EXPLANATORY MEMORANDUM TO

THE CONTROL OF MERCURY (AMENDMENT) (EU EXIT) REGULATIONS 2020

2020 No. 1620

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 Explanatory Memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of this instrument is to make the necessary corrections to Regulation EU 2017/852 of the European Parliament and of the Council on mercury, which repeals Regulation (EC) No 1102/2008, to enable its continued use as retained EU law after the end of the Transition Period. This instrument also makes amendments for purposes relating to the implementation of the Protocol on Ireland / Northern Ireland ("the Protocol").

2.2 This instrument will help ensure the UK meets its obligations under the Protocol in respect to the movement of mercury from Great Britain ("GB") to Northern Ireland and Northern Ireland to GB by amending (EC) No 2017/852 and the Control of Mercury (Enforcement) Regulations 2017 (SI 2017/1200) so that Northern Ireland continues to fully apply (EC) No 2017/852, as required at the end of the Transition Period.

2.3 This instrument revokes both the Control of Mercury (Amendment) (EU Exit) Regulations 2019 (SI. 2019/ 96) and regulation 8 of the Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019 (SI. 2019/473).

Explanations

What did any relevant EU law do before exit day?

2.4 Regulation (EU) 2017/852 on Mercury repealed existing mercury legislation (1102/2008) and filled legislative gaps to enable the EU and its Member States to ratify the Minamata Convention on Mercury.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?

2.5 As retained EU law, the current Regulation on mercury ("Regulation (EU) 2017/852") ("the Regulation") would not be effective in GB or UK law due to the deficiencies within the provisions of the Regulation, arising from the withdrawal of the United Kingdom from the European Union ('retained EU law' is the body of law that has been converted and preserved under the Withdrawal Act 2018). This instrument

makes minor and technical amendments to the existing legislation described above to ensure the legislation is operable after the end of the Transition Period and to reflect that Northern Ireland will continue to implement the Regulation under the Protocol. 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 GB 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.

2.6 This instrument also transfers a series of legislative functions that are currently conferred by European Union ("EU") legislation upon the European Commission ("the Commission"), to be exercisable instead by public authorities in GB, so that they can be undertaken at national level after the end of the Transition Period. These powers were previously set out in The Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019 which was debated in the House of Lords and House of Commons on the 12 and 14 February 2019, respectively, and agreed by both Committees.

2.7 We will be introducing new procedural requirements for the transport of elemental mercury between GB and Northern Ireland and the introducing a prohibition on the transport of specified products containing mercury between GB and Northern Ireland. This is described in more detail below:

- The movement of mercury-added products (listed in Annex II to Regulation 2017/852) from Northern Ireland to GB and GB to Northern Ireland will be prohibited (Note: There are no controls on the movement of mercury added products ("MAPs") between member states. Currently, MAPs, and commodity mercury can move freely around the EU without any controls.);
- The movement of elemental or commodity mercury from Northern Ireland to GB and from GB to Northern Ireland will require written consent. We propose that this written consent will be managed through the provision of a list of GB approved uses of mercury;
- It should be noted that movements of mercury waste from GB to Northern Ireland will be subject to a consent process in accordance with the application of the EU Waste Shipment Regulations as required by the Protocol; and
- There will be no controls on the movement of mercury waste for disposal from Northern Ireland to GB. It should be noted that movements of mercury waste from Northern Ireland to GB are not currently notifiable.

What will it now do?

2.8 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.

2.9 This instrument will ensure that the legislation described will operate effectively in GB, while EU legislation will operate in Northern Ireland, both for the purposes of implementing the Protocol.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument revokes and replaces the Control of Mercury (Amendment) (EU Exit) Regulations 2019 ("SI 2019/ 96"), revokes regulation 8 of the Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019 ("SI 2019/ 473") and also amends the Control of Mercury (Enforcement) Regulations 2017 ("SI 2017/1200").

3.2 SI 2019/ 96 was previously presented as a proposed negative instrument and laid before both the House of Lords and Commons on 24 January 2019. The House of Lords and Commons confirmed it should proceed as negative No objections or concerns were raised at this time.

3.3 This instrument is being laid in draft to the Joint Committee on Statutory Instruments pursuant to the European Union (Withdrawal) Act 2018. This instrument provides for the exercise by the appropriate GB authority of a number of legislative functions currently carried out by the Commission. These legislative functions were previously included within regulation 8 of The Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019 (SI 2019/473). That instrument was debated in the House of Lords and House of commons on 12 February and 14 February, respectively, and agreed by both Committees.

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)

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

3.5 The powers under which this instrument is made cover Great Britain (see section 24 of the European Union (Withdrawal) Act 2018) and the European Union (Withdrawal Agreement) Act 2020, 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.

4.2 The territorial application of Parts 1, 2, 3 and 5 is the United Kingdom.

4.3 The retained law is incorporated into domestic law under section 3 of the European Union (Withdrawal) Act 2018 except as it applies to Northern Ireland for the purposes of the Northern Ireland Protocol. Accordingly, the territorial application of Part 4 is Great Britain (and this instrument will not have practical application in Northern Ireland in relation to Part 4).

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 Control of Mercury (Amendment) (EU Exit) Regulations 2020 are compatible with the Convention rights"

6. Legislative Context

6.1 On 23 June 2016, a referendum on the United Kingdom's membership of the EU took place which concluded in a vote to the leave the EU. The UK ceased to be a Member State of the EU on the 31 January 2020, and under the terms of the Withdrawal Agreement entered into a Transition Period until 31 December 2020.

6.2 During the Transition Period, the UK continues to apply Regulation EU 2017/852 of the European Parliament and of the Council on mercury and repealing Regulation (EC) No 1102/2008.

6.3 After the end of the Transition Period, GB will cease to apply Regulation EU 2017/852 of the European Parliament and of the Council on mercury and repealing Regulation (EC) No 1102/2008.

6.4 Under the terms of the Protocol, Northern Ireland will continue to apply Regulation EU 2017/852 of the European Parliament and of the Council on mercury which repeals Regulation (EC) No 1102/2008.

6.5 To ensure that the UK has a working statute book at the end of the Transition Period the Withdrawal Agreement 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 after the end of the Transition Period and to operationalise the Protocol.

6.6 This instrument amends Regulation (EU) 2017/852 of the European Parliament and of the Council on mercury, which repeals 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.

6.7 Notably, this instrument transfers legislative powers within Articles 6, 7(3), 8(6), 13(2), 20 and 22 of Regulation (EU) 2017/852, from the EU Commission to the appropriate GB authority.

6.8 The competent authorities, penalties and offences under Regulation (EU) 2017/852 were implemented through the UK-wide Control of Mercury (Enforcement) Regulations 2017 (SI 2017/1200).

6.9 No changes are made to the competent authorities' penalties and offences in the Control of Mercury (Enforcement) Regulations 2017 by this instrument.

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 methylmercury 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 1 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 Regulation (EU) 2017/852 of the European Parliament and of the Council on mercury establishes measures and conditions concerning the use and storage of, and trade in, mercury, mercury compounds and mixtures of mercury, and the manufacture and use of, and trade in, mercury-added products, and the management of mercury waste, in order to ensure a high level of protection of human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds. The Commission has the power to specify forms to be used for export and import restrictions; set out technical requirements for environmentally sound interim storage of mercury, mercury compounds and mixtures of mercury; authorise new mercury-added products or manufacturing processes; extend the period allowed for temporary storage of mercury waste; and amend Annexes 1 to 4 to the Regulation in line with international agreements. In some cases, this instrument allows these functions to be transferred to the Secretary of State, the Welsh Ministers and the Scottish Ministers to exercise in their respective areas. In other cases, the Secretary of State may exercise the functions on behalf of a Devolved Administration with its consent.

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 (1) of the European Union (Withdrawal) Act 2018 and section 8C of the European Union (Withdrawal Amendment) Act 2020 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 and the requirements of the Protocol. 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 The Devolved Administrations were closely consulted on the approach taken during the drafting of this instrument and were given the opportunity to propose amendments to the text.

10.2 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. 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 Regulation, and this has been supported in responses to a previous public consultation on the government approach in 2017.

10.3 Informal engagement was undertaken with UK stakeholders representing industry and trade associations who could potentially supply, purchase, use or manufacture products that contain mercury between July and September 2020. Those who responded so far indicated that they do not supply, purchase, use or manufacture products that contain mercury. Analysis and engagement undertaken in 2020 demonstrates that there is very little movement of any of elemental mercury or mercury added products concerned between Northern Ireland and GB and between the UK and EU.

10.4 Government informally engaged with stakeholders representing industry and trade associations from July 2020 to September 2020. No issues have been raised by stakeholders so far. We are awaiting further responses from other industries.

11. Guidance

11.1 Guidance will be published on the GOV.UK website in relation to this instrument.

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 This instrument 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 instrument 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.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that Defra, as well as the Devolved Administrations in relation to devolved matters, will monitor and review the impact of this instrument as part of their standard policy-making procedures.

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

15. Contact

15.1 Naomi Ward at the Department of Environment, Food and Rural Affairs Telephone: 020 8720 3530 or email: Naomi.Ward@defra.gov.uk can be contacted with any queries regarding this instrument.

15.2 Dr Kay Williams, Joint Head of Chemicals, Pesticides and Hazardous Waste and Gabrielle Edwards, Deputy Director for Chemicals and Pesticides 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, Rebecca Pow MP 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. Appropriateness statement

1.1 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow, 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 2020 does no more than is appropriate".

1.2 This is the case because this instrument provides for the exercise of legislative functions by UK authorities as appropriate given the nature of the functions concerned; and 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 the end of the Transition Period and that the UK continues to meet its international obligations under the Minamata Convention.

2. Good reasons

2.1 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow, 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: without this instrument, retained EU law will not work properly and it is appropriate for UK authorities to exercise legislative functions currently carried out by the Commission. 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 the end of the Transition Period.

3. Equalities

3.1 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow, has made the following statement:

"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.

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

"In relation to the 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."

3.3 The amendments made by this 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.

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.