EXPLANATORY MEMORANDUM TO

THE RESTRICTION OF THE USE OF CERTAIN HAZARDOUS SUBSTANCES IN ELECTRICAL AND ELECTRONIC EQUIPMENT (AMENDMENT) REGULATIONS 2021

2021 No. 422

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department for Environment, Food and Rural Affairs ("Defra") 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 This instrument has been laid to correct an error in Schedule A1 to the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2012 (SI 2012/3032) ("the RoHS Regulations"), which was inserted by the Hazardous Substances and Packaging (Legislative Functions and Amendment) (EU Exit) Regulations 2020 (SI 2020/1647) ("the 2020 Regulations"). The list of restricted substances and maximum concentration values in Schedule A1 to the RoHS Regulations is intended to correspond with the list in Annex 2 to the RoHS Directive, which applied by reference before IP completion day. The maximum concentration value for cadmium, which is 0.01% in Annex 2 to the Directive, was incorrectly specified as 0.1% in Schedule A1. This instrument corrects that error.

Explanations

What did any relevant EU law do before exit day?

2.2 Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment ("the RoHS Directive") requires member States to ensure that electrical and electronic equipment ("EEE") placed on the market does not contain certain hazardous substances specified in Annex 2 to that Directive, or does not contain those substances in concentrations exceeding specified maxima. The RoHS Regulations implemented this by providing that EEE placed on the market must not contain substances specified in Annex 2 to the RoHS Directive in quantities greater than the maximum concentration values specified in that Annex, as amended from time to time.

Why is it being changed?

2.3 The 2020 Regulations amended provisions of the RoHS Regulations which cross-referred to the RoHS Directive, in consequence of the Directive not being retained EU law. Among other things, they inserted a new Schedule A1 in the RoHS Regulations, which sets out the list of restricted substances and maximum concentration values. The list of restricted substances and maximum concentration values in Schedule A1 to the RoHS Regulations is intended to correspond with the list in Annex 2 to the RoHS Directive, which applied by reference before IP completion day. The maximum concentration value for cadmium, which is 0.01% in Annex 2 to the Directive, was

incorrectly specified as 0.1% in Schedule A1. This instrument is intended to correct that error.

What will it now do?

2.4 The list of restricted substances and maximum concentration values in Schedule A1 to the RoHS Regulations will now correctly correspond with the list in Annex 2 to the RoHS Directive, which applied by reference before IP completion day. It will now show the correct maximum concentration value for cadmium as 0.01% as in Annex 2 of the RoHS Directive as opposed to the incorrect specification of 0.1% in Schedule A1 of Hazardous Substances and Packaging (Legislative Functions and Amendment) (EU Exit) Regulations 2020.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory instruments.

3.1 On 9th March 2021 the Sifting Committees agreed with the Government that this instrument does not have to have a debate in parliament though one may still occur. The instrument will therefore remain subject to the negative resolution procedure.

3.2 A copy of this instrument is being made available free of charge to all known recipients of S.I. 2020/1647.

3.3 Defra has considered whether this instrument widens the scope of the criminal offence in regulation 37 of the RoHS Regulations, of placing on the market EEE which does not comply with those Regulations. In Defra's view it does not do so, and is therefore not required under paragraph 1(1) and (2)(c) of Schedule 7 to the European Union (Withdrawal) Act 2018 to be subject to affirmative resolution. This is because the specification of 0.1% as the maximum concentration value for cadmium, instead of 0.01%, was a plain and obvious drafting error, having regard to the policy intention, stated in paragraph 7.4 of the Explanatory Memorandum to S.I. 2020/1647, that the restrictions in Schedule A1 to the RoHS Regulations should correspond with those in Annex 2 to the RoHS Directive. In those circumstances, applying the principle of construction in Confederation of Passenger Transport UK v. Humber Bridge Board [2004] QB 310 (CA), the present text of Schedule A1 should be construed as if it specified the correct percentage. This instrument therefore merely clarifies the RoHS Regulations, rather than substantively altering their effect.

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 As this instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales and Scotland.

4.2 The territorial application of this instrument is England and Wales and Scotland.

5. European Convention on Human Rights

5.1 5.1 As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 This instrument is made in exercise of powers conferred by section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018, to correct an error contained in amendments made to the RoHS Regulations by the 2020 Regulations, the relevant provisions of which were also made under those powers.

6.2 The RoHS Regulations, as they extend to England and Wales and Scotland, have been amended in relation to EU Exit by S.I. 2019/188 and by the 2020 Regulations. Regulation 12 and Schedule 2 of the 2020 Regulations inserted Schedule A1, which is amended by this instrument.

7. Policy background

What is being done and why?

7.1 Please refer to the explanations in Sections 2.1 to 2.4.

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 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. 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 Not applicable.

10. Consultation outcome

10.1 No consultation is necessary ahead of the introduction of this instrument.

11. Guidance

11.1 Defra has received a small number of enquiries from businesses about the discrepancy between the maximum concentration value for cadmium specified in Schedule A1 to the RoHS Regulations, and that which applied before EU Exit pursuant to Annex 2 to the RoHS Directive. It has informed those businesses that this is an error in Schedule A1 which is to be corrected.

12. Impact

12.1 There will be no impacts on business as a result of the correction of the cadmium threshold from 0.1% to 0.01% as manufacturers had already been following the 0.01% threshold while the United Kingdom was a member of the European Union.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because no impact on business, charities or voluntary bodies is foreseen.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise the impact of the requirements on small businesses (employing up to 50 people), since no such impact is anticipated.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is that no specific monitoring arrangements are needed.

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

15. Contact

15.1 Graeme Vickery at the Department for Environment, Food and Rural Affairs – Email address: Graeme.vickery@defra.gov.uk Telephone number: 020 8225 7406 – can be contacted with any queries regarding the instrument.

15.2 Chris Preston for the Resources and Waste Division, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 Rebecca Pow MP, the Parliamentary Under Secretary of State for the Environment and Rural Affairs at the Department for Environment, Food and Rural Affairs 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	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
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. Sifting statement(s)

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

"In my view the Restriction of the Use of Certain Hazardous Substances in Electronic and Electrical Equipment (Amendment) Regulations 2021 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)".

1.2 This is the case because this instrument merely clarifies the effect of the RoHS Regulations by correcting a plain and obvious drafting error, as explained in paragraph 3.3 of the body of this Explanatory Memorandum.

2. Appropriateness statement

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

"In our view the Restriction of the Use of Certain Hazardous Substances in Electronic and Electrical Equipment (Amendment) Regulations 2021 does no more than is appropriate".

2.2 This is the case because this instrument merely clarifies the effect of the RoHS Regulations by correcting a plain and obvious drafting error.

3. Good reasons

3.1 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow MP 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".

3.2 These are: to ensure the UK meets its obligations under the Protocol on Ireland / Northern Ireland to the Withdrawal Agreement.

4. Equalities

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

"The draft 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".

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

"In relation to the draft 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".

5. Explanations

5.1 The explanations statement has been made in section 2 of the main body of this Explanatory Memorandum.