

EXPLANATORY MEMORANDUM TO
THE PERSISTENT ORGANIC POLLUTANTS (AMENDMENT) (EU EXIT)
REGULATIONS 2019

2019 No. 1340

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 Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument makes the necessary corrections to ensure that Regulation (EU) 2019/1021 of the European Parliament and of the Council on Persistent Organic Pollutants (“POPs”) functions once we leave the EU. This includes transferring legislative and administrative functions that are currently conferred by EU legislation upon the European Commission (“the Commission”) and the European Chemicals Agency (“ECHA”), to be exercisable instead by public authorities in the UK, so that they can be exercised at national level after the UK leaves the EU. This instrument also revokes the following regulations:
 - Part 4 of the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2018 (S.I. 2018/1405) which made corrections to the, now repealed;
 - Regulation (EC) No 850/2004 on POPs; and
 - Regulation 2 of the Environment and Wildlife (Legislative Functions) (EU Exit) Regulation 2019 (S.I. 2019/473) which transferred legislative functions contained in Regulation (EC) No 850/2004 on POPs.
- 2.2 This instrument also makes consequential amendments to the Chemicals (Health and Safety) and Genetically Modified Organisms (Contained Use) (Amendment etc.) (EU Exit) Regulations 2019.

Explanations

What did any relevant EU law do before Exit Day?

- 2.3 Directly applicable Regulation (EU) 2019/1021 enabled the EU and its Member States to implement the Stockholm Convention on Persistent Organic Pollutants and the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants.
- 2.4 The Stockholm Convention came into effect in 2004 and aims to eliminate or restrict the production and use of these persistent organic pollutants. It regulates the production, placing on the market, and use of persistent organic pollutants, which are banned or restricted under the Stockholm Convention with exemptions and limits for the quantity of the substance allowed in new articles. It also sets out requirements to take appropriate measures to destroy persistent organic pollutant waste and requirements to monitor and report on listed substance elimination, stockpiles and

management. The UK is a Party to the Stockholm Convention in its own right and will continue to be bound by its international obligations under the Convention following the UK's withdrawal from the EU.

Why is it being changed?

- 2.5 As retained EU law, the current regulation would not be effective in UK law due to the deficiencies arising from the withdrawal of the UK from the EU. This instrument makes minor and technical amendments to the existing legislation described above to ensure the legislation is operable after EU Exit. The changes include amending references to the EU, EU institutions and EU administrative processes to UK equivalents, updating legal references to refer to relevant UK legislation and placing an obligation on the Secretary of State to publish reports previously sent to the Commission.
- 2.6 This instrument also transfers legislative and administrative functions that are currently conferred by EU legislation upon the Commission and the ECHA, to be exercisable instead by public authorities in the UK, so that they can be exercised at national level after the UK leaves the EU.
- 2.7 This instrument also creates a power which will allow the UK to put in place the necessary measures to ensure the control and traceability of waste contaminated by relevant pollutants, as required by the existing EU regulation. The measures to be put in place must accord with Article 17 of Directive 2008/98/EC of the European Parliament and of the Council.

What will it now do?

- 2.8 Following the UK's withdrawal from the EU, the amendments to Regulation (EU) 2019/1021 will enable the UK to implement the Stockholm Convention by regulating the production, placing on the market, and use of POPs. The amendments will also enable the UK authorities to regulate stockpiles and manage waste where POPs are present, and set out monitoring and reporting requirements. Furthermore, the amendments will create a power which will enable UK to put in place the necessary measures to ensure the control and traceability of waste contaminated by relevant pollutants.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is being made urgently using the made affirmative procedure provided for in the European Union (Withdrawal) Act 2018 (the 'Withdrawal Act'). This is necessary to ensure this instrument is in force on Exit Day. A Ministerial statement concerning the need for urgency is included in Part 2 of the annex to this Explanatory Memorandum.

Regulation-making power created by virtue of regulation 10(4)

- 3.2 Regulation 10(4) substitutes paragraph (6) of Article 7 of Regulation (EU) 2019/1021 with new paragraphs numbered (7) to (15). These new paragraphs:
- restate the duty imposed on Member States in existing paragraph (6) to take measures to ensure the control and traceability of waste contaminated by POPs (see the words before the semi-colon in new paragraph (7)); and

- create a new power to make regulations to implement that duty (see the words after the semi-colon in new paragraph (7) and also new paragraphs (8) to (15)).
- 3.3 This new power includes power to create criminal offences (see new paragraph (11)).
- 3.4 This new power is subject to the following limitations:
- regulations may not create offences for which individuals are capable of being sentenced to imprisonment for a term of more than 2 years (see new paragraph (13));
 - no regulations may be made under the power on or after 31st October 2022 (see new paragraph (14)); and
 - regulations which create offences are subject to the affirmative resolution procedure (see new Article 18(5) and (10)).
- 3.5 This new power is somewhat unusual in that it does not correspond to a power of the Commission to make legislation in Regulation (EU) 2019/1021; it therefore is not the result of a “transfer” of an existing Commission legislative function to a UK authority.
- 3.6 Defra considers the creation of this power to be appropriate for the following reasons:
- Article 7(6) of Regulation (EU) 2019/1021 requires Member States to take measures to ensure the control and traceability of waste contaminated by POPs in accordance with Article 17 of Directive 2008/98. Article 17 of Directive 2008/98 in turn refers to the requirements contained in Articles 13, 35 and 36 of that Directive. This is the current obligation under EU law and those provisions of Directive 2008/98 are reflected in new paragraphs (8), (9), (10) and (15) of Article 7 which set out the scope of the new power to make regulations.
 - Measures relating to the control of waste contaminated by POPs are complex and will require consultation. Defra does not consider it is in any position to implement them under section 2(2) of the European Communities Act 1972 before Exit Day.
 - Section 2(2) will be repealed on Exit Day by section 1 of the Withdrawal Act. In light of this, the department considers it is appropriate to create the new power, subject to the scope and limitations described above, in order that it will be able to meet the duty to take measures to ensure the control and traceability of waste contaminated by POPs, which will continue to exist in UK law on and after Exit Day.

Regulation-making power created by virtue of regulation 19

- 3.7 Regulation 19 substitutes Article 18 of Regulation (EU) 2019/1021 with a new Article 18 which contains new provisions about regulations which may be made under the Regulation. New Article 18(1) contains a power to make consequential, incidental, supplementary, transitional or saving provision (including provision amending, repealing or revoking primary legislation). Where regulations made under new Article 18(1) amend primary legislation, they are subject to the affirmative resolution procedure (see new Article 18(5)).

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)

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

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

4. Extent and Territorial Application

4.1 The 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 Minister Rebecca Pow has made the following statement regarding Human Rights:

“In my view the provisions of the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

6.1 On 23rd June 2016, a referendum on the UK’s membership of the EU took place which concluded in a vote to leave the EU. The Government’s intention is that the UK will cease to be a Member State of the EU on 31st October 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 had left the EU.

6.3 On 21st December 2018, the Persistent Organic Pollutants (Amendment) (EU Exit) 2018 Regulations were laid in Parliament. That instrument made corrections to Regulation (EC) No 850/2004 on POPs to ensure that it remained operable after the UK leaves the EU.

6.4 On 15th July 2019 that EU Regulation was revoked and replaced with Regulation (EU) 2019/1021 of the European Parliament and of the Council on persistent organic pollutants.

6.5 This instrument amends Regulation (EU) 2019/1021 in order to ensure that it remains operable after the UK leaves the EU.

6.6 This instrument also transfers legislative and administrative functions that are currently conferred by EU legislation upon the Commission and the ECHA, to be exercisable instead by public authorities in the UK, so that they can be exercised at national level after the UK leaves the EU. It also requires the UK to put in place necessary measures to ensure control and traceability of waste contaminated with POPs listed in Annex 4 to the regulation, within the scope of Article 17 of Directive 2008/98/EC, which is set out in this regulation.

6.7 This instrument also revokes part 4 of the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2018 (S.I. 2018/1405) which made corrections to the, now repealed, Regulation (EC) No 850/2004 on POPs; and regulation 2 of the Environment and Wildlife (Legislative Functions) (EU Exit) Regulation 2019 (S.I. 2019/473) which transferred legislative functions contained in Regulation (EC) No 850/2004 on POPs.

6.8 Minor amendments have been made to the Chemicals (Health and Safety) and Genetically Modified Organisms (Contained Use) (Amendment etc.) (EU Exit)

Regulations 2019. Those amendments correct various out of date references to Regulation (EC) No 850/2004 in those regulations. The 2004 Regulation was revoked and replaced by Regulation 2019/1021 of the European Parliament and of the Council on persistent organic pollutants.

7. Policy background

What is being done and why?

7.1 Persistent Organic Pollutant (“POPs”) are substances identified as toxic, persistent bioaccumulative and subject to long range transportation. The intention is to have a UK regulation which, on EU Exit, sets out the same restrictions as the EU Regulation on production, placing on the market, and use of POPs and also sets out the same exemptions to those restrictions. It will also prohibit the import of intentionally produced POPs. It will set limits for the concentration of POPs in products and for the destruction of POPs in waste products. It will require that stockpiles and wastes be identified and managed to reduce or eliminate POPs releases from these sources. Parties to the Stockholm Convention are also required to report on their management of POPs and this is also set out in the regulation. The changes covered by this instrument include:

- (a) amending references to the EU and EU institutions and administrative processes to UK equivalents;
- (b) updating legal references to refer to relevant UK legislation; and
- (c) retaining the requirements for the governments of the United Kingdom to monitor and report.

7.2 Furthermore, Regulation (EU) 2019/1021 grants the Commission powers, for the purpose of adapting to scientific and technical progress, to amend POPs waste concentration limits in the Annexes to the Regulation; and to amend Annexes to the Regulation to ban/restrict/modify the use of POPs in accordance with international agreements. This instrument transfers these functions to the Secretary of State, the Welsh Ministers, the Scottish Ministers and, in Northern Ireland, the Department of Agriculture, Environment and Rural Affairs (“DAERA”) to exercise in their respective areas. The Secretary of State may exercise the functions on behalf of a Devolved Administration with its consent.

7.3 In addition, Regulation (EU) 2019/1021 requires the UK to take the necessary measures to trace and control POPs specified in Annex 4 to the Regulation, once they become waste. Additional powers have been included in this instrument to allow the UK to develop waste tracking and control measures to facilitate the identification of POPs waste, the tracking of movements of that waste, confirmation of appropriate disposal and the creation of criminal sanctions in addition to those already in place. The measures to be taken have not been developed yet and any legislative changes will be subject to the affirmative resolution procedure no later than the 31st October 2022.

8. European Union (Withdrawal) Act 2018/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.

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 Defra does not intend to consolidate the relevant legislation at this time.

10. Consultation outcome

10.1 As there is no policy change, no public consultation was required. The purpose of this instrument is solely to enable the current legislative and policy framework to remain unchanged by the withdrawal of the UK from the EU.

10.2 Devolved Administrations were consulted on earlier drafts and given the opportunity to propose amendments to the text.

10.3 Selected stakeholders, representing industry and non-government associations were also consulted at stakeholder meetings in June and July 2018.

11. Guidance

11.1 The Government has published a Technical Notice to cover a no-deal scenario.

11.2 Attention has been 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 businesses

13.1 The legislation applies to activities that are undertaken by small businesses. No significant impacts on small businesses is foreseen as a result of this instrument.

14. Monitoring & review

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

15. Contact

15.1 Alison Elliott at the Department for Environment, Food and Rural Affairs, telephone: 02080266547 or email: Alison.elliott@defra.gov.uk can be contacted with any queries regarding this instrument.

15.2 Holly Yates, Deputy Director for Chemicals, Pesticides and Hazardous Waste, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 Rebecca Pow MP, Parliamentary Under Secretary of State 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 procedure SI.	Explain why the SI 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 SI 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 Equality 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 2018 SIs.	Explain the SI, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the SI, 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 SI.	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 s. 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 1972.	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA 1972, identifying the relevant law before exit day, and explaining the SI’s effect on retained EU law.
Scrutiny statement where amending regulations under s. 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 1972.	Statement setting out: a) the steps which the relevant authority has taken to make the draft SIs 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 SI, and c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the SI or draft SIs 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 Rebecca Pow, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Persistent Organic Pollutant (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate”.

- 1.2 This is the case because: this instrument corrects deficiencies as necessary to ensure that we can continue to control substances considered persistent organic pollutants in the UK after we leave the EU.

2. Good reasons

- 2.1 Rebecca Pow, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs, 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 This instrument corrects deficiencies as necessary to ensure that we can continue to control substances considered persistent organic pollutants in the UK after we leave the EU.

3. Equalities

- 3.1 Rebecca Pow, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs, has made the following statement(s):

“This 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 Rebecca Pow, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to this instrument, I, Rebecca Pow, 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. Criminal offences

5.1 No criminal offences are created by this instrument.

6. Urgency

6.1 Rebecca Pow, Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs, has made the following statement(s):

“In my view by reason of urgency, it is necessary to make The Persistent Organic Pollutants (Amendment) (EU Exit) Regulation 2019 without a draft of this instrument containing the regulations being laid before, and approved by a resolution of, each House of Parliament.”

6.2 This is because: if this instrument is not in force on exit day, the UK will not have an operable persistent organic pollutants regulation and will, therefore, be in breach of its obligations under the Stockholm Convention. Furthermore, during any period of inoperability, the harmful chemicals currently restricted under the POPs regulation would not be regulated; this would pose a significant risk to the environment and human health.

6.3 The Government considers it important to urgently have this instrument in place so as to provide confidence and certainty to the public and business and to ensure the effective functioning of the statute book after EU Exit. Using the made affirmative procedure still allows for parliamentary scrutiny and Parliament will be required to approve its making for this instrument to remain in force.