EXPLANATORY MEMORANDUM TO

THE TOBACCO AND RELATED PRODUCTS (AMENDMENT) (NORTHERN IRELAND) REGULATIONS 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care ('DHSC') and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to implement Commission Delegated Directive (EU) 2022/2100 of 29th June 2022[1] ('Commission Delegated Directive'), which amends Directive 2014/40/EU ('The Tobacco Products Directive'), in order to withdraw certain exemptions in respect of heated tobacco products in Northern Ireland.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The extent of this instrument (that is, the jurisdiction which the instrument forms part of the law of) is Northern Ireland.

4.2 The territorial application of this instrument (that is, the jurisdiction where the instrument produces a practical effect) is Northern Ireland.

5. European Convention on Human Rights

5.1 Neil O'Brien MP, Parliamentary Under Secretary of State for Primary Care and Public Health, has made the following statement regarding Human Rights:

> "In my view the provisions of The Tobacco and Related Products (Amendment) (Northern Ireland) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 This instrument amends the Tobacco and Related Products Regulations 2016 ('TRPR') in relation to Northern Ireland.

6.2 The instrument is being made to comply with the United Kingdom's obligations under the Windsor Framework. In accordance with Article 5(4) of, and Annex 2 to, the Windsor Framework, the UK government has agreed that certain EU legislation would continue to apply to the UK in respect of Northern Ireland.

6.3 The instrument is being made to ensure that changes introduced by the Commission Delegated Directive will apply to heated tobacco products placed on the Northern

[1] EUR-Lex - 32022L2100 - EN - EUR-Lex (europa.eu)

Ireland market. These changes will not apply to heated tobacco products placed on the Great Britain market.

7. Policy background

What is being done and why?

Heated tobacco

7.1 Heated tobacco is a tobacco stick that is inserted into a device that heats the tobacco to temperatures less than conventional cigarettes, releasing an aerosol. Heated tobacco products usually use tobacco in leaf or some other solid form. However, there are some hybrid products that can use both solid tobacco and liquid. Heated tobacco products first appeared on the UK market in 2016 and their use remains very low, at less than 1% in Great Britain and less than 0.5% in Northern Ireland. DHSC's policy is to help people quit tobacco as all tobacco use is harmful and DHSC does not recommend the use of heated tobacco products.

7.2 In the UK, heated tobacco is regulated as a novel tobacco product under TRPR and is subject to certain product requirements. Heated tobacco products that are currently on the market do not involve a combustion process and as such, they are subject to the labelling requirements applicable to "smokeless tobacco products". If new heated tobacco products emerge that involve a combustion process, they would be regulated as "tobacco products for smoking" and would be subject to the relevant labelling requirements in TRPR.

Characterising flavours prohibition

7.3 New Regulation 15A(1)-(2) mirrors the prohibition in regulation 15 of TRPR (no flavoured cigarettes or hand rolling tobacco etc) for heated tobacco products in Northern Ireland. This means that heated tobacco products with a characterising flavour, or heated tobacco products with a component containing flavourings, tobacco or nicotine, or a technical feature that allows for the modification of the smell, taste or smoke intensity of the product, can no longer be produced or supplied in Northern Ireland. This prohibition will not apply in Great Britain.

Commencement

7.4 The Commission Delegated Directive requires Member States to adopt and publish the requirements by 22 July 2023, and for the requirements to apply from 23 October 2023.

7.5 The prohibition will come into force on 23 October 2023 for heated tobacco products in Northern Ireland. Any prohibited products that are sold after 23 October 2023 are subject to local enforcement by each district council in Northern Ireland.

Explanations

What did any law do before the changes to be made by this instrument?

7.6 UK product standards for heated tobacco products are contained in TRPR, which implemented the Tobacco Products Directive. Prior to the implementation of the Commission Delegated Directive, heated tobacco products on the Northern Ireland market were permitted to have a characterising flavour.

Why is it being changed?

7.7 The European Commission has found that there was a substantial change of circumstances for heated tobacco products, as established in a Commission report published on 15 June 2022. The report is here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0279&qid=1655456179686.

7.8 In view of those substantial change of circumstances, the Commission introduced the Commission Delegated Directive, in order to withdraw certain exemptions in respect of heated tobacco products.

7.9 In particular, the Commission Delegated Directive makes two main changes: firstly, it amends Article 7(12) of the Tobacco Products Directive so that heated tobacco products cannot be exempted from the characterising flavour and flavourings prohibition in Article 7(1) and 7(7) of the Tobacco Products Directive. Secondly, it amends Article 11(1) of the Tobacco Products Directive so that heated tobacco products cannot be exempted from the obligations relating to tobacco products for smoking to carry the information message laid down in Article 9(2) and the combined health warnings laid down in Article 10.

7.10 As outlined in paragraph 7.2 above, the heated tobacco products on the market do not involve a combustion process and as such, they do not fall within the meaning of "tobacco products for smoking". If new products emerge which involve a combustion process, the current wording of TRPR ensures they would not be exempted from the labelling requirements that apply to "tobacco products for smoking".

What will it now do?

7.11 This instrument amends TRPR to ensure that heated tobacco products in Northern Ireland are subject to the characterising flavour and flavourings prohibitions. The new requirements are contained in new Regulation 15A, which extends to Northern Ireland only.

7.12 Commission Implementing Regulation (EU) 2016/779 sets out the procedures for determining whether a tobacco product has a characterising flavour and Commission Implementing Decision (EU) 2016/786 lays down the procedure for the establishment and operation of an independent advisory panel to assist in this determination. In accordance with the Windsor Framework, both pieces of EU tertiary legislation apply in Northern Ireland in determining whether or not a tobacco product has a characterising flavour.

8. European Union Withdrawal and Future Relationship

8.1 This instrument is not being made to address a deficiency in retained EU law but relates to the withdrawal of the United Kingdom from the European Union because it is being made under section 8C(1)(c) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 There are no plans to consolidate the relevant legislation at this time.

10. Consultation outcome

10.1 The European Commission introduced the Commission Delegated Directive in June 2022. There are no formal requirements for DHSC to consult on these changes.

However, DHSC has written to all producers that have notified heated tobacco products on the Northern Ireland market to inform them of the forthcoming changes for heated tobacco products.

11. Guidance

11.1 Guidance relating to these amendments is not being issued.

12. Impact

12.1 There is no significant impact on business, charities or voluntary bodies.

12.2 There is no significant impact on the public sector. Each district council in Northern Ireland will enforce the new requirements. These new requirements are not expected to be a significant burden on each district council, given the low use of heated tobacco products in Northern Ireland.

12.3 A full Impact Assessment has not been prepared for this instrument because the amounts involved on business fall below the threshold for producing one. Heated tobacco products on the UK market are produced and manufactured from outside the UK by the tobacco industry. The characterising flavour ban will limit the products they can produce and supply to the Northern Ireland market and may impact on their profits, in what is a relatively small market for them in Northern Ireland.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses in the form of retail and wholesalers selling heated tobacco products in Northern Ireland. They will need to be aware that after 23 October 2023 they can no longer sell heated tobacco products with a characterising flavour.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is that DHSC has informed Retail NI and the Federation of Small Businesses of the regulations so they can inform their members. DHSC has also informed producers who have notified heated tobacco products on the Northern Ireland market so they may inform their networks including wholesalers and retailers.

14. Monitoring & review

14.1 The Secretary of State is already required to carry out a review of TRPR and to publish a report setting out the conclusions. The last report was published in March 2022 and subsequent reports must be published at intervals not exceeding five years. The March report is here: https://www.gov.uk/government/publications/the-tobacco-and-related-products-regulations-2016-post-implementation-review.

14.2 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. Contact

15.1 Matthew Birkenshaw, Tobacco Control Team Leader, Office for Health Improvement and Disparities at the Department of Health and Social Care (email: addictionspolicy@dhsc.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Rosanna O'Connor, Director, Addictions and Inclusion, Office for Health Improvement and Disparities at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Neil O'Brien MP, the Parliamentary Under Secretary of State for Primary Care and Public Health at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.