Annex: Submission from ClientEarth

Part 2 is intended to transfer legislative functions in relation to the restriction of hazardous substances in electrical and electronic equipment from the Commission to the Secretary of State. However, Part 2 does not amend existing provisions of EU/retained EU law but appears to introduce new provisions without revoking the equivalent provisions in EU law, which has made this rather difficult to review. The following appear to be changes that could be problematic:

- Regulation 3(1) gives the Secretary of State the power to amend the list of restricted substances and maximum concentration values. The Secretary of State may only do this "for the purpose of contributing to the achievement of the objective of the protection of human health and the environment" (emphasis is my own). However, under corresponding EU law (Directive 2011/65/EU), the Commission may amend this list "with a view to achieving" this objective, which appears to be a stronger standard.

- Regulation 8 provides that the Secretary of State must consult "such persons as the Secretary of State considers appropriate" when amending the list. However, the corresponding EU law expressly states that the Commission must consult environmental organisations when making any such amendment to the list.

21 October 2020

Response from Defra

1. The equivalent legislative functions in EU law are contained in Articles 5 and 6 of Directive 2011/65/EU. Article 5 gives the Commission power to amend Annexes 3 and 4 to the Directive to grant, renew or revoke exemptions. Article 6 gives the Commission power to amend the list of restricted substances. The Directive will not be retained direct EU legislation, and it is therefore not possible to amend or revoke those Articles.

2. Article 6(1) states that the power to amend the list of restricted substances is exercisable "with a view to achieving the objectives set out in Article 1 and taking account of the precautionary principle". Article 1 states that the Directive lays down rules "with a view to contributing to the protection of human health and the environment, including the environmentally sound recovery and disposal of waste EEE".

3. Regulation 3(2)(a) of the draft SI provides that regulations amending the list of restricted substances may only be made "for the purpose of contributing to achievement of the objective of the protection of human health and the environment, including the environmentally sound recovery and disposal of waste EEE, and taking account of the precautionary principle".

4. Thus, regulation 3(2)(a) incorporates the requirements of both Article 1 and Article 6(1), with the only difference being that it uses the words "for the purpose of" instead of "with a view to". We do not consider that this minor difference in wording has any difference in effect from the wording of the Directive.

5. In relation to consultation, Article 5(7) and the last subparagraph of Article 6(1) of the Directive refer to environmental organisations as part of a longer list of persons to be consulted. For example, Article 5(7) states that "the Commission shall, inter alia, consult economic operators, recyclers, treatment operators, environmental organisations and employee and consumer associations". It is clear from the wording of both Articles that this

is not an exhaustive list, and their effect is to require the Commission to carry out a general public consultation.

6. Regulation 8(1) contains standard wording for a statutory consultation requirement. It does not replicate the lists in Articles 5(7) and 6(1) because it is not usual practice in domestic legislation to include lengthy non-exhaustive lists of persons to be consulted. It is the Secretary of State's intention to comply with regulation 8(1) by carrying out a general public consultation before making regulations to which it applies, and environmental organisations will, like other persons, have the opportunity to respond to such a consultation.

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