

EXPLANATORY MEMORANDUM TO

THE CONTROL OF MERCURY (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 96

1. Introduction

- 1.1 This explanatory memorandum has been prepared by 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 Regulation EU 2017/852 of the European Parliament and of the Council on mercury, and repealing Regulation (EC) No 1102/2008 to enable its continued operability as retained EU law under the European Union (Withdrawal) Act 2018, following the UK's withdrawal from the European Union.
- 2.2 There are corrections to some provisions of the EU legislation relating to legislative functions which will be made in a subsequent statutory instrument.

Explanations

What did any relevant EU law do before exit day?

- 2.3 Regulation (EU) 2017/852 on Mercury repealed existing mercury legislation (1102/2008) and filled legislative gaps to enable the EU and its Member States to ratify the Minamata Convention on Mercury. The Regulation regulates the imports and exports of mercury between the EU and non-Member States, restricts the use of dental amalgam, sets requirements for the storage, disposal and reporting of mercury and mercury wastes, and restricts the creation of new mercury-added products or new manufacturing processes involving mercury.

Why is it being changed?

- 2.4 As retained EU law, the current Regulation would not be effective in UK law due to the deficiencies within the provisions of the Regulation, arising from the withdrawal of the United Kingdom from the European Union. The instrument makes minor and technical amendments to the existing legislation described above to ensure the legislation is operable after Exit. The changes include amending references to the EU, EU institutions and EU administrative processes to UK equivalents and updating legal references to refer to relevant UK legislation. Requirements to report to the Commission have also been amended to requirements on appropriate authorities to report to the Secretary of State or requirements to publish reports. Obligations on the Commission to report the results of assessments to the European Parliament have been deleted.

What will it now do?

- 2.5 Following the UK's withdrawal from the European Union the retained EU Regulation, as amended by this instrument, will continue to implement the UK's obligations as a

Party to the Minamata Convention and provide a regulatory framework for management of mercury across the UK.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Control of Mercury (Amendment) (EU Exit) Regulations 2019 were presented to the Sifting Committees for consideration on 8th November 2018. On 21st November the Sifting Committees agreed with the Government that this instrument does not have to have a debate in Parliament, though one may still occur. This instrument will therefore remain subject to the negative resolution 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 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 On 23rd June 2016, a referendum on the United Kingdom's membership of the EU took place which concluded in a vote to leave the EU. The UK Government's intention is that the UK will cease to be a member state of the EU on 29th March 2019.
- 6.2 To ensure that the UK has a working statute book on the day it leaves the EU the Withdrawal Act incorporates EU law as it stands, into domestic law. It also creates temporary powers to make secondary legislation to correct laws that would otherwise no longer work appropriately once the UK has left the EU.
- 6.3 This SI amends Regulation (EU) 2017/852 of the European Parliament and of the Council on mercury, and repealing Regulation (EC) No 1102/2008, and Commission Implementing Decision (EU) 2017/2287 specifying the forms to be used in relation to the import of mercury and of certain mixtures of mercury pursuant to Regulation (EU) 2017/852
- 6.4 Provisions within Articles 6, 7(3), 8(6), 13(2), 20 and 22 of Regulation (EU) 2017/852, which transfer legislative functions from the EU Commission to the appropriate UK authority, are included in a separate cross-cutting transfer of legislative functions SI relating to the environment.
- 6.5 The competent authorities, penalties and offences under Regulation (EU) 2017/852 are implemented through the UK-wide Control of Mercury (Enforcement) Regulations 2017/1200.

7. Policy background

What is being done and why?

- 7.1 Mercury is a naturally-occurring element that is found in air, water and soil. The release of mercury into the environment mainly stems from human activities such as, use of mercury-added products, coal-fired power generation, and the mining/processing of mercury, gold and other metals.
- 7.2 Emissions of mercury into the air can travel long distances across the globe. Once mercury enters the environment it can be naturally transformed into methylmercury, which accumulates in organisms and can biomagnify through food chains, often leading to human exposure through consumption of fish and shellfish.
- 7.3 Exposure to even small amounts of mercury or methyl-mercury may cause serious health problems, and is a particular threat to child development in utero and early life. As a result, mercury is considered by the World Health Organisation as one of the top ten chemicals (or groups of chemicals) of major public health concern.
- 7.4 The Minamata Convention (“the Convention”) on mercury, to which the UK is a Party, is a United Nations treaty that intends to protect human health and the environment from the adverse effects of exposure to mercury. The Convention aims to achieve this by taking global action to limit releases and emission of mercury across its lifecycle. This includes; restricting the supply and trade of elemental mercury; requiring the phasing out of mercury in a number of products and processes; prohibiting small-scale gold mining with mercury; and placing measures on the storage of mercury when used in industrial processes and its management once it becomes waste.
- 7.5 In order to enable the UK and other Member States to ratify the Convention, the EU and its Member States adopted Regulation (EU) 2017/852 on mercury, which came into effect on 1st January 2018. This Regulation repeals existing legislation on mercury and fills legislative gaps. Whilst it primarily implements the commitments in the Minamata Convention, the EU Regulation does go further in a number of areas, including restrictions of the use of dental amalgam and export of mercury.
- 7.6 The Control of Mercury (Amendment) (EU Exit) Regulations 2019 do not make any policy changes from Regulation (EU) 2017/852, ensuring that the current controls on mercury continue to be in place after the UK withdraws from the EU.
- 7.7 This instrument applies to the implementation of the regulatory regime relating to mercury which is a transferred matter for Northern Ireland under the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With exit day less than one year away, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

- 7.8 A number of corrections are not included in this instrument but will instead be contained within a separate cross-cutting transfer of legislative functions instrument relating to the environment. That instrument will have its own Explanatory Memorandum. The following matters will be addressed in that later instrument:
- a. Specifying forms to be used for the purpose of implementing Articles 3 (export restrictions) and 4 (import restrictions) (EU Regulation 2017/852, Article 6);
 - b. Setting out technical requirements for environmentally sound interim storage of mercury, mercury compounds and mixtures of mercury in line with decisions adopted by the Conference of the Parties to the Minamata Convention (EU Regulation 2017/852, Article 7(3));
 - c. Decisions specifying whether the relevant new mercury- added product or new manufacturing process is authorised (EU Regulation 2017/852, Article 8(6));
 - d. Extending the period allowed for temporary storage of mercury waste referred to in paragraph 1 by up to three years (EU Regulation 2017/852, Article 13(2));
 - e. Amending Annexes I, II, III and IV to align them with decisions adopted by the Conference of the Parties to the Convention in accordance with Article 27 of the Convention (EU Regulation 2017/852, Article 20); and
 - f. Providing provision for the Secretary of State and Ministers from the Devolved Administrations to make regulations by statutory instrument under this legislation (EU Regulation 2017/852, Article 22).

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 Consolidation is not required.

10. Consultation outcome

- 10.1 Government informally engaged stakeholders at six separate sessions on the proposed approaches. No substantive comments or issues were raised, with questions raised relating to clarification of how existing processes will function after the UK leaves.
- 10.2 The devolved administrations were closely consulted on the approach taken during the drafting of the SI and were given the opportunity to propose amendments to the text.

11. Guidance

- 11.1 The Government has published a Technical Notice to cover a no-deal scenario.
- 11.2 Attention will be drawn to the Technical notice via email communications to industry stakeholders and associations.

12. Impact

- 12.1 There is no, or no significant impact on business, charities or voluntary bodies as existing regulatory standards have not changed.
- 12.2 There is no, or no significant impact on the public sector as existing regulatory standards have not changed.
- 12.3 An Impact Assessment has not been prepared for this instrument because no, or no significant, impact on the private or voluntary sector is foreseen.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action was required to minimise the impact of the requirements on small businesses (employing up to 50 people).
- 13.3 The basis for the final decision on what action to take to assist small businesses was that this SI retains current EU legislation, primarily maintaining existing regulatory standards. No mitigating actions for small businesses were deemed necessary for The Control of Mercury (Enforcement) Regulations 2017/1200.
- 13.4 Some businesses may wish to market new mercury-added products in both the UK and the EU. In this case they would need to apply for approval in the UK and in the EU. The UK market for mercury is small and decreasing in size. There is limited use of mercury, mercury compounds, and mercury-added products in the UK. Therefore, only a small number of businesses may be affected and they would incur a small one-off cost.
- 13.5 A change in the UK's customs relations with the EU will affect businesses importing and exporting mercury, mercury compounds and mercury-added products listed under the Regulation to and from the EU. Data indicates, however, that only a small number of imports per year would be affected by the new restrictions under the EU Regulation, and this has been supported in responses to a previous public consultation on the government approach in 2017.

14. Monitoring & review

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

15. Contact

- 15.1 Patrick McKell at the Department of Environment, Food and Rural Affairs, Telephone: 02080 263836 or email: Patrick.McKell@defra.gsi.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Gabrielle Edwards, Deputy Director for Chemicals and Pesticides - EU Exit policy and implementation at the Department of Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Parliamentary Under Secretary of State for the Environment, Dr Thérèse Coffey MP at the Department of Environment, Food and Rural Affairs 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. Sifting statement(s)

- 1.1 The Parliamentary Under Secretary of State for the Environment Food and Rural Affairs, Thérèse Coffey, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view The Control of Mercury (Amendment) (EU Exit) Regulations 2019 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”.

- 1.2 This is the case because this instrument does not fall into the category of regulations identified in schedule 7 Part 1 paragraph 1(2) as requiring approval in draft by resolution of both Houses of Parliament. This instrument makes minor and technical amendments to the existing legislation described above to ensure retained EU law and preserved UK law is operable after Exit. No substantive policy changes are brought in by this instrument.

2. Appropriateness statement

- 2.1 The Parliamentary Under Secretary of State for the Environment Food and Rural Affairs, Thérèse Coffey, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view The Control of Mercury (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate”.

- 2.2 This is the case because: this instrument corrects deficiencies within the retained EU legislation as necessary to ensure the continued protection from the use and movement of mercury in the UK after we leave the EU and that the UK continues to meet its international obligations under the Minamata Convention.

3. Good reasons

- 3.1 The Parliamentary Under Secretary of State for the Environment Food and Rural Affairs, Thérèse Coffey, 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”.

- 3.2 These are: this instrument, in line with section 8(1) of the European Union (Withdrawal) Act 2018, corrects deficiencies as necessary to ensure retained EU legislation and the protections for mercury and mercury compounds to operate efficiently after we leave the EU.

4. Equalities

- 4.1 The Parliamentary Under Secretary of State for the Environment Food and Rural Affairs, Thérèse Coffey 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.”

- 4.2 The Parliamentary Under Secretary of State for the Environment Food and Rural Affairs, Therese Coffey, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018: “In relation to the instrument, I, Therese Coffey 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.”
- 4.3 The amendments made by the instrument do not raise any issues relevant to the public sector equality duty under section 149(1) Equality Act 2010 because they are minor and technical and do not alter the operation of the underlying schemes or impose any new liabilities or obligations on any relevant persons.

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 No criminal offences are created by the instrument.

7. Legislative sub-delegation

- 7.1 No sub-delegated powers are created by the instrument.

8. Urgency

- 8.1 We are not invoking the need for urgency to avoid a draft affirmative procedure as the instrument is suitable for a negative procedure.