EXPLANATORY MEMORANDUM TO

THE EXPLOSIVES REGULATIONS 2014 (AMENDMENT) REGULATIONS 2016

2016 No. 315

1. Introduction

1.1 This explanatory memorandum has been prepared by Health and Safety Executive (HSE) on behalf of the Department of Work and Pensions and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of this instrument is to transpose, in Great Britain:

- European Directive 2014/28/EU on the harmonisation of the laws of the member States relating to the making available on the market and supervision of transfers of explosives for civil uses ("the recast Directive").
- The intended effects of implementing the recast Directive are to improve the safety of civil explosives made available on the market by (i) ensuring that the obligations of all of the economic operators in the supply chain are clearer (and in particular, those of importers and distributors); (ii) adding to provisions on the traceability of civil explosives; and (iii), providing a more structured market surveillance regime.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Although the power available under section 15 of the Health and Safety at Work etc. Act 1974 (the 1974 Act) would permit the making of this instrument for implementing some of the recast Directive, this instrument is made solely under section 2(2) of the European Communities Act 1972 (the ECA).

3.2 Section 2(2) has alone been relied upon for two main reasons. First, it enables a more consistent and comprehensible approach to be taken to the enforcement provisions. Making the instrument under both the 1974 Act and the ECA would have resulted in substantive provisions being derived from different sources of enabling power and similarly so for the enforcement regimes, with possible uncertainty as to which regime may apply to which provision. Second, it allows more consistency between the wording of this instrument and the other Regulations that have been prepared to implement other Directives forming part of the EU's New Legislative Framework programme.

Other matters of interest to the House of Commons

3.3 As this instrument is subject to the negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

New Legislative Framework

4.1 The recast Directive on civil use explosives is one of 9 directives that have been updated, or "recast", as part of a European work package known as the New Legislative Framework (NLF). The NLF aims to improve market surveillance requirements across a range of products on the single market. The Department for Business, Innovation and Skills (BIS) are the lead policy Department for all the Directives in the NLF apart from the recast Directive on civil use explosives, which the Health and Safety Executive (HSE) leads on as part of its health and safety remit. The recast of the Directive on the harmonisation of the laws of member States relating to the making available on the market of pyrotechnic articles (Directive 2013/19/EU) has already been transposed into United Kingdom law through the Pyrotechnic Articles (Safety) Regulations 2015 (S.I. 2015/1553)

4.2 The instrument is an amending instrument. It inserts the implementing provisions into the Explosives Regulations 2014 (S.I. 2014/1638).

4.3 The approach taken to implementing the recast Directive is to copy-out the obligations in the Directive where possible. A Transposition Note has been prepared and is attached as an Annex to this Memorandum.

5. Extent and Territorial Application

5.1 This instrument extends to Great Britain.

5.2 This instrument applies in Great Britain and outside Great Britain as sections 1 to 59 and 80 to 82 of the Health and Safety at Work etc. Act 1974 (the 1974 Act) apply by virtue of the Health and Safety at Work etc. Act 1974 (Application outside Great Britain) Order 2013 (S.I. 2013/240).

5.3 The policy has been shared with Department for Justice, Northern Ireland and they will transpose amending Regulations in due course to complete UK transposition of the recast Directive.

6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation no statement is required.

7. Policy background

What is being done and why

7.1 A number of Directives, including the recast Directive on civil use explosives, have been amended or 'recast' to strengthen and modernise market surveillance of products placed on the market. The recast Directive was adopted on 26th February 2014 and published in the Official Journal of the European Union on 29th March 2014. Under EU law, the UK has a legal obligation to implement the recast Directive into domestic legislation and apply that from 20th April 2016.

7.2 The recast Directive, as with the other Directives being recast, applies the EU's New Legislative Framework (the "Framework") approach to the civil use explosives sector. The Framework is a set of general principles and rules which aims to make legislation on the single market for goods clearer, more consistent and more effective. That is the

main purpose of the recasting of the various Directives. It is not intended to change the technical essential requirements of EU product legislation, but instead build on the existing systems to reinforce the application and enforcement of legislation. The key changes under the recast Directive relate to a strengthening of the legal obligations on manufacturers, distributors and importers involved in placing civil use explosives on the single market. There is also a strengthening of the legal obligations on notified bodies who conformity assess products so that a CE mark can be applied. CE marking confirms that a notified body has tested that the explosive conforms to the relevant European standard and meets essential safety requirements. The UK currently has one Explosives Notified Body (ENB), the Health and Safety Laboratory (HSL).

7.3 The transposition will mean some amendments to the existing regime for anyone who places an explosive within scope on the EU market for the first time; and for ongoing market surveillance thereafter. The civil use explosives within the scope of the Directive are used in activities such as blasting at mines and quarries, or in offshore work.

Consolidation

7.4 The instrument amends the Explosives Regulations 2014 (S.I. 2014/1638). Those Regulations are a recent consolidation of explosives Regulations in Great Britain. There is no plan for a further consolidation to include this instrument at this stage.

8. Consultation outcome

8.1 A joint BIS/HSE consultation on the NLF package ran from 4th August – 29th September 2015. In parallel, HSE facilitated a series of working groups with 18 representatives from the explosives industry, other Government Departments, and other enforcing authorities to discuss the consultation proposals in more detail. At the end of the formal consultation period, BIS had received 27 responses, 3 of which related specifically to civil use explosives. There were 3 other respondents that replied in relation to every Directive. HSE also considered a number of specific areas in more detail through working group discussion.

8.2 The majority of respondents to the joint BIS/ HSE consultation felt that the changes would make obligations clearer, products more traceable, and facilitate more effective enforcement. However, specific concerns were raised with HSE by the civil use explosives industry, both in the consultation responses and through working group discussion, about the totality of the costs of implementing EU requirements, such as CE marking, against the benefits. This was a particular concern for multi-national businesses working within and outside the EU. HSE plans to carry out a post implementation review (PIR) of the Explosives Regulations 2014 (which are being amended as a result of the recast) and this will cover the relevant EU Directives. HSE will continue to work with industry as part of this PIR work to consider the concerns raised around the cost and impact of the changes.

8.3 HSE also considered a number of specific areas in more detail through working group discussion. Specifically, the recast introduces an explicit requirement that civil use explosives placed on the market by manufacturers or used for their own purposes must be CE marked. We have consulted with stakeholders through the working group to ensure they are aware of the impact of these changes and are developing guidance to support implementation.

8.4 We have also secured agreement from the Commission, along with several other member states, that the recast should not bring, previously excluded non-commercial and 'hobbyist' activities in scope. The Commission have generally supported this view and we are developing guidance to make this clear.

8.5 HSL, the UK's current Explosive's notified body, are undergoing accreditation, in line with UK government policy and the recast accreditation requirements, to continue in this role. There might be increased rates for conformity assessment as a result of their accreditation. HSL is working to identify where any processes can be streamlined to minimise the level of any cost increase to business.

9. Guidance

9.1 Guidance on the new instrument has been made available on HSE's webpage since 20th January 2016 in line with Government policy (http://www.hse.gov.uk/explosives/regulations2016.htm).

10. Impact

10.1 The impact on business is around £481k (ten-year present value). Manufacturers bear around 85% of the total monetised costs to business, mainly because of changes in requirements for notified bodies who test that the explosive conforms to the relevant European standard and meets essential safety requirements. This includes the one-off costs of conformity attestation for 'own-use' explosives mixed on-site, which will affect around 28 quarries and mines, and the ongoing costs of accreditation to the notified body that will be passed on to manufacturers in the form of an increase in the charge per approval, costed together at around £327k. The other monetised costs to business are one-off familiarisation costs for manufacturers, importers, and distributors, estimated at around £154k.

10.2 The impact on the public sector is estimated at around £8k. The costs to government are to the regulator in terms of one-off training costs for inspectors.

10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 The recast Directive requirements apply to activities that are undertaken by all businesses, therefore small and micro businesses will need to comply with the new legislation that implements these requirements. The high hazard nature of explosives is not necessarily linked to business size, and the potential for poor risk management leading to serious incidents when explosive products are deployed by end-users is the same whether the manufacturer, importer or distributor was a small or large business.

11.2 It is important that all businesses operating in the civil use explosives sector are subject to the same regulatory regime to ensure that they continue to provide a high level of protection for both their workers and end-users of their products. However, risk management by the economic operators in the civil use explosives industry should be proportionate. HSE has published straightforward guidance to support SMEs in applying the law and has worked with the UK's notified body (responsible for conformity assessment of explosives) to ensure proportionate approaches to assessment.

12. Monitoring & review

12.1 The impact of the changes will be considered as part of a Post Implementation Review of the Explosives Regulations 2014, with a review report which must be published by 1st October 2019.

13. Contact

13.1 Alison.wellens@hse.gsi.gov.uk at the Health and Safety Executive Tel: 0151 951 3356 or email: Alison.wellens@hse.gsi.gov.uk can answer any queries regarding the instrument.