



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 15 October 2012

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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 10 October 2012

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

No Cion doc.: C(2012) 7037 final

Subject: Commission Delegated Directive .../.../EU of 10.10.2012 amending, for the
purposes of adapting to technical progress, Annex III to Directive 2011/65/EU
of the European Parliament and of the Council as regards an exemption for
applications containing cadmium

Delegations will find attached Commission document C(2012) 7037 final.

Encl.: C(2012) 7037 final



Brussels, 10.10.2012
C(2012) 7037 final

COMMISSION DELEGATED DIRECTIVE ../.../EU

of 10.10.2012

amending, for the purposes of adapting to technical progress, Annex III to Directive 2011/65/EU of the European Parliament and of the Council as regards an exemption for applications containing cadmium

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Subject: Commission Delegated Directive amending, for the purposes of adapting to technical progress, Annex III to Directive 2011/65/EU of the European Parliament and of the Council as regards an exemption for applications containing cadmium.

Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 (RoHS 2) restricts the use of certain hazardous substances (lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls, polybrominated diphenyl ethers) in electrical and electronic equipment. RoHS 2 (recast) entered into force on 21 July 2011. It followed Directive 2002/95/EC (RoHS 1) which entered into force on 13 February 2003. RoHS 1 will be repealed with effect from 3 January 2013.

RoHS 2 Annexes III and IV list exemptions of materials and components from the RoHS substance restrictions. Article 5 provides for the adaptation (inclusion and deletion of exemptions) of the Annexes to scientific and technical progress. Pursuant to Article 5, exemptions shall be included in Annexes III and IV, provided that such inclusion does not weaken the environmental and health protection afforded by Regulation (EC) No 1907/2006 and where any of the following conditions is fulfilled: the elimination or substitution via design changes or materials and components which do not require any of the materials or substances listed in Annex II is scientifically or technically impracticable; the reliability of substitutes is not ensured; or the total negative environmental, health and consumer safety impacts caused by substitution are likely to outweigh the total environmental, health and consumer safety benefits thereof.

RoHS 2 Annex III reflects the status of the RoHS 1 exemptions Annex at the time of the adoption of RoHS 2. However, the RoHS 1 Annex was amended one more time after the publication of RoHS 2; Commission Decision 2011/534/EU of 8 September 2011 added two exemptions for applications containing lead or cadmium to this Annex.

Therefore, these two exemptions are missing from RoHS 2 Annex III. The exemptions granted under RoHS 1 in 2011/534/EU apply until 3 January 2013 but still need to be legally incorporated under RoHS 2 in order to apply afterwards. For the sake of legal certainty and coherence, and in order to enable economic operators to make use of these exemptions as provided in RoHS 1, they should be incorporated in RoHS 2 Annex III as soon as possible.

RoHS Article 5(1) (a) provides that the Commission shall include materials and components of EEE for specific applications in the lists in Annexes III and IV by means of individual delegated acts. This implies that in order to transfer the provisions in 2011/534/EU to RoHS 2, two delegated acts are required. The objective of this delegated directive is to incorporate the RoHS 1 exemption 40 "Cadmium in photoresistors for analogue optocouplers applied in professional audio equipment (Expires on 31 December 2013)" in Annex III.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Prologue (RoHS 1): The proposal for Commission Decision 2011/534/EU (amending the RoHS 1 Annex) had been based on a thorough assessment by the Commission's consultants. The technical and legislative procedure included a targeted stakeholder consultation, a

scientific evaluation¹ and a vote by the Member States' Committee for the "Adaptation to Scientific and Technical Progress and Implementation of the Directives on Waste Established under Article 39 of Directive 2008/98/EC".

Specific preparatory activities in the context of this delegated act: As the conditions for granting an exemption have slightly changed from RoHS 1 to RoHS 2 (cf. Article 5(1) (a)), the Commission commissioned a study for the re-assessment of this exemption in view of the new criteria, in order to clarify if the consultants' original findings and recommendations were still valid in the context of RoHS 2. After consultation with the relevant stakeholders², the consultants came to the clear conclusion that their assessment was still accurate and that RoHS 2 Annex III should be amended accordingly. The final report is available on the consultants' webpage³; stakeholders and Member States were notified. The project page is accessible via the DG Environment webpage.

Subsequently, the Commission established an official expert group for delegated acts under ROHS 2 and invited to a meeting on 5 July 2012, where the consultants gave an overview on the history of the respective exemption and of their scientific work, and explained their recommendation for granting the same exemption now under RoHS 2. The expert group fully supported this proposal. Council and Parliament were notified of all activities.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The proposed act grants an exemption from the substance restrictions in Annex II of Directive 2011/65/EU (RoHS 2), to be listed in Annex III, for the use of cadmium in specific applications.

The draft delegated directive implements Directive 2011/65/EU, and in particular Article 5(1) (a) thereof.

The objective of the proposed act is to ensure legal certainty, coherence and continuity between RoHS 1 and RoHS 2.

The proposed instrument is a delegated directive⁴. Other measures would be inadequate, as the deadline for the transposition of RoHS 2 into national legislation has not expired yet.

In accordance with the principle of proportionality, the measure does not go beyond what is necessary to achieve its objective.

The proposal has no implications for the EU budget.

¹ <http://rohs.exemptions.oeko.info/index.php?id=95>.

² The consultation list is regularly updated and maintained by the consultants in cooperation with the Commission, and includes electronics related industry organisations, manufacturers and suppliers, recyclers, consumer associations, NGOs, academia, Member States' representatives etc.

³ http://rohs.exemptions.oeko.info/fileadmin/user_upload/Rohs_V/Re-evaluations_transfer_RoHS_I_RoHS_II_final.pdf.

⁴ Following an advice for the Commission's legal service, the format of the legal measure has been changed from a regulation to a directive after the inter service consultation.

COMMISSION DELEGATED DIRECTIVE ../../EU

of 10.10.2012

amending, for the purposes of adapting to technical progress, Annex III to Directive 2011/65/EU of the European Parliament and of the Council as regards an exemption for applications containing cadmium

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment⁵, and in particular Article 5(1)(a) thereof,

Whereas:

- (1) Directive 2011/65/EU prohibits the use of cadmium in electrical and electronic equipment placed on the market.
- (2) The substitution of cadmium in photoresistors for analogue optocouplers applied in professional audio equipment is still technically impracticable. The use of cadmium in those photoresistors should therefore be exempted from the prohibition. However, that exemption should be limited in time as the research for cadmium free technology is in progress and substitutes could become available by the end of 2013.
- (3) Directive 2011/65/EU should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Annex III to Directive 2011/65/EU is amended as set out in the Annex to this Directive.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [2 January 2013] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

⁵ OJ L 174, 1.7.2011, p. 88.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 10.10.2012

For the Commission
The President
José Manuel BARROSO

ANNEX

In Annex III to Directive 2011/65/EU the following point 40 is added:

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40	Cadmium in photoresistors for analogue optocouplers applied in professional audio equipment	Expires on 31 December 2013
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