

Issues identified in Defra EU exit statutory instruments

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Introduction

Since the European Union (Withdrawal) Act 2018 entered into force, Greener UK has reviewed over 50 statutory instruments (SIs) from the Department for Environment, Food and Rural Affairs (Defra) made pursuant to the Act. The Act gives ministers the power to introduce SIs to make changes to retained EU legislation to make it 'operable' in UK law post Brexit.

During our review, we found several issues in the resulting body of retained EU law relating to the environment. In particular, the drafting in certain areas does not adequately correct the provisions of EU law, and leaves significant governance gaps in the application, interpretation and enforcement of environmental law.

Over the past three years, Greener UK has therefore made a number of [evidence submissions](#) to the [Secondary Legislation Scrutiny Committee](#), a parliamentary committee which scrutinises SIs, highlighting our concerns and seeking clarifications from Defra. We have also provided briefings to MPs and peers ahead of debates in Parliament so that these concerns could be raised directly with ministers.

This briefing sets out the key systemic issues identified in the SIs we reviewed. These issues are also likely to be found in other SIs. A fuller database of the SIs reviewed, the problems and gaps identified, and any significant issues to look out for during implementation can be found in this [spreadsheet](#).

Issues identified

1 Greater discretionary powers for ministers

Many of the statutory instruments reviewed have been used to introduce substantive policy changes to environmental standards and give greater discretionary powers to ministers.

For example, the authorisation process for pesticides may no longer be based on the latest scientific advice. EU regulation [\(EC\) No. 396/2005](#) provides that the maximum residue levels of pesticides allowed in food and crops are reviewed within 12 months of a pesticide being authorised. The new UK version, [Pesticides \(Maximum Residue Levels\) \(Amendment etc.\) \(EU Exit\) Regulations 2019](#), extends the review period from 12 months to 36 months. It also states that pesticides approvals may be extended even further 'where the competent authority considers it necessary'. This could mean that the UK will not be applying the latest scientific advice on pesticides because they will be on the market for far longer periods before being reviewed.

The role of scientific advice on pesticides use in the UK is also now much weaker. Under EU law, the European Food Safety Authority must factor in independent scientific advice and integrate scientific assessments into approval processes. However, the new UK equivalent allows the Secretary of State and devolved governments to assess existing maximum residue limits without any requirement to consider scientific advice from a

specialist advisory body (see regulation 4(9) of the [Pesticides \(Maximum Residue Levels\) \(Amendment etc.\) \(EU Exit\) Regulations 2019](#)).

Another example is the greater powers for the Secretary of State on food standards. Several new SIs pertaining to UK food and agricultural standards remove lists of banned or restricted substances, meaning the UK government will need to establish new lists. However, the processes for doing so offer very little opportunity for scrutiny compared to those offered through the European Commission and have weaker requirements on considering scientific advice. For example, the [Veterinary Medicines and Animals and Animal Products \(Examination of Residues and Maximum Residue Limits\) \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) and the [Specific Food Hygiene \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) transfer a number of powers from experts in the European Medicines Agency to the Secretary of State.

2 Inadequate replacement of Commission oversight and enforcement role

A number of provisions in the SIs remove references to oversight procedures involving the European Commission without replacing them with an appropriate domestic alternative. For example, provisions of the [Common Fisheries Policy \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) remove obligations to provide assessments of fish stock quantities to the European Commission and the European Parliament, but do not place requirements on the UK government to undertake these assessments or present them to the UK Parliament.

In addition, the key role that the European Commission plays in enforcing the rules of the Common Fisheries Policy has been removed and not replaced. For example, regulation 4(43) of the [Common Fisheries Policy \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) removes articles from the EU regulation (EC) No 1224/2009 relating to the European Commission's enforcement of the Common Fisheries Policy. This includes the Commission's role in reviewing member states' reports on fisheries policy implementation and its role in ensuring compliance with Common Fisheries Policy objectives through the power to suspend financial assistance and to close fisheries.

Defra [argued](#) that the Commission's oversight role over member states could, for England at least, be provided by the new Office for Environmental Protection (the OEP). However, the Environment Bill, which establishes the OEP, will need to be significantly strengthened for the OEP to take on this role, and its resourcing increased.

3 Inadequate replacement of specialist EU advisory roles

Many of the SIs reviewed remove references to specialist EU advisory roles and either replace them with an inadequate alternative, or do not replace them at all. For example, regulations in the [Common Fisheries Policy \(Amendment etc.\) \(EU Exit\) \(No. 2\) Regulations 2019](#) remove references to the Scientific Technical and Economic Committee for Fisheries, which provides advice on whether to grant exemptions from important environmental requirements.

Similarly, references to the European Chemicals Agency in the [Persistent Organic Pollutants \(Amendment\) \(EU Exit\) Regulations 2020](#) are replaced with references to 'relevant authorities', including the Environment Agency. It is unclear whether these authorities will have an adequate level of resources, funding and expertise compared with the equivalent European agencies.

4 Weaker reporting obligations

EU environmental law often requires member states and bodies to report on technical matters and on implementation. However, these requirements have been routinely removed from UK law. For example, requirements to notify the European Commission on ambient air quality and pollutant emissions have been removed without replacement (see regulations 2(16) and 4(5) of the [Air Quality \(Miscellaneous Amendment and Revocation of Retained Direct EU Legislation\) \(EU Exit\) Regulations 2018](#) and regulation 4(2) of the [Air Quality \(Amendment of Domestic Regulations\) \(EU Exit\) Regulations 2018](#)). This reduces transparency and accountability that is crucial to the effective implementation of air quality legislation. The OEP and parliamentary committees could help fill this gap and, as a minimum, reports must be published.

5 Weaker penalty regime

Several SIs remove the requirement for proportionate and dissuasive penalties and fines. For example, the [Timber and Timber Products and FLEGT \(EU Exit\) Regulations 2018](#) remove this requirement, which has proved valuable in guiding the penalties regime under the [EU Timber Regulation](#). Without this safeguard, the UK could reduce the penalties for breach of timber regulations, which could result in unscrupulous operators acting with impunity, decreased traceability of timber products and increased illegal logging.

6 Removal of targets and actions falling after the end of the transition period

Where EU-derived legislation previously contained targets or actions with an associated date post 31 December 2020, these have either not been fully transposed or simply deleted. By removing commitments previously agreed by the UK government, these SIs have therefore created uncertainty for regulators and businesses.

For example, regulation 7(8) of the [Veterinary Medicines and Residues \(Amendment\) \(EU Exit\) Regulations 2020](#) omits an update to reference points for action (RPAs) set out in [Article 8 of Regulation \(EU\) 2019/1871](#), previously scheduled for 28 November 2022. RPAs help ensure that products containing banned substances are kept off the market. Because the substances are banned, RPAs set a 'limit' at the minimum quantity that can technically be detected and ensure that if banned substances are found in products they cannot be marketed. These limits are reviewed (and decreased) as scientists are able to detect smaller quantities. The SI mentioned above removes the need to update these RPAs, meaning the control of banned substances may not follow the latest science. While the EU Withdrawal Agreement does not require the transposition of provisions falling after the end of the transition period, this regulation was agreed while the UK was a member of the EU and it is unclear why the government would choose not to retain the planned update to support effective controls of banned substances in the future.

EU directives [2018/851](#) and [2018/852](#) introduced 2025, 2030 and 2035 targets for the recycling of municipal and packaging waste. However, in transposing these directives into UK law via the [Waste \(Circular Economy\) \(Amendment\) Regulations 2020](#), the UK government omitted the majority of these targets, retaining only a 65 per cent municipal waste reuse and recycling target for 2035. Retaining the 2025 and 2030 interim targets would have helped drive progress towards the 2035 target.

For more information, please contact:

Agathe de Canson, Policy adviser, Green Alliance

e: adcanson@green-alliance.org.uk

t: 020 7630 4553

GREENER UK

