Ministers and the devolved administrations to fix deficiencies in retained EU law, to ensure that the UK’s legal system continues to function properly outside of the EU. The European Union (Withdrawal) Act 2018 does not preserve EU directives. Changes made under section 8 of that Act are therefore made to relevant legislation which implements an EU directive in the UK.
- 6.4 This instrument corrects a number of legal deficiencies in transport legislation relating to environmental protection. Those deficiencies are found both in EU-derived domestic legislation and in direct EU legislation which will become retained EU law upon EU Exit. It makes only those changes necessary to preserve the legal status quo.
- 6.5 This instrument also relies on powers under section 2(2) of the European Communities Act 1972 in order to update references to Council Directive 1999/32/EC, which was repealed and replaced on 21st May 2016 by consolidated Directive (EU) 2016/802 (O.J. No. L 132, 21.05.2016, p. 58) and an out of date reference to the Agreement on the European Economic Area. These provisions are contained in Part 2 of the instrument.

7. Policy background

What is being done and why?

- 7.1 This instrument is designed to ensure that the existing regulatory framework for transport environmental protection remains operable in UK law when the UK withdraws from the European Union. It does this by amendment to primary legislation, existing statutory instruments and retained EU Regulations and Decisions.
- 7.2 Regulations 2, 4 and 5 amend the following existing transport legislation relating to environmental impact assessments:
- Part 1 of the Transport and Works Act 1992; and
 - The Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 (S.I. 2006/1466).
- 7.3 These amendments ensure that the UK continues to take a coordinated and streamlined approach to environmental impact assessments where an assessment is required under more than one aspect of EU law. For example, where the obligation arises under both transport legislation and protection of habitats legislation, information can be used for both assessments rather than having to be collected twice. The amendments also ensure that where a UK project is likely to have significant environmental effects on an EU Member State, the Secretary of State will continue to consult that country before deciding whether to grant permission for that project.
- 7.4 In relation to maritime environmental provisions, this draft instrument amends the following legislation in relation to the sulphur content of marine fuels:
- The Merchant Shipping (Prevention of Air Pollution from Ships) Regulations 2008 (S.I. 2008/2924) (“the 2008 Regulations”); and
 - Commission Implementing Decision (EU) 2015/253 of 16th February 2015 laying down the rules concerning the sampling and reporting under Council Directive 1999/32/EC as regards the sulphur content of marine fuels (O.J. No. L 41, 17.02.2015, p. 55) (“the 2015 Sulphur Decision”).
- 7.5 In relation to anti-fouling systems, the draft instrument amends the following legislation:
- The Merchant Shipping (Anti-Fouling Systems) Regulations 2009 (S.I. 2009/2796) (“the 2009 Regulations”);
 - Regulation (EC) 782/2003 of the European Parliament and of the Council of 14th April 2003 on the prohibition of organotin compounds on ships (O.J. No. L 115, 09.05.2003, p. 1) (“the 2003 AFS Regulation”); and
 - Commission Regulation (EC) 536/2008 of 13th June 2008 giving effect to Article 6(3) and Article 7 of the Regulation (EC) No 782/2003 of the European Parliament and of the Council on the prohibition of organotin compounds on ships (O.J. No. L 156, 14.06.2008, p. 10) (“the 2008 AFS Regulation”).
- 7.6 This instrument makes amendments necessary to ensure that the existing regulatory framework for maritime environmental protection is retained, and operates effectively, following the UK’s exit from the European Union. In addition to ensuring that the same regulatory requirements continue to apply to UK-registered ships, the

amendments also ensure that UK regulators are able to enforce these standards against foreign vessels in UK waters, including EU vessels. The amendments:

- replace references to Member States with the Secretary of State or the United Kingdom in order to ensure that regulatory requirements continue to apply within the UK when it is no longer a Member State;
- insert, omit or amend definitions to ensure compatibility or consistency with other legislation;
- omit or amend wording to reflect that the United Kingdom will no longer be in the European Union or the European Economic Area;
- ensure that the UK continues to recognise emissions abatement methods approved by EU Member States;
- ensure that specified marine diesel engines in recreational or pleasure craft will continue to benefit from an exemption from certain regulatory requirements;
- remove what will become redundant requirements on the UK to make reports to the Commission;
- remove what will become redundant references to EU databases (SafeSeaNet) which we will no longer have access to, whilst ensuring that their role is replicated domestically; and
- transfer to the Secretary of State, Commission powers to amend references to provisions of international law governing the use of anti-fouling systems.

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.

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. These provisions, contained in Part 2 of the instrument, update references to Council Directive 1999/32/EC, which was repealed and replaced on 21st May 2016 by Directive (EU) 2016/802 (O.J. No. L 132, 21.05.2016, p. 58) and an out of date reference to the Agreement on the European Economic Area.

9. Consolidation

9.1 There are currently no plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

10.1 No formal consultation has been carried out, as the instrument maintains the regulatory status quo and ensures that those to whom the amended instruments apply are able to continue to carry on activities within the same regime once the UK withdraws from the European Union.

- 10.2 Regulations 2, 4 and 5, which amend the Transport and Works Act 1992 and the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006, operate in areas which are devolved to Wales (rail transport, canals and inland waterways and planning). The Welsh Government has been consulted and is content for this instrument to be made.

11. Guidance

- 11.1 The Department for Transport is not producing any specific guidance on the amendments provide for in this instrument as there are no new requirements for industry which require explanation.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies in respect of the changes made by these Regulations are limited to minor familiarisation costs.
- 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 there is no, or no significant impact, as the instrument relates to the maintenance of existing regulatory standards.

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. The basis for the final decision on what action to take to assist small businesses is that the impact on business, charities or voluntary bodies in respect of the changes made by these Regulations are limited to minor familiarisation costs as this instrument maintains the current regulatory position.

14. Monitoring & review

- 14.1 To the extent that this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.
- 14.2 Regulation 2, which is made under section 2(2) of the European Communities Act 1972, amends primary legislation and as such section 28 of the Small Business Enterprise and Employment Act 2015 is not engaged.
- 14.3 Regulation 3, which is made under section 2(2) of the European Communities Act 1972, amends an instrument which contains its own review provision and so in accordance with paragraph 14(c) of the ‘Statutory Guidance under s.31 of the Small Business, Enterprise and Employment Act’ no additional review provision is included in these Regulations. The amendments introduced by regulation 3 will be reviewed as part of the review of the instrument which it amends.

15. Contact

- 15.1 Ian Timpson at the Department for Transport (telephone: 020 7944 4446 or email: Ian.Timpson@dft.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Tom Newman-Taylor at the Department for Transport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Nusrat Ghani, Parliamentary Under Secretary of State at the Department for Transport, can confirm that this Explanatory Memorandum meets the required standard.

Annex 1

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/ESIC
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	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 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. Sifting statement(s)

- 1.1 No sifting statement is required as this instrument is subject to approval by each House of Parliament, by virtue of paragraph 1 of Schedule 7 to the European Union (Withdrawal) Act 2018.

2. Appropriateness statement

- 2.1 The Parliamentary Under Secretary of State for Transport, Nusrat Ghani, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Merchant Shipping and Other Transport (Environmental Protection) (EU Exit) (Amendment) Regulations 2018 do no more than is appropriate.”

- 2.2 This is the case because it makes technical changes which do no more than necessary to ensure that transport-related environmental protection legislation is able to operate effectively following the United Kingdom’s withdrawal from the European Union.

3. Good reasons

- 3.1 The Parliamentary Under Secretary of State for Transport, Nusrat Ghani, 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 draft instrument, and I have concluded they are a reasonable course of action”.

- 3.2 These are that the provisions do no more than is necessary to correct legal deficiencies. Without these corrections, substantial parts of transport-related environmental protection legislation would be inoperable or inapplicable following the United Kingdom’s withdrawal from the European Union.

4. Equalities

- 4.1 The Parliamentary Under Secretary of State for Transport, Nusrat Ghani, has made the following statement:

“The draft 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.”

- 4.2 The Parliamentary Under Secretary of State for Transport, Nusrat Ghani, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, Nusrat Ghani, 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 section 2 of the main body of this explanatory memorandum.

6. Criminal offences

- 6.1 This draft instrument does not create any criminal offences.

7. Legislative sub-delegation

- 7.1 This draft instrument does not create any sub-delegated powers.

8. Urgency

- 8.1 This draft instrument is not being made urgently.