

EXPLANATORY MEMORANDUM TO

THE REACH ETC. (AMENDMENT ETC.) (EU EXIT) (NO. 2) REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Environment Food and Rural Affairs (“DEFRA”) and is laid before Parliament by Act.
- 1.2 This memorandum contains information of special interest for the Joint Committee on Statutory Instruments and the Sifting Committees.

2. Purpose of the instrument

- 2.1 This instrument amends the REACH etc. (Amendment etc.) (EU Exit) Regulations 2019 (the “REACH SI”). It adds to one of the transitional provisions relating to imported substances.

Explanations

What did any relevant EU law do before exit day?

- 2.2 Controls on the use of chemicals are set out in Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals and establishing a European Chemicals Agency (“the EU REACH Regulation”). The REACH SI makes amendments to the EU REACH Regulation to make it operable in the domestic context and create a domestic regime for chemicals. The REACH SI contains a number of transitional provisions to allow for uninterrupted production and supply of chemicals, including one to allow the continued import of substances from the European Economic Area (“the EEA”) (“the transitional import provision”). That provision allows the importer of the substance two years from exit before they have to register the substance with the UK Agency. In the meantime the importer must provide the UK Agency with a notification within 180 days of exit.

Why is it being changed?

- 2.3 After the REACH SI was laid, the Department received representations from industry about the transitional import provision. Industry was concerned that, as drafted, it would still lead to disruption in the supply chain in the case of substances imported from outside the EEA. Industry was also concerned that the provision did not allow an only representative to send the required notification to the UK Agency. Only representatives are UK-based entities appointed by non-UK manufacturers, formulators or producers to fulfil the obligations of importers under the REACH Regulation. The EU REACH Regulation contains an equivalent provision regarding EEA-based only representatives. While industry has not provided detailed evidence of the impact, the Government has decided to reduce the risk through this instrument.

What will it now do?

- 2.4 This instrument adds to the transitional import provision. The revised version will also apply to imports to the UK from outside of the EEA where an EEA-based only

representative had registered the substance under the EU REACH Regulation prior to exit. It also inserts a new provision that allows UK-based only representatives to provide the notification to the UK Agency.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments for Parliament and the Sifting Committees

- 3.1 This instrument needs to come into force before exit day to ensure that there is no risk to the continuity of supply of substances into the UK. If there is a gap between exit day and this instrument coming into force then substances that are not already registered within the UK cannot be legally imported from outside the EEA until they are registered. Consequently, the 21 day rule will be breached.
- 3.2 Defra takes the 21 day rule extremely seriously; however, it has received more evidence which we believe now justifies using the powers in the Act to make provision which takes effect from exit day.

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 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 The Parliamentary Under Secretary of State for the Environment Dr Thérèse Coffey has made the following statement regarding Human Rights:
“In my view the provisions of the REACH etc. (Amendment etc.) (Amendment) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument is being made using powers in the European Union (Withdrawal) Act 2018. It amends the REACH etc. (Amendment etc.) Regulations 2019, which fixed inoperabilities in the EU REACH Regulation, in order to avoid potential interruption in the supply of chemicals into the UK after exit day.

7. Policy background

What is being done and why?

- 7.1 Under the EU REACH Regulation, downstream users of chemical substances within the EEA do not have to register the substances they use. This includes UK companies who are currently sourcing substances from suppliers in the rest of the EEA. However, these UK companies will become importers into the UK market after EU Exit, which means they will have the duty to register the substances.

- 7.2 The REACH SI provides transitional support to these companies through an interim notification system for imports instead of requiring them to undertake a full registration immediately after EU Exit. The effect of this transitional import provision is that qualifying UK companies will be able to continue buying substances from the EEA without any interruption after EU Exit.
- 7.3 Under the notification system, those importing chemicals from the EEA will need to submit basic data on the company, substances and information on safe use within 180 days. The interim notification will need to be replaced with a full registration after two years.
- 7.4 The current instrument addresses two issues which were identified by industry after the REACH SI was laid before Parliament. The transitional import provision in the REACH SI covers imports from manufacturers or other producers in the EEA. It also covers the situation where a chemical is imported into the EEA under a registration held by an EEA-based only representative and then sold on into the UK. However, the provision in the REACH SI does not include the situation where a chemical was registered by an EEA-based only representative but is imported directly into the UK from outside the EEA. As a consequence, these importers would not benefit from the transitional provisions and would need to register under UK REACH before continuing to import the chemical.
- 7.5 The revised provision in the current instrument brings these importers within the scope of the transitional import provision. This fulfils the intention that all chemicals registered under EU REACH should be able to access the UK market after exit through the transitional provisions, either by being transferred directly into the UK REACH system in the case of UK-held registrations, or through the notification arrangements.
- 7.6 An EEA manufacturer, formulator or producer of articles can appoint a UK-based only representative to register a chemical on their behalf. Where they do so the UK importer is exempt from the duty to register that would otherwise lie with them. However, the REACH SI does not allow for a UK-based only representative to carry out the transitional notification for the same chemical.
- 7.7 The instrument reverses this so a UK-based only representative can complete the notification, in which case the importer will be exempt from this duty. This will reduce burdens on importers and avoid unnecessary duplication by importers and only representatives. An only representative will also have easier access to better information about the chemicals, especially in the case of chemical mixtures or chemicals in articles. This means that the regulator will receive better information, which will contribute to the intention of increasing the effective management of chemicals in the UK.

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 This instrument does not consolidate any legislation.

10. Consultation outcome

10.1 The amendments are being made in response to issues raised by industry representatives concerning potential impacts on businesses after the REACH etc. (Amendment etc.) (EU Exit) Regulations 2019 were laid.

The Devolved Administrations have been consulted and have consented to this instrument.

11. Guidance

11.1 Guidance is available on line and will be updated in the light of these amendments. The guidance on regulating chemicals (REACH) if there is no Brexit deal is in a Technical Notice on the website GOV.UK published on the 24 September 2018. UK REACH Additional Guidance if there is no Brexit deal and a Table on steps to take is on the website hse.gov.uk published on the 4 December 2018. The Technical Notice and Additional Guidance have been combined and expanded upon to create the “UK REACH guidance if there is no Brexit deal” document, published on the HSE on the HSE website on 25 March 2019. Specific guidance on notifications in relation to Article 127E, as well as guidance on all the other transitional arrangements, was published by HSE on 21 March 2019.

12. Impact

12.1 There will be positive impacts on business, charities or voluntary bodies. It will avoid potential disruption to chemical supply chains by bringing the import of substances from outside the EEA fully within the scope of the transitional provisions in the REACH SI. Allowing UK-based only representatives to notify will reduce burdens on UK companies importing from the EEA. It will also provide them with greater business certainty that the chemical will subsequently be registered and that supply will continue into the medium and long term.

12.2 The positive impact on the public sector is that only representatives are expected to be able to provide more complete and better quality information in notifications, in particular with regard to imported mixtures and articles. This will contribute to the effective management of chemicals in the UK.

12.3 An Impact Assessment has not been prepared for this instrument because the SI relates to minor amendments of existing regulatory standards.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 The amendments in this instrument will benefit all businesses but allowing an only representative to fulfil the information and administrative requirements of a notification instead of the company importing from the EEA is expected to benefit small businesses in particular.

13.3 The provisions in this instrument reflect the representations from industry associations, the majority of whose members are medium or small businesses.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is to monitor the operation of the transitional import provision, in particular the two year time period for replacing the interim notification with a full registration.
- 14.2 As this instrument is made under the EU (Withdrawal) Act 2018, no review clause is required.

15. Contact

- 15.1 Keith Bailey, at the Department for Environment, Food and Rural Affairs (DEFRA), Telephone: 020 8026 3477 or email: Keith.Bailey@defra.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Gabrielle Edwards, Deputy Director for EU Exit, Chemicals, Pesticides and Hazardous Waste, at the Department for Environment, Food and Rural Affairs (DEFRA), 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 for the Environment, Food and Rural Affairs (DEFRA), can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the ‘good reasons’ for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister’s opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument’s effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority’s response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement(s)

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

“In my view the REACH etc. (Amendment etc.) (No. 2) 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: the provisions in the instrument are limited to amending the scope and operation of one transitional provision in the REACH SI in response to industry representations; these issues were also raised during the debates in Parliament on the REACH SI and we are now responding to the evidence that has come to light in order to reduce risk to supply chains and to reduce burdens; the amendments remain within the scope of the policy intention of the transitional provisions of minimising disruption to supply chains, trade flows, business continuity and economic growth, and minimising barriers to accessing the UK market; and the impacts on business, including small business, and the public sector are all positive.

2. Appropriateness statement

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

“In my view the REACH etc. (Amendment etc.) (No. 2) (EU Exit) Regulations 2019 do no more than is appropriate”.

- 2.2 This is the case because the amendments to the transitional provisions are limited to addressing the representations made by industry.

3. Good reasons

- 3.1 The Parliamentary Under Secretary of State for the Environment Dr Thérèse Coffey 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”.

- 3.2 These are: to ensure that all imports of chemicals into the UK are brought within the scope of the transitional provisions in the REACH SI and avoid potential disruption to supply chains; to reduce burdens on importing companies; and to improve effective management of chemicals through better quality of information.

4. Equalities

- 4.1 The Parliamentary Under Secretary of State for the Environment Dr Thérèse Coffey

MP, has made the following statement(s):

“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 the Environment Dr Thérèse Coffey 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, Thérèse 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”.

5. Explanations

- 5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.