

CHEMICALS - NOTIFICATION TO THE SCOTTISH PARLIAMENT

The Control of Mercury (Amendment) (EU Exit) Regulations 2020

1. Name of instrument and summary of proposal:

The Control of Mercury (Amendment) (EU Exit) Regulations 2020 (“the 2020 regulations”) will revoke and replace the Control of Mercury (EU Exit) Regulations 2019 (“the initial Mercury regulations”) to take account of developments since the initial Mercury regulations were laid in the UK Parliament on 24 January 2019, namely, that the UK has entered the Implementation Period as provided for in the Withdrawal Agreement and is now required to implement the terms of the Protocol on Northern Ireland (“NIP”).

On 5 December 2018 the Scottish Parliament recommended that the initial Mercury regulations should include Scottish devolved matters, as set out in the notification that was provided to the Parliament on 5 November 2018. On 18 December 2018, the Scottish Parliament recommended that the Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2018 (“the Legislative Functions regulations”) should include Scottish devolved matters, as set out in the notification that was provided to the Parliament on 6 December 2018. This notification should be read alongside the notifications that were provided for the initial Mercury regulations and for the Legislative Functions regulations.

2. Explanation of law that the proposals amend and summary of the proposals

Regulation (EU) 2017/852 of the European Parliament and of the Council on mercury (“the EU Mercury Regulation”) enables the EU and its Member States, including the UK, to ratify the Minamata Convention on Mercury as well as regulate the import and export of mercury between the EU and non-Member States, restrict the use of dental amalgam, set requirements for the storage, disposal and reporting of mercury and mercury wastes, and restrict the creation of new mercury-added products or new manufacturing processes involving mercury. The Control of Mercury (Enforcement) Regulations 2017 (“the enforcement regulations”) are UK-wide regulations which provide the enforcement mechanisms required for the EU Mercury Regulation by establishing offences, penalties and enforcement powers. The enforcement regulations also implement article 17 of the EU Mercury Regulation which requires the designation of authorities responsible for performing certain functions.

At the end of the current Implementation Period the EU Mercury regulation will become retained EU law. The initial Mercury regulations amended the retained EU Mercury regulation to enable its continued operability as retained EU law under the European Union (Withdrawal) Act 2018. The changes made included amending references to the EU, EU institutions, and EU administrative processes to domestic equivalents and updating legislative references to refer to relevant domestic 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. These amendments were included in the initial Mercury regulations which the Parliament has already recommended consent to.

The 2020 regulations revoke and replace the initial regulations. They make further amendments to implement the NIP. The retained EU Mercury Regulation will now only apply to Great Britain, while the original EU Mercury Regulation will continue to apply directly in Northern Ireland as required by the NIP. To reflect this, the 2020 regulations amend and delete references to Northern Ireland legislation and departments in the retained EU Mercury regulation. Further, new processes to implement the NIP have been introduced for movements of mercury waste, mercury goods and commodity mercury moving between Great Britain and Northern Ireland:

1. The movement of mercury and mixtures of mercury, those listed in Annex I of the retained EU Mercury regulation, between Great Britain and Northern Ireland, including mercury waste from any of the large sources referred to in Article 11 of the EU Mercury regulation, will be prohibited.
2. The movement of mercury and mixtures of mercury listed in Annex I between Great Britain or Northern Ireland will be allowed where the movement is for an approved use and the competent authority has granted written consent to such movements. This written consent will be managed through the provision of a list of approved uses of mercury for Great Britain and Northern Ireland.
3. Mercury waste may only be moved between Northern Ireland and Great Britain for the purposes of disposal. Movements for disposal will only be allowed where Great Britain or Northern Ireland has no access to available conversion capacity within its own territory.. The shipment of mercury waste, where allowed, will be covered by amendments made to the Transfrontier Shipment of Waste Regulations 2007. .

In addition, the 2020 regulations transfer legislative functions that are currently conferred by EU legislation upon the European Commission so that they can be exercised by public authorities in the UK, either the Secretary of State or Scottish Ministers, including the powers to determine whether new mercury-added products pose a risk to environmental or human health and to amend Annexes to the retained EU regulation. Where the Secretary of State seeks to exercise such functions in relation to Great Britain as a whole, the consent of Scottish Ministers is required. Apart from amendments to remove references to Northern Ireland, these provisions transferring legislative functions were all included in regulation 8 of the Legislative Functions regulations (which is now revoked by the 2020 regulations). Full details of the transfers of functions are contained in the previous notification and the Parliament has already recommended consent to them.

The regulations also amend Schedule 1 of the enforcement regulations which lists offences that can be subject to enforcement orders. The amendments will create new offences related to restrictions on the movement of mercury, except for waste, and mercury-added products between Northern Ireland and Great Britain.

3. Why are these changes necessary?

The provisions which have been included in the 2020 regulations, but which were not in the initial Mercury regulations that were previously notified to the Parliament, are necessary in order to give effect to the NIP.

4. Scottish Government categorisation of significance of proposals

Category B. The instrument contains provisions to implement the Northern Ireland protocol that provide for new regulatory measures to control the movement of mercury, mixtures of mercury and mercury waste between Scotland and Northern Ireland.

The movement of mercury in the UK is already highly regulated and the Minamata Convention on Mercury will continue to apply in GB. The unauthorised import of mercury into the UK is currently an offence and will remain an offence after the Implementation Period ends.

We consider the risk that breaches of such new restrictions requiring enforcement to be low as there is widespread awareness of the dangers posed by mercury and accordingly strong controls are already in place.

SEPA data shows that in 2019 Scotland received a total of 41K tonnes waste from NI, of which 261 tonnes (0.64%) were mercury related. No Mercury waste currently goes from Scotland to NI.

5. Impact on Devolved Area

There remains ongoing engagement between the Scottish Government and the UK Government regarding the practical implications of the NIP.

Chemicals policy engages a complex mixture of reserved and devolved competence. Environmental protection, waste management and public health are devolved while product safety, trade and Health and Safety at Work are reserved. We take the view that the Mercury regulation is primarily concerned with public health which is an area of devolved competence. We are satisfied that the regulations respect devolved competence in this area.

6. Stakeholder engagement/consultation

We have been and are continuing to deepen our contact with stakeholders through the EU exit process. However, these measures are aimed solely at preserving the functioning of the EU regulations as they are at present and implementing the NIP, a legal requirement. We have not undertaken any focussed engagement on this basis.

Stakeholders in this area are primarily UK- or EU- wide, such as trade bodies or environmental groups, and they have been clear and consistent that they wish to see the regulatory systems of the EU-27 and the UK remain highly aligned.

7. Any other impact assessments

As per previous notification.

8. Summary of reasons for Scottish Ministers proposing to consent to UK Ministers legislating

The provisions were made at the UK level to reflect overlapping reserved and devolved responsibilities, and it is most effective to make the changes to address deficiencies at the same level. Officials have worked with Defra to ensure the drafting delivers for our interests and respects devolved competence in Scotland, and so Scottish Ministers propose to agree to a UK approach for these deficiencies.

We recognise that the new provisions extend similar existing offences to the movement of mercury between GB and NI, except Mercury waste. The penalties for Scotland are set out in regulation 47(c) and (d) of the existing Control of Mercury (Enforcement) Regulations 2017 and these are unchanged. The Scottish Environment Protection Agency also has powers to impose civil sanctions under Part 4 of the regulations and these also remain unchanged.

9. Have Scottish Ministers had regard to the guiding principles on animal welfare and the environment?

As per previous notification.

10. Are there governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

To the extent these measures affect devolved statutory regimes, they will be within the scope of the new environmental governance arrangements that are proposed in the UK Withdrawal from the European Union (Continuity) (Scotland) Bill. Where there are interactions with reserved regimes, we will expect the new Scottish governance body to reflect this through cooperation, as appropriate, with the UK environmental governance body proposed in the UK Environment Bill.

We remain engaged in framework discussions with all the administrations of the UK and the relevant regulators specifically looking at the regulation of chemicals and pesticides in the UK outside of the EU and its existing regimes.

The Scottish Government's position remains that future arrangements should be based on staying closely aligned with the EU chemicals regulatory regime and maintaining existing standards of protection for human health and the environment.

11. Intended laying date

The 2020 regulations are intended to be laid at Westminster under the draft affirmative procedure on 13 October 2020.

12. Does the Scottish Parliament have 28 days to scrutinise?

To date we have been working with Defra on the basis that EU Exit SIs would not be debated until after they have been through the consent process agreed with the Scottish Parliament. The instrument is due to be laid on 13 October and, while it is

difficult to predict when it would be debated, it is likely to be a number of weeks following the laying date.

The Scottish Government still has concerns about the operation of the NIP, but we also recognise the need to prepare for the end of the Implementation Period. We are therefore proceeding on the basis that we are notifying the Scottish Parliament now of our intention to consent to these instruments, but invite the committee to note that the SG continues to engage with the UK Government on the NIP.

13. Information about any time dependency associated with the proposal?

It is essential that the 2020 regulations are in force at the end of the Implementation period in order to give effect to the NIP, in addition to ensuring that legislation is operable to allow continued high levels of protection for human health and the environment.

14. Any significant financial implication?

As per previous notification.

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