

EXPLANATORY MEMORANDUM TO

THE WASTE AND ENVIRONMENTAL PERMITTING ETC. (LEGISLATIVE FUNCTIONS AND AMENDMENT ETC.) (EU EXIT) REGULATIONS 2020

2020 No. [XXXX]

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.
- 1.2 This Explanatory Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument amends a number of existing EU Exit SIs to ensure that the legislation amended by those instruments will continue to operate effectively at the end of the Transition Period and makes EU Exit related amendments to, or revokes, some recent EU legislation which will become retained direct EU law. It also makes amendments to primary and subordinate domestic legislation for similar purposes. It also includes some technical amendments to EU Exit SIs that are needed in consequence of the Protocol on Ireland / Northern Ireland to the Withdrawal Agreement (“the Protocol”). This instrument also transfers some functions from the European Commission to the Secretary of State and the Devolved Administrations.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The European Commission has powers under Article 7(1) of Directive 2008/98/EC of the European Parliament and the Council of 19 November 2008 on waste (Waste Framework Directive) to adopt delegated acts establishing and reviewing a list of waste. Commission Decision 2000/532/EC establishing a list of waste was adopted under the predecessor of this power. The list of waste classifies types of waste for the purposes of waste management, and indicates which categories of waste are normally to be treated as hazardous waste..
- 2.3 Commission Implementing Decision (EU) 2020/248 lays down technical guidelines for inspections of mining waste facilities.
- 2.4 The provisions of S.I. 2019/620 which are amended by regulation 14 of this instrument include provisions amending 14 EU Regulations and Decisions on waste, details of which are included in the Explanatory Memorandum to S.I. 2019/620.
- 2.5 The retained direct EU legislation revoked by the Schedule to this instrument includes legislation relating to landfill of waste, food waste, packaging waste and waste electrical and electronic equipment, and legislation relating to the EU Ecolabel and eco-management and audit schemes.

Why is it being changed?

- 2.6 The changes made by this instrument will ensure that waste regulation and environmental permitting can continue to be effectively managed after the end of the EU Exit transition period. The legislative power conferred on the Commission by Article 7(1) of the Waste Framework Directive is being transferred into domestic law in order to enable the list of waste to be amended without having to use primary legislation. This will provide flexibility to update the list from time to time, for example to respond to scientific and technical changes. The existing EU Exit SIs amended by this instrument are being changed principally in consequence of recent amendments to EU and domestic legislation on waste. Some amendments are also necessary in consequence of the Protocol.

What will it now do?

- 2.7 This instrument will ensure that existing domestic and retained EU legislation will still be fit for purpose. For example, it updates references in domestic EU Exit legislation so that they refer to waste and resources Directives and domestic Regulations as amended by the EU Circular Economy Package. It also makes EU Exit related amendments to, or revokes, recent EU legislation which will become retained direct EU law. The European Commission's powers related to Article 7(1) of the Waste Framework Directive will now be exercised by the Secretary of State and Devolved Administrations as appropriate. Section 7 of this Explanatory Memorandum further explains what this instrument does.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments.

- 3.1 The Committee's 52nd Report of Session 2017-19 reported regulation 10(3) of the Waste (Miscellaneous Amendments) (EU Exit) (No. 2) Regulations 2019 (S.I. 2019/188) for defective drafting, on the ground that the modification of Article 6 of Directive 2000/53/EC by new regulation 2A of the End-of-Life Vehicles (Producer Responsibility) Regulations 2005 (S.I. 2005/263) ("the ELV Regulations"), as inserted by regulation 10(3), left uncertain the extent to which Article 6 was intended to apply after EU Exit. The amendments made to regulation 10 of S.I. 2019/188 by regulation 11(4) of this instrument include amendments to address this issue. The amendments made to the ELV Regulations by regulation 10 are changed so that the ELV Regulations will no longer refer to Article 6, or to any other provision of the Directive which cross-refers to it. In consequence, the modifications of Article 6 which were inserted by regulation 10(3) of S.I. 2019/188 are no longer required, and are omitted by regulation 11(4)(a)(iii) of this instrument.
- 3.2 The other errors in S.I. 2019/188 which the Committee reported have already been corrected by the Environment and Rural Affairs (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/1078).

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)

- 3.3 The territorial application of this instrument includes Scotland and Northern Ireland.

3.4 The powers under which this instrument is made cover the entire United Kingdom (see section 24(1) of the European Union (Withdrawal) Act 2018) and the territorial application of this instrument is not limited either by the Act or by this instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom, subject to paragraphs 4.3 and 4.4.

4.2 The territorial application of this instrument is the United Kingdom, subject to paragraphs 4.3 and 4.4.

4.3 Amendments made to domestic Regulations by Parts 3 and 4 of this instrument have the same extent and application as the Regulations being amended.

4.4 The revocations of retained direct EU legislation by paragraphs 7, 9, 10 and 11 of the Schedule extend and apply to England, Wales and Northern Ireland, but not Scotland.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State for the Environment Rebecca Pow MP has made the following statement regarding Human Rights:

“In my view the provisions of the Waste and Environmental Permitting etc. (Legislative Functions and Amendment etc.) (EU Exit) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

6.1 This instrument is principally made in exercise of powers conferred by Sections 8(1) and 8C of the European Union (Withdrawal) Act 2018.

6.2 This instrument makes amendments to the following existing Act and instruments:

- The Environmental Protection Act 1990 (c. 43)
- The Hazardous Waste (England and Wales) Regulations 2005 (S.I. 2005/894)
- The Marine Licensing (Exempted Activities) Order 2011 (S.I. 2011/409)
- The Environmental Permitting (England and Wales) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/39)
- The Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019 (S.I. 2019/620)
- The Waste (Miscellaneous Amendments) (EU Exit) (No. 2) Regulations 2019 (S.I. 2019/188)
- The Environment (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/458)
- The Environment (Miscellaneous Amendments and Revocations) (EU Exit) Regulations 2019 (S.I. 2019/559)
- The Environment and Rural Affairs (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/1078).

6.3 S.I. 2019/39, 188 and 620 contain amendments to domestic legislation which implements, and to retained direct EU legislation which is made under, 8 EU Directives relating to waste management (“the EU Waste Directives”), which are listed in the Explanatory Memorandum to S.I. 2019/188. The EU Waste Directives

have recently been amended by a series of amending Directives (Directives (EU) 2018/849 to 2018/853 of the European Parliament and of the Council), collectively known as the “Circular Economy Package”. The Waste (Circular Economy) (Amendment) Regulations 2020 (S.I. 2020/904) amended domestic waste legislation to implement the Circular Economy Package.

- 6.4 Three of the EU Waste Directives (Directive 94/62/EC on packaging and packaging waste, Directive 2006/66/EC on batteries and accumulators, and Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment) are listed in Annex 2 to the Protocol, and will therefore continue to apply in relation to Northern Ireland after the end of the EU Exit transition period.

7. Policy background

What is being done and why?

- 7.1 This instrument makes technical amendments, which can be grouped as follows:
- Transferring some of the European Commission’s functions in relation to Article 7(1) of the Waste Framework Directive, which allows the European Commission to establish and review, in accordance with Article 7(2) and (3) of that Directive, a list of waste. This power has been exercised by the Commission to make Decision 2000/532/EC, which sets out the list of waste types and their codes (“EU waste codes”), and identifies which categories of waste are normally to be treated as hazardous waste. For England this power is being transferred to the Secretary of State and to the appropriate devolved Ministers in Wales and Scotland. For Northern Ireland this power will go to Department of Agriculture, Environment and Rural Affairs (DAERA). This instrument will allow the Secretary of State and the Devolved Administrations to establish their own lists of waste or amend the existing list of waste (Decision 2000/532/EC) as it will have effect as retained direct EU legislation on and after the end of the EU Exit transition period. The consent of the relevant Devolved Administrations will be required for the Secretary of State to make amendments to the list of waste on their behalf. Any amendments to the list of waste would be subject to public consultation.
 - Amending cross-references which existing EU Exit SIs insert into legislation, where the cross-references have become out of date due to recent legislative changes.
 - Amending provisions of existing EU Exit SIs which amend legislation to provide for EU Directives to be read with modifications, for the purpose of interpreting references to those Directives in that legislation. In most cases this is being done because the modifications as originally drafted no longer work because the Directives have been amended by the Circular Economy Package. The opportunity has also been taken, in a few places, to simplify provisions of this kind in existing EU Exit SIs.
 - Making EU Exit related amendments to, or revoking, recent EU legislation which will become retained direct EU law. This relates to EU legislation which has been adopted by the EU since the existing EU Exit SIs were made.
 - Amending references to ‘exit day’ in existing EU Exit SIs, to refer instead to IP completion day.

- Making some amendments that are needed in consequence of the Protocol, to provisions of existing EU Exit SIs that amend legislation relating to batteries and accumulators, and packaging. For example: EU Exit SIs have inserted definitions of terms such as “appropriate authority” into UK-wide legislation, which include a Northern Ireland authority. For the Protocol Annex legislation, the amendments made by EU Exit SIs will no longer apply to Northern Ireland, so the Northern Ireland specific references need to be removed.
- The Schedule lists retained direct EU legislation relating to resources and waste which is being revoked.

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. It also makes provision to implement the Protocol in the EU Withdrawal Agreement.
- 8.2 This instrument is also made under paragraph 21 of Schedule 7 to the European Union (Withdrawal) Act 2018. In accordance with the requirements of that Act the Parliamentary Under Secretary of State for the Environment Rebecca Pow MP, has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 Not considered necessary.

10. Consultation outcome

- 10.1 A consultation was not required because no policy changes are being made via this instrument.
- 10.2 The Department for Environment, Food and Rural Affairs has worked with the Devolved Administrations in developing this instrument.

11. Guidance

- 11.1 There is no associated guidance as this instrument only amends deficiencies arising from the UK’s withdrawal from the EU.

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 because this instrument only amends deficiencies arising from the UK’s withdrawal from the EU, along with associated repatriation of powers to the UK.

13. Regulating small business

- 13.1 This instrument applies to activities that are undertaken by small businesses.

13.2 The effect of this instrument is to maintain the status quo, therefore no specific action was required to minimise the impact of the requirements on small businesses.

14. Monitoring & review

14.1 The approach to monitoring of this instrument is that no specific monitoring arrangements are needed.

14.2 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. Contact

15.1 Dawn Woodward at the Department for Environment, Food and Rural Affairs, Telephone: 02080 255306 or email: Dawn.Woodward@defra.gov.uk can be contacted with any queries regarding this instrument.

15.2 Chris Preston, Deputy Director for Resources and Waste Policy, at the Department for 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 Rebecca Pow MP at the Department for 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. Appropriateness statement

- 1.1 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Waste and Environmental Permitting etc. (Legislative Functions and Amendment etc.) EU Exit) Regulations 2020 does no more than is appropriate”.

- 1.2 This is the case because it does no more than: ensure that existing domestic EU legislation is still fit for purpose, update references in domestic EU Exit legislation and transfers a European Commission power related to Article 7(1) of the Waste Framework Directive to appropriate UK authorities, as explained further in Section 7 of this Explanatory Memorandum.

2. Good reasons

- 2.1 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow 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: this instrument corrects deficiencies in the waste regulatory regime to ensure that it can continue to operate from the end of the EU Exit transition period.

3. Equalities

- 3.1 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow MP, 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.

- 3.2 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, Rebecca Pow 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.