



Council of the
European Union

Brussels, 15 December 2021
(OR. en)

15049/21

ENV 1005
MI 947
DELECT 269

COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	13 December 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

No. Cion doc.:	C(2021) 8979 final
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 discharge lamps for special purposes

Delegations will find attached document C(2021) 8979 final.

Encl.: C(2021) 8979 final



Brussels, 13.12.2021
C(2021) 8979 final

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 discharge lamps for special purposes

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

This Commission Delegated Directive amends, for the purpose of adapting to technical and scientific 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, currently 4(f), for specified applications containing mercury in other discharge lamps for special purposes.

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 RoHS 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 or revoking exemptions. Pursuant to Article 5(1)(a), exemptions are to be included in Annexes III and IV only if this does not weaken the environmental and health protection afforded by Regulation (EC) No 1907/2006 (REACH)² and only if they meet any of the following conditions: (i) elimination or substituting the substance 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 substituting the substance 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 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.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

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

The current Annex III exemption 4(f) permits the use of mercury in other discharge lamps for special purposes not specifically mentioned in this Annex.

The Commission received three applications to renew this exemption in January 2015. One applicant claimed that replacing mercury in the lamps covered by this exemption is

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.

scientifically and technically impracticable⁴, whilst the other two applicants focused their requests on specific applications such as high intensity discharge lamps⁵ and lamps used for curing / polymerisation and for disinfection⁶, on the same grounds of scientific and technic impracticability. In line with the requirements of the RoHS Directive (Article 5(5), second subparagraph), the 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 study⁷ in June 2015, concluded in 2016, to carry out the required technical and scientific assessment, including an eight-week online stakeholder consultation.⁸ Further to that study assessing the extensive technical and scientific data and contributions received, as documented in the study report, the Commission carried out in 2019⁹ an update of the 2016 study focused on the socioeconomic assessment and on the availability of substitutes regarding this and other exemptions. The final report of the study was published¹⁰ 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 proposals 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) of the RoHS Directive.¹¹ The Council and the European Parliament were notified of all actions undertaken.

The supporting study highlighted that:

- The exemption covers a wide array of applications such as multiple types of ultraviolet lamps (e.g. curing lamps, lamps used in photochemistry, development of polymers), projector lamps, horticultural lamps etc.
- Mercury-free substitutes are understood to be available at system level (for use in new light emitting diode (LED) luminaires), but such substitutes have various limitations and cannot be used in the numerous types of existing discharge lamps for special purposes (component replacement).
- Currently, the substitution of mercury in the applications concerned is technically impracticable and the current exemption should be renewed. However, where possible, the applications should be further specified. For part of the exemption, it is already possible to specify in further detail the applications where mercury cannot be substituted. For those, the maximum validity for the exemption should apply. The previous formulation of the exemption regarding 'other discharge lamps for special

⁴ https://rohs.exemptions.oeko.info/fileadmin/user_upload/RoHS_Pack_9/Exemption_4_f/Lighting_Europe/4f_LE_RoHS_Exemption_Req_Final.pdf.

⁵ https://rohs.exemptions.oeko.info/fileadmin/user_upload/RoHS_Pack_9/Exemption_4_f/Vske/4f_201412-09_RoHS_Application_VskE.pdf.

⁶ https://rohs.exemptions.oeko.info/fileadmin/user_upload/RoHS_Pack_9/Exemption_4_f/VDMA/4f_VDMA_excempt_req_4f_RoHS_16Jan14.pdf.

⁷ The final report of the study is available at <https://op.europa.eu/en/publication-detail/-/publication/a3fdcc8c-4273-11e6-af30-01aa75ed71a1>.

⁸ Consultation period: 21 August 2015 to 16 October 2015, <https://rohs.exemptions.oeko.info>.

⁹ https://rohs.exemptions.oeko.info/fileadmin/user_upload/reports/FWCW_RoHS_Lamps_SEA_20190729_Final.pdf

¹⁰ https://ec.europa.eu/environment/waste/rohs_eee/studies_rohs1_en.htm.

¹¹ A list of the required administrative steps is available on the [Commission website](https://webgate.ec.europa.eu/regdel/#/home). The 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>.

purposes not specifically mentioned’ is still necessary for the uses not covered by the specific formulation, but it should be extended for a period shorter than the maximum five years given the prospects of limiting the exemption in future.

- In conclusion, the scientific and technical assessments, including stakeholder consultations, detailed that the exemption criteria continue to be met with regard to exemption 4(f), as reworded, as reliable substitutes are not yet available. The evaluation results also showed that renewing the exemption would not weaken the level of 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, 36 contributions were received. The points raised were considered and the draft act was consequently amended.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The delegated directive renews exemption 4(f) in Annex III to 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) of the RoHS Directive that justifies extending the exemption: mercury cannot be reliably substituted in the lamp categories covered by this exemption.

In summary, the conditions for the exemption are fulfilled, and the exemption entry 4(f) is to be renewed. The assessment concluded that, to limit the exemption in light of prospects for substitution, the current broader part of the exemption should be renewed for a shorter duration of three years (entry 4(f)-I). Where possible, the scope of the exemption should also be narrowed to specified applications as follows:

- 4(f) –II: Mercury in high pressure mercury vapour lamps used in projectors where an output ≥ 2000 lumen ANSI is required;
- 4(f) –III: Mercury in high pressure sodium vapour lamps used for horticulture lighting;
- 4(f) –IV: Mercury in lamps emitting light in the ultraviolet spectrum.

Narrowing down the scope of the exemption in this way is in line with the approach expressed in the recital 19 of the RoHS Directive that exemptions should be limited in their scope and duration in order to achieve a gradual phase-out of hazardous substances in EEE. Where necessary, the list of specified applications should be further adjusted in the future.

The expiry dates for this exemption are 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 for the specific applications. For the broader entry 4 (f)-I for ‘other discharge lamps for special purposes not specifically mentioned’, the validity period should be set at three years. The validity periods are not expected to have an adverse impact 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, in line with the provisions and under the conditions of the RoHS and the procedure for adapting Annexes III and IV to scientific and technical progress.

The delegated directive has no implications on 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 discharge lamps for special purposes

(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 discharge lamps for special purposes not specifically mentioned ('the exemption'), which is now listed as exemption 4(f) 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) The function of mercury in gas discharge lamps for special purposes is related to the light generating process to convert electricity into light.
- (6) On 15 January 2015, the Commission received several applications for renewal of the exemption ('the renewal applications') that is within the time limit laid down in Article 5(5) of Directive 2011/65/EU. 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.

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).

- (7) The evaluation of the renewal applications, which took into account the availability of substitutes and the socioeconomic impact of substitution, concluded that the substitution or elimination of mercury in the applications concerned by the exemption is currently technically impracticable. Given the prospects of substitution limiting the exemption in future, it is however appropriate to grant the renewal of the exemption for a period of three years only. The evaluation also concluded that it is possible to further define the applications that qualify for a renewal of the exemption in accordance with the criteria set out in Article 5(1), point (a), of Directive 2011/65/EU because of their specific functionality and application area, namely high pressure mercury vapour lamps used in projectors, used for horticulture lighting and emitting light in the ultraviolet spectrum. For those specific applications, the exemption should be renewed for a maximum period of five years. The evaluation included stakeholder consultations in accordance with Article 5(7) of Directive 2011/65/EU. The comments received during those 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) 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.

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.

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).

- (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