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COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	COMMISSION DELEGATED DIRECTIVE (EU) .../... of 13.12.2021 amending, for the purposes of adapting to scientific and technical progress, Annex III to Directive 2011/65/EU of the European Parliament and of the Council as regards an exemption for the use of mercury in other low pressure discharge lamps

Delegations will find attached document C(2021) 8951 final.

Encl.: C(2021) 8951 final



EUROPEAN
COMMISSION

Brussels, 13.12.2021

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COMMISSION DELEGATED DIRECTIVE (EU) .../...

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amending, for the purposes of adapting to scientific and technical progress, Annex III to Directive 2011/65/EU of the European Parliament and of the Council as regards an exemption for the use of mercury in other low pressure discharge lamps

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

This Commission Delegated Directive amends, for the purpose of adapting to scientific and technical progress, Annex III to Directive 2011/65/EU of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment (recast)¹ (the RoHS Directive). The amendment concerns an exemption for specified applications containing mercury in other low pressure discharge lamps.

The RoHS Directive restricts the use of certain hazardous substances in electrical and electronic equipment (EEE), as specified in Article 4. Ten substances are currently restricted and listed in Annex II to the Directive: lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBB), polybrominated diphenyl ethers (PBDE), bis (2-ethylhexyl) phthalate (DEHP), butyl benzyl phthalate (BBP), dibutyl phthalate (DBP) and diisobutyl phthalate (DIBP). Annexes III and IV list the EEE materials and components for specific applications that are exempt from the substance restrictions laid down in Article 4(1).

Article 5 of the Directive provides for the adaptation of Annexes III and IV to scientific and technical progress, which can include granting, renewing and revoking of exemptions. Pursuant to Article 5(1)(a), exemptions are to be included in Annexes III and IV only if such inclusion does not weaken the environmental and health protection afforded by Regulation (EC) No 1907/2006 (REACH)² and where any of the following conditions is fulfilled: (i) their 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; (ii) the reliability of substitutes is not ensured; (iii) 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.

Decisions on exemptions, and their duration, must also take into account the availability of substitutes and the socioeconomic impact of substitution. Decisions on the duration of exemptions must also take into account any potential impact on innovation. Life-cycle thinking on the overall impacts of the exemption must be applied, where relevant.

Article 5(1)(a) also specifies that, to include materials and components of EEE for specific applications in the lists in Annexes III and IV, the Commission must adopt individual delegated acts. Article 5(3) and Annex V describe the procedure for submitting exemption-related applications to the Commission.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

The Commission received requests³ from economic operators to grant or renew exemptions as provided for under Article 5(3) and Annex V to the RoHS Directive.

¹ OJ L 174, 1.7.2011, p. 88.

² OJ L 396, 30.12.2006, p. 1.

³ The list is available at: https://ec.europa.eu/environment/waste/rohs_eee/adaptation_en.htm.

The current Annex III exemption 4(a) permits the use of mercury in other low pressure discharge lamps (per lamp): 15 mg.

In December 2014 and January 2015 the Commission received two applications for the renewal of this exemption claiming in essence that there is no available light-emitting diodes (LED) or other lighting technology that use less mercury or which can be used as a substitute for these lamps⁴. One of the applications was renewed with additional information in January 2020. In line with the requirements of Article 5(5) of the RoHS Directive, an exemption remains valid until the Commission takes a decision on the renewal application.

To evaluate the application to renew that exemption, the Commission launched a study⁵ in June 2015, concluded in 2016, to carry out the required scientific and technical assessment, including an eight-week online stakeholder consultation⁶. Further to that study assessing the extensive scientific and technical data and contributions received, as documented in the study report, the Commission in 2019⁷ carried out an update of the 2016 study, focused on the socioeconomic assessment and availability of substitutes of this and other exemptions. The final report of the study was published⁸ and stakeholders were notified.

The Commission consulted the Member State expert group for delegated acts under the RoHS Directive during the expert meetings of 1 September 2016, 29 October 2018 and 21 October 2019 to collect Member States' views on an envisaged course of action in line with the conclusions of the evaluations. It carried out all the requisite procedural steps relating to exemptions from the substance restriction, under Article 5(3) to 5(7).⁹ The Council and the European Parliament were notified of all activities.

The final reports highlighted that:

- the lamps covered by this exemption are not phosphor-coated and produce mainly light in ultraviolet spectrum. They are installed in equipment for industrial, commercial and residential applications and cover uses such as ultraviolet germicidal or bacterial disinfection/purification of air/water/surfaces;
- in order to fulfil these purposes, the light output must be in the deep ultraviolet range. Mercury-free alternatives do not yet provide the necessary wavelength range. Therefore, substitutes with a comparable performance are currently technically impracticable;
- it was also concluded that first alternatives coming on the market would not cover the full product range and, at the system level, time is still needed to develop

⁴ <https://rohs.exemptions.oeko.info/fileadmin> and http://rohs.exemptions.oeko.info/fileadmin/user_upload/RoHS_Pack_9/Exemption_4_a/Lighting_Europe/4a_LE_RoHS_Exemption_Req_Final.pdf.

⁵ Final Report of the study is available at <https://op.europa.eu/en/publication-detail/-/publication/a3fdcc8c-4273-11e6-af30-01aa75ed71a1>.

⁶ Consultation period: 21 August 2015 to 16 October 2015, <https://rohs.exemptions.oeko.info>.

⁷ https://rohs.exemptions.oeko.info/fileadmin/user_upload/reports/FWCW_RoHS_Lamps_SEA_20190729_Final.pdf

⁸ https://ec.europa.eu/environment/waste/rohs_eee/studies_rohs1_en.htm.

⁹ A list of the required administrative steps is available on the [Commission website](#). Current stage of the procedure can be viewed for each draft delegated act in the Interinstitutional Registry of Delegated Acts at <https://webgate.ec.europa.eu/regdel/#/home>.

sufficient alternatives, reason for which it was recommended to renew the exemption for the maximum duration of a further five years;

- the current scope of the exemption can be narrowed to low-pressure discharge lamps that are not phosphor-coated and emit light in the ultraviolet range.

In conclusion, the scientific and technical assessments, including stakeholder consultations, detailed that, as reliable substitutes are not yet available, the exemption criteria continue to be met with regard to exemption 4(a). The evaluation results also show that the specific exemption would not weaken the environmental and health protection afforded by the REACH Regulation, in accordance with Article 5 of Directive 2011/65/EU.

In accordance with the Better Regulation Guidelines, the draft Delegated Directive was published on the Better Regulation Portal for a four-week public feedback period. During the consultation on the draft act, 15 contributions were received. The draft act was revised and clarified taking into consideration some of the points raised.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The delegated directive renews exemption 4(a), listed in Annex III of Directive 2011/65/EU, for the use of mercury in specified applications.

The Commission's assessment, based on the supporting studies and consultations, concluded that the exemption request meets at least one of the criteria laid down in Article 5(1)(a), that justifies extending the exemption: the substitution of mercury, with reliable substitutes, in the lamp categories concerned by this exemption cannot currently be ensured. The assessment also concluded that the scope of the exemption should be narrowed to further specified applications.

In summary, the conditions for renewing the exemption are fulfilled, and exemption 4(a) is to be renewed by introducing a new wording suitable to the actual scope of the exemption.

The date by which this exemption shall expire is set in line with Article 5(2)(first subparagraph). As concluded by the evaluation, the state of development of substitutes justifies renewing the exemption for the maximum validity period of five years. The granted validity period is not expected to have adverse impacts on innovation.

The legal instrument is a delegated directive, as provided for by Directive 2011/65/EU, in particular to meet the requirements set out in Article 5(1)(a) thereof.

The objective of the delegated directive is to contribute to the protection of human health and the environment and to align the provisions for the functioning of the internal market in the field of electrical and electronic equipment, by allowing the use of otherwise banned substances for specific applications, with the provisions and under the conditions of the RoHS Directive and the procedure for adapting Annexes III and IV to scientific and technical progress.

The delegated directive has no implications for the EU budget.

COMMISSION DELEGATED DIRECTIVE (EU) .../...

of 13.12.2021

amending, for the purposes of adapting to scientific and technical progress, Annex III to Directive 2011/65/EU of the European Parliament and of the Council as regards an exemption for the use of mercury in other low pressure discharge lamps

(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 equipment¹, and in particular Article 5(1), point (a), thereof,

Whereas:

- (1) Directive 2011/65/EU requires Member States to ensure that electrical and electronic equipment placed on the market does not contain the hazardous substances listed in Annex II to that Directive. That restriction does not apply to certain exempted applications listed in Annex III to that Directive.
- (2) The categories of electrical and electronic equipment to which Directive 2011/65/EU applies are listed in Annex I to that Directive.
- (3) Mercury is a restricted substance listed in Annex II to Directive 2011/65/EU.
- (4) By Decision 2010/571/EU², the Commission granted, among other things, an exemption for the use of mercury in other low pressure discharge lamps ('the exemption'), which is now listed as exemption 4(a) in Annex III to Directive 2011/65/EU. The exemption was to expire on 21 July 2016, in accordance with Article 5(2), second subparagraph, point (a), of that Directive.
- (5) Mercury is used in low pressure discharge lamps to produce ultraviolet light used for ultraviolet germicidal or bacterial disinfection and/or purification of air, water and surfaces.

¹ OJ L 174, 1.7.2011, p. 88.

² Commission Decision 2010/571/EU of 24 September 2010 amending, for the purposes of adapting to scientific and technical progress, the Annex to Directive 2002/95/EC of the European Parliament and of the Council as regards exemptions for applications containing lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls or polybrominated diphenyl ethers (OJ L 251, 25.9.2010, p. 28).

- (6) On 19 December 2014 and 15 January 2015, the Commission received two applications for renewal of the exemption ('the renewal application'), that is within the time laid down in Article 5(5) of Directive 2011/65/EU, of which one was updated with a renewed application on 20 January 2020. In accordance with Article 5(5) of Directive 2011/65/EU, the exemption remains valid until a decision on the renewal application has been taken.
- (7) The evaluation of the renewal application, which took into account the availability of substitutes and the socioeconomic impact of substitution, concluded that the elimination of mercury in the applications concerned or its substitution by a substance of comparable performance is currently technically impracticable. That evaluation further concluded that the current scope of the exemption can be limited to low pressure discharge lamps that are not phosphor-coated and emit light in the ultraviolet range. The evaluation included stakeholder consultations in accordance with Article 5(7) of Directive 2011/65/EU. The comments received during these consultations were made publicly available on a dedicated website.
- (8) The exemption is consistent with Regulation (EC) No 1907/2006 of the European Parliament and of the Council³ and thus does not weaken the environmental and health protection afforded by it.
- (9) It is therefore appropriate to grant the renewal of the exemption, with a revised wording, setting out the limited scope of the exemption, for a maximum period of five years, in accordance with Article 5(2), first subparagraph, of Directive 2011/65/EU. In accordance with Article 5(6) of Directive 2011/65/EU, an expiry date of 12 months should be set for the current exemption 4(a). In view of the results of the ongoing efforts to find a reliable substitution, the duration of the exemption is unlikely to have adverse impacts on innovation.
- (10) 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 adopt and publish, by [the last day of the sixth month after the date of entry into force of this Directive] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

³ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396, 30.12.2006, p. 1).

They shall apply those provisions from [the last day of the sixth month after the date of entry into force of this Directive + 1 day].

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, 13.12.2021

For the Commission
The President
Ursula VON DER LEYEN