

**EXPLANATORY MEMORANDUM TO**  
**THE REACH ENFORCEMENT (AMENDMENT) REGULATIONS 2013**  
**2013 No. 2919**

**1.** This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 To allow second-hand articles containing asbestos to be placed on the market, under conditions that ensure a high level of protection for human health, and to provide for some other amendments to the REACH Enforcement Regulations 2008.

**3. Matters of special interest to the [Joint Committee on Statutory Instruments or the Select Committee on Statutory Instruments]**

3.1 None

**4. Legislative Context**

4.1 The REACH Enforcement Regulations 2008 (S.I. 2008/2852 – the “2008 Regulations”) set out an enforcement regime in the United Kingdom for Regulation (EC) No. 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (“REACH”). REACH is concerned with the protection of human health and the environment by identifying the intrinsic properties of over 30,000 chemical substances and ensuring that key information about the hazards or risks associated with those chemicals is understood so that they can be properly managed. This instrument amends the 2008 Regulations and revokes two, now obsolete instruments. The principal amendment made by this instrument is to provide for the exercise of the derogation available on the marketing of articles containing asbestos fibres as set out in entry 6 of Annex XVII to REACH. The marketing of articles containing asbestos is allowed if they were installed or in service before 1<sup>st</sup> January 2005, and this is carried out in accordance with an asbestos exemption certificate issued by one of the enforcing authorities nominated under the 2008 Regulations. In addition, this instrument inserts an updated definition of “REACH” into the 2008 Regulations to encompass future amendments to REACH. The Office of Rail Regulation is inserted into the 2008 Regulations as a new enforcing authority and some minor updating amendments are made to reflect changes already made to REACH since 2008. Furthermore, the Secretary of State is now required to review the operation of the 2008 Regulations in England and lay a report before Parliament setting out the

conclusions of that review, every five years starting from the coming into force date of this instrument. Regulation 15 of this instrument revokes the Asbestos Products (Safety) Regulations 1985 (1985/2042) and the Asbestos Products (Safety) (Amendment) Regulations 1987 (S.I. 1987/1979) which implemented Council Directive 76/769/EEC (OJ NO L262, 27.9.1976, p201) (as amended) , now repealed by Article 139 of REACH.

## **5. Territorial Extent and Application**

5.1 This instrument applies to the United Kingdom.

## **6. European Convention on Human Rights**

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

## **7. Policy background**

7.1 The sale and use of asbestos has been restricted in the UK and the EU for many years. The legal basis for the restriction is now entry 6 in Annex XVII of the EU Regulation on Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH). However, when REACH replaced the previous EU legislation on chemicals, several legal definitions in the new Regulation, in particular the definitions of “placing on the market” and “article”, had the unintended effect of extending the scope of the existing asbestos restriction to cover second-hand articles containing asbestos. As a result they could not be placed on the market unless the asbestos content was first removed. Alternatively articles might be disposed of before the end of their useful life or articles of heritage value might be lost.

7.2 This requirement on second-hand articles imposed costs on business and individuals across a wide range of sectors and interests. As asbestos was widely used before its health risks became apparent, it is legitimately found in many articles which were manufactured and originally placed on the market before the restrictions on its use came into force. Both informal and formal consultation indicates that railways, road transport, certain types of industrial and agricultural equipment, and the museums and heritage sector are particularly adversely affected by the restriction.

7.3 Costs were due in particular to the potential devaluation of assets, the cost of asbestos removal, and the disposal of items before the end of their service life. The Impact Assessment indicates best estimate avoided costs from adopting the derogation of £54 million p.a. (£34.5 million p.a. for business) over a 10 year time period. In the case of heritage items, the restriction could be expected to lead to the disposal of items that would otherwise be preserved, while for other heritage items asbestos removal is impossible or would cause irreparable damage to the article. Application of the restriction would also risk increasing harm to human health by forcing interventions to remove asbestos, as disturbing asbestos that is safely encapsulated can pose a greater health risk than leaving it *in situ*.

7.4 In order to rectify the unintended change to the scope of the restriction, REACH has been amended to allow Member States to adopt a derogation, which provides for exemptions so that second-hand articles containing asbestos, which were originally installed or in service before 1 January 2005, can still be placed on the market.

7.5 The UK conducted a public consultation on whether it should adopt the derogation. A total of 27 responses were received from a range of sectors. The primary question was whether the UK should take up the derogation so that exemptions could be issued from the EU restriction. 21 respondents were in favour of the proposal, while four disagreed entirely. In addition one broadly agreed, but stated that exemptions should be strictly controlled to ensure the protection of human health, and one broadly disagreed, stating that the proposal was too wide, although supporting a limited derogation for certain items. (The consultation is discussed in more detail in section 8 of this Explanatory Memorandum.) As a result of the consultation response, and in order to prevent significant costs to business, protect human health, and preserve items of cultural and historical value, the Government has decided to proceed with the derogation.

7.6 A minimal legislative amendment is necessary to take full advantage of the derogation and this is provided for by this instrument. In the UK, the derogation would be effected by the addition of a new provision to the 2008 Regulations 2008, permitting exemptions to be granted which would allow the placing on the market of a second-hand asbestos-containing article. A new Schedule to the REACH Enforcement Regulations sets out the operation of the exemption system. Exemptions could apply to a class of persons, activities, or articles, or to a person, activity or article individually. The responsibility of issuing exemptions would lie primarily with the Health and Safety Executive, the Health and Safety Executive for Northern Ireland, and the Office of Rail Regulation (ORR). These bodies would also be responsible for subsequent enforcement action. The Amendment Regulations add ORR as an enforcement authority for REACH as the national health and safety authority for the railways, including issues regarding asbestos.

7.7 The derogation also requires the imposition of conditions to ensure a high level of protection of human health. A person wishing to place a second-hand article containing asbestos on the market must demonstrate that any risks to human health have been properly assessed and are adequately controlled. They should take any reasonable opportunity to remove asbestos from the article to be placed on the market, unless it can be demonstrated that the removal of asbestos would increase the risk to human health. Records must be maintained of the location, type, and condition of asbestos in the second-hand article, and must be of sufficient clarity to allow another person to take appropriate precautions to control the risk of any exposure to asbestos. Second-hand articles containing asbestos will only be permitted to be placed on the market if they bear a warning label in accordance with the requirements listed in Appendix 7 of REACH. It is expected that exemptions will be subject to a time limit.

7.8 The derogation does not affect the regulations governing the disposal of asbestos-containing articles once they reach the end of their useful life. It also does not affect the

long-standing ban on the import or new use of asbestos, or the existing controls on the export of asbestos.

## **8. Consultation outcome**

8.1 The public consultation on whether the UK should adopt the derogation took place between 18 July 2013 and 15 August 2013. In addition to the four week formal consultation period there was close involvement and engagement with the affected sectors during preparation of the detailed Impact Assessment.

8.2 The formal consultation was published *via* the Department's website. When the consultation was launched, Defra notified the consultees listed in the consultation paper, as well as a number of trades unions who were not on the formal list. At the same time Defra briefed a meeting of the UK Chemicals Stakeholder Forum to inform them of the consultation and where it could be found. The Forum, which brings together representatives of environmental and other NGOs and the trades unions as well as industry sectors, meets four times a year and is Defra's primary route for keeping a wide range of organisations regularly informed about developments concerning REACH.

8.3 The consultation asked the following questions:

Q1. Do you agree that the UK Government should take up the derogation so that exemptions can be issued from the asbestos restriction?

Q2. Have the sectors which may be affected by the REACH restriction on asbestos been properly identified?

Q3. Do you agree that formal responsibility for exemptions from the asbestos restriction belongs with HSE, the HSENI, the Office of Rail Regulation, and the formal REACH Competent Authorities, depending on their respective responsibilities?

Q4. Do you agree that in practice HSE and HSENI, as the agencies with the most practical experience of administering asbestos exemptions, should be able to issue exemptions at the request of and on behalf of the formal Competent Authorities, and under their oversight? And so should issue exemptions which other regulators may enforce?

Q5. Overall, do you agree with the assumptions that have been made in the Impact Assessment?

Q6. Does the Impact Assessment give an accurate representation of the costs and benefits that the impact of implementing this derogation may have?

Q7. Do you agree that the estimated costs associated with applying for an exemption certificate are valid representations of (1) the time taken, and (2) the managerial position of the applicant? If not, please indicate what you consider would be better estimates.

8.4 Question 1 was the primary question with the others being dependent upon it. 21 respondents were in favour of the proposal while four disagreed. General comments in favour pointed out that the derogation would re-establish the position prior to the unintentional extension of the scope of the restriction by REACH and would avoid unnecessary costs and administrative burdens. The opinion was also expressed that without the derogation vendors would be encouraged to remove secure asbestos from an article to allow a sale, and that this would increase the potential risk to health. Respondents from the museums and heritage sector made additional comments relevant to their own circumstances. These included avoiding the destruction of items of historical and cultural value, and the importance of acquiring new items for collections or transferring items between museums, whilst ensuring that any hazards are safely managed. The railway sector highlighted the need to ensure the continued availability of rolling stock.

8.5 Opposition to the UK adoption of the derogation was expressed by trades unions. It was rooted in the view that the UK should be working towards the removal of all asbestos, whereas adoption of the derogation would discourage or delay that long-term goal. In addition it was stated that the proposal appeared to be driven by business concerns whereas the burdens arising from exposure to asbestos were borne by society, not business alone. In the case of the railways it was proposed that rolling stock should be systematically reviewed to ensure identification and safe removal of all asbestos, with the decommissioning of units where this was felt to be economically unviable.

8.6 This is not consistent with the Health and Safety Executive's established technical and policy position that it is safer to leave asbestos *in situ* than require its mandatory removal, if the asbestos is in good condition and properly managed. This technical position is based on an up-to-date understanding of the risk and it underpins this proposal. In many cases, asbestos is confined to parts of the article where it is inaccessible to users. The Government considers that without the derogation there is a risk that vendors might attempt amateur removal of the asbestos in order to allow a sale to go ahead, which would increase risk of damage to health. In addition, for some heritage items asbestos removal is impossible or achievable only by causing irreparable damage to the article.

8.7 One respondent disagreed with adopting the derogation as they believed it would encourage the continued use of asbestos in buildings. However, buildings do not count as articles for the purposes of REACH so the restriction and hence the need for a derogation do not apply to them.

8.8 With regard to the sectors most affected, respondents agreed with those identified in the consultation document, but also drew attention to aerospace, certain types of agricultural machinery, and the antiques and auction trade.

8.9 Questions 3 and 4 addressed the practical application of the derogation. 21 out of 22 respondents agreed with the proposed exempting authorities as they held the required technical competence and had previous experience of operating a regime to exempt items from import controls. Two respondents, however, proposed that competent conservation

and curatorial bodies should be allowed to issue or assess exemptions alongside the HSE. The Government does consider that it would be appropriate to increase the number of authorities with regulatory oversight of asbestos; however, exempting authorities will discuss with each sector the precise terms of exemptions, for example to ensure preservation of heritage items, as well as the conditions that would apply to ensure a high level of protection of human health.

8.10 Questions Q5, Q6 and Q7 related to the Impact Assessment (IA) that accompanied the consultation. The majority of respondents agreed with the assumptions underpinning the IA, either generally or with regard to their own sector. Of those respondents who disagreed, one stated that the IA did not consider the potential negative effects on health. It was also stated that the figures had been provided by those with an economic interest in making the case for the derogation, and were inflated as a result. Some respondents suggested that the estimates were conservative, especially when additional sectors such as aerospace and agriculture were taken into account. Some museums stated that the number of items had been underestimated; it was also suggested that smaller museums would not have the resources to carry out asbestos removal. However, the Science Museum revised downwards the costs it would face without the derogation following further audit of its stocks.

8.11 The IA acknowledged that there may be an element of bias contained in the evidence used, which could lead to inflated figures. However, the cost to business was not the sole factor in the decision to adopt the derogation. Human health factors, in particular the view that the restriction would encourage uncontrolled removal of asbestos, and the desirability of preserving items of cultural and historical value were also important considerations.

8.12 Responses were evenly balanced with regard to the costs of applying for an exemption. Of those which disagreed with the IA figures, an industry respondent considered that the costs were too low on the basis of its experience of preparing justifications for exemptions from the previous controls on imports. Another respondent suggested that the lack of a single co-ordinating body for the museums and heritage sector would make discussions with the exempting authorities more difficult and costly. It is not proposed that fees will be levied by the exempting authorities.

## **9. Guidance**

9.1 A summary of consultation responses, as well as the government response, which includes further detail on how the exemption process will operate, has been published on gov.uk.

## **10. Impact**

10.1 The derogation is expected to save business £34.5m a year. The Impact Assessment estimated that the cost of applying for exemption certificates is around £16,000 to businesses, and a further cost of processing applications is estimated at

£23,000 to Government issuing authorities over the 10 years appraisal period in present value terms.

10.2 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on [www.legislation.gov.uk](http://www.legislation.gov.uk).

## **11. Regulating small business**

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, relevant umbrella bodies and industry associations can apply for blanket exemption certificates covering the whole industry and bear the small associated costs. SMEs would be covered by such certificates and therefore would incur minimal costs (if any at all).

11.3 An extensive informal consultation was undertaken to inform the impact assessment. Of the organisations consulted the Chemicals Industry Association, Heritage Rail Association, National Association of Road Transport Museums, Confederation of Passenger Transport, Federation of British Historic Vehicle Clubs all represent SMEs or individuals. Historic or heritage activities involving asbestos-containing articles tend to represent more niche markets with smaller businesses, it is expected that SMEs will particularly benefit from the adoption of the derogation, with the costs associated with the restriction avoided.

## **12. Monitoring & review**

12.1 This instrument places a duty on the Secretary of State to formally review the operation of the 2008 Regulations in relation to England and set out the conclusions of that review in a published report. It is anticipated that the Secretary of State will consult with the Devolved Administrations and with the Department of Work and Pensions as the department ultimately responsible for the Health and Safety Executive's reserved powers in Scotland and Wales. The review process must be undertaken every five years starting from the coming into force date of this instrument.

## **13. Contact**

Keith Bailey at the Department for Environment, Food and Rural Affairs – Tel: 020 7238 1572 or email: [keith.bailey@defra.gsi.gov.uk](mailto:keith.bailey@defra.gsi.gov.uk) – can answer any queries regarding the instrument.