

EXPLANATORY MEMORANDUM TO
THE CONSTRUCTION PRODUCTS (AMENDMENT ETC.) (EU EXIT)
REGULATIONS 2019

2019 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Housing, Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument corrects failures of retained EU law to operate effectively, and other deficiencies arising from the United Kingdom’s withdrawal from the European Union, in the following pieces of legislation:

- Regulation (EU) No 305/2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC (“the CPR”) and EU tertiary legislation under that Regulation; and
- The Construction Products Regulations 2013, S.I. 2013/1387.

Explanations

What did any relevant EU law do before exit day?

- 2.2 The CPR is an EU regulation that is directly applicable in the UK. It seeks to remove technical barriers to the trade of construction products in the European single market.
- 2.3 The CPR “lays down harmonised rules for the marketing of construction products in the EU. The Regulation provides a common technical language to assess the performance of construction products. It ensures that reliable information is available to professionals, public authorities, and consumers, so they can compare the performance of products from different manufacturers in different countries”¹.
- 2.4 The European Commission requests European standardisation bodies to produce harmonised European standards for construction products (which define the methods and the criteria for assessing the performance of the product in relation to its “essential characteristics”). The British Standards Institution participates in this process. If the European Commission is content that the standard produced conforms to its request, it publishes the reference to the standard.
- 2.5 Where a harmonised standard exists for a product the CPR places obligations on manufacturers, distributors and importers of that product when it is placed on the market. It must have a declaration of performance and have been affixed with a ‘CE’ mark.
- 2.6 In order to safeguard the reliability of the declaration of performance, the CPR provides for systems of “Assessment and Verification of Constancy of Performance”. Where third party assessment of the performance of construction products is required,

¹ European Commission website: https://ec.europa.eu/growth/sectors/construction/product-regulation_en

it may only be undertaken by authorised Conformity Assessment Bodies (known as ‘notified bodies’). Notified bodies are designated by an EU Member State and their competence is then recognised across the EU. Member States must inform the European Commission when a body is accredited, hence they are known as notified bodies.

- 2.7 The CPR also allows manufacturers to affix a CE mark to products that are not fully covered by a harmonised standard. This is by applying for a technical assessment of their product based on a ‘European Assessment Document’ (EAD). EADs are devised by the group of ‘technical assessment bodies’.
- 2.8 The CPR delegates various powers to the European Commission (to make ‘Delegated and Implementing Acts’) to update and revise certain technical aspects of the CPR regime. The European Commission can make delegated acts for the purpose of achieving the objectives of the CPR, in particular to remove and avoid restrictions on making products available on the market. Between the CPR coming into force in 2013 and November 2018 there have been 18 delegated and implementing acts made.
- 2.9 The enforcement of the CPR is undertaken by Trading Standards in England, Wales and Scotland and by district councils in Northern Ireland. The enforcement regime is provided for in domestic regulations: The Construction Products Regulations 2013, S.I 2013/1387.

Why is it being changed?

- 2.10 When the CPR becomes retained EU law, without the amendments made by this instrument, it would be ineffective for the UK market. Its provisions would not have practical application in the UK (as the UK will not be a Member State). It also confers several functions on the European Commission which will no longer operate in relation to the UK.
- 2.11 This instrument is needed to ensure the law will operate effectively after the UK has left the EU. The general policy is to keep the same requirements but to convert them into a UK regime. The key elements of the Government’s approach to the future arrangements for the regulation of most goods covered by the European Union’s ‘New Approach’ framework, including the CPR, was set out in technical notice guidance² in September 2018. That technical notice set out the requirements that would apply in a scenario in which the UK leaves the EU without agreement (a ‘no deal’ scenario). This instrument makes provision to implement the approach outlined in the technical notice.
- 2.12 While the government has every confidence that a deal will be reached and the implementation period will be in place, it has a duty to plan for all eventualities, including a ‘no deal’ scenario. The government is clear that this scenario is in neither the UK’s nor the EU’s interest, and the government does not anticipate it arising. To prepare for this eventuality, the Ministry of Housing, Communities and Local Government intends to use powers in the European Union (Withdrawal) Act 2018 to ensure that the UK continues to have a functioning regulatory regime in all scenarios. If the UK does not enter an implementation period, this instrument will come into force on exit day.

² <https://www.gov.uk/government/publications/trading-goods-regulated-under-the-new-approach-if-theres-no-brexite-deal/trading-goods-regulated-under-the-new-approach-if-theres-no-brexite-deal>

What will it now do?

- 2.13 The CPR regime amended by this instrument will maintain the requirement on manufacturers to declare the performance of their product, in accordance with product standards, when the product is placed on the UK market. To enable the regime to function effectively in the UK context it is necessary to make a number of amendments through this instrument. The key component parts of this are as follows.

Product standards

- 2.14 Existing European harmonised standards will become UK ‘designated standards’ at the point the UK leaves the EU. This will mean that immediately following exit the UK’s product standards under the CPR will be identical to those under the EU’s regime.
- 2.15 This instrument then provides the Secretary of State with two routes to designate a standard after exit day. Firstly, in the same way as the European Commission issues mandates now, the Secretary of State may issue a mandate to a UK standardisation body to develop a standard. The standardisation body must consult with such persons as it considers appropriate on the content of the standard.
- 2.16 Alternatively, the Secretary of State may designate a harmonised standard adopted by a European standardisation body (such as the European Committee for Standardisation (“CEN”)). This will enable the Secretary of State, where appropriate and on a case-by-case basis, to designate a European harmonised standard which the British Standards Institution, as a member of CEN will have participated in the development of.

Assessment and verification of constancy of performance

- 2.17 The role of “notified bodies” – who are the only third parties authorised to undertake conformity assessment activity under the CPR - will be undertaken by “approved bodies”. Approved bodies must be based within the UK (but see below in terms of products that have met EU requirements). This instrument automatically grants existing CPR notified bodies based in the UK ‘approved body’ status. The Secretary of State may authorise new approved bodies on or after exit day.
- 2.18 Where an approved body has undertaken the assessment, the manufacturer must affix a ‘UK mark’. The UK mark will be established under a separate instrument led by the Department for Business, Energy and Industrial Strategy. That instrument is titled “The Product Safety and Metrology (Amendment etc.) (EU Exit) Regulations 2019”.

Products that meet EU requirements

- 2.19 In addition to the above, products that meet requirements under the EU’s CPR can continue to be placed on the UK market without any need for retesting or additional marking, provided that the product is covered by a designated standard which is also a harmonised European standard. This includes where the economic operator has demonstrated compliance with EU requirements after exit day. Such products must display the CE mark. We recognise that businesses will need time to adapt to the new UK regime. This approach will ensure that goods continue to flow onto the UK market. It will help to minimise disruption for businesses and for consumers. As explained in the technical notice referred to in paragraph 2.11 above, it is intended that these arrangements will be for a time-limited period, but this instrument itself does not limit the duration of this provision.

UK marking of products not fully covered by a designated standard

- 2.20 These amendments will also provide a route to UK marking for products that are not fully covered by a designated standard in the same way as the CPR does on an EU-wide basis currently. Preparation of UK Assessment Documents (UKADs), and the issuing of Technical Assessments (the documented assessment of the product in accordance with the respective UKAD), will be undertaken by Technical Assessment Bodies established in the UK.

Updating technical aspects of the CPR regime

- 2.21 The instrument will give the Secretary of State regulation-making powers to enable the UK to make technical updates to the CPR framework that will become retained EU law. This will replace the role that the European Commission has under the CPR to make ‘delegated and implementing acts’. This provision is necessary to ensure that the CPR regime can respond to technical progress and new or emerging issues. Schedule 3 of this instrument also corrects deficiencies in a number of pre-existing delegated and implementing acts to ensure that they continue to operate effectively in the UK.

Transitional provisions

- 2.22 Part 12 of Schedule 1 details the transitional and saving provisions that are necessary to support a smooth transition to the new arrangements.

Enforcement

- 2.23 Schedule 2 of this instrument makes fixes to correct deficiencies in the market surveillance regime arising from EU exit. These technical operability fixes are made to *The Construction Products Regulations 2013, S.I 2013/1387*.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Minister of State for Housing, Communities and Local Government, Kit Malthouse has made the following statement regarding Human Rights:
“In my view the provisions of the Construction Products (Amendment etc.) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The CPR is an EU Regulation which sets conditions for the marketing of construction products and the use of CE marking. Member States remain responsible for safety, environmental, energy and other requirements applicable to construction works.
- 6.2 The European Union (Withdrawal) Act 2018 makes provision for repealing the European Communities Act 1972 and will preserve EU law, as it stands at the moment of exit, in UK law. The European Union (Withdrawal) 2018 Act creates a new body of domestic legislation from directly applicable EU law being brought into domestic legislation, as well as saving EU-derived domestic legislation which was made to implement the UK's obligations as a member of the European Union, together this will be retained EU law. The CPR will form part of this new body of domestic legislation.
- 6.3 The European Union (Withdrawal) Act 2018 contains a temporary power to make secondary legislation to deal with deficiencies in this retained EU law. This instrument makes the changes necessary to ensure that there is a functioning CPR regime for the UK market when the UK leaves the EU. These amendments relate to matters which have been identified as deficiencies in the legislation arising from that withdrawal from the European Union.

7. Policy background

What is being done and why?

- 7.1 When the CPR regime becomes retained law at the point that the UK leaves the EU, changes are required to ensure that it operates effectively in the UK. The general policy is to keep the same requirements but to convert them into a UK regime. If the Government did not make these changes there would be no functioning CPR regime in the UK. Details of the amendments are set out in paragraph 2 above.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The instrument is also made under paragraph 21 of Schedule 7 to the European Union (Withdrawal) Act 2018. In accordance with the requirements of the European Union (Withdrawal) Act 2018 the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 The department does not intend to consolidate the relevant legislation at this time.

10. Consultation outcome

- 10.1 A public consultation was not considered necessary because the instrument does not change the key requirements of the CPR regime.
- 10.2 The department has engaged with a cross-section of industry on the detailed provisions in this instrument, including the Construction Products Association, the

UK Group of notified bodies, and the British Standards Institution, to test the proposals.

- 10.3 The devolved administrations were consulted at an early stage and are content with the approach taken.

11. Guidance

- 11.1 The central concepts of the CPR are already familiar to those operating in the sector. The technical notice published in September provided information on the key elements contained within this instrument. The department will update the guidance on Gov.uk shortly and has been engaging with industry bodies on the detailed policy matters in this instrument.

12. Impact

- 12.1 There is no significant impact on business, charities or voluntary bodies. This instrument does not change the key requirements needed to comply with the CPR regime. This instrument will ensure that the same standards apply as they did at the point the UK left the EU.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because it maintains the current requirements and so we do not expect it to result in any material costs or benefits to business. There will be some familiarisation costs, but we consider these to be limited.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses, however the amendments introduced by this instrument seek only to maintain the way the current regimes function; as such it is not necessary to take any steps to minimise impacts. The approach of this instrument (i.e. to ensure the continuation of the relevant regimes as they currently function) will be communicated to the public in order to mitigate the risk of confusion or costs incurred.
- 13.2 To minimise the impact of the requirements on micro-enterprises the CPR provides for them to use simplified procedures to demonstrate the performance of their product, in cases where their products are not safety-critical. There are also derogations from product marking requirements for individually manufactured products and products manufactured in a traditional manner.

14. Monitoring & review

- 14.1 As this instrument is made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. Contact

- 15.1 David Hughes at the Ministry of Housing, Communities and Local Government Telephone: 0303 444 0282 or email: david.hughes@communities.gov.uk can be contacted with any queries regarding the instrument.

- 15.2 Simon Gallagher, Planning Director at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kit Malthouse MP at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/ESIC
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Sch 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s.2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s.2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s.2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

- 1.1 The Minister of State for Housing, for the Ministry of Housing, Communities and Local Government, Kit Malthouse has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Construction Products (Amendment etc.) (EU Exit) Regulations 2019 do no more than is appropriate”.

- 1.2 This is the case because they do no more than prevent, remedy or mitigate deficiencies in construction products law arising from the withdrawal of the United Kingdom from the European Union. This instrument therefore ensures that the regime can continue to operate from exit day. Recognition of CE marked products that have met EU requirements (where the product is covered by a UK designated standard which is a harmonised European standard) is necessary to help to minimise disruption for businesses and consumers and is intended to be time-limited.

2. Good reasons

- 2.1 The Minister of State for Housing, for the Ministry of Housing, Communities and Local Government, Kit Malthouse has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in the Construction Products (Amendment etc.) (EU Exit) Regulations 2019, and I have concluded they are a reasonable course of action.

- 2.2 This is because these Regulations correct deficiencies arising from withdrawal in construction products law to ensure that it can continue to operate from exit day. Delegating to the Secretary of State the power to designate standards, and the transfer to the Secretary of State of the European Commission’s power to make ‘Delegated Acts’ to update technical aspects of the regime (in the form of a regulation-making power) is the most effective way of ensuring the regime will remain fit for purpose after exit.”

3. Equalities

- 3.1 The Minister of State for Housing, for the Ministry of Housing, Communities and Local Government, Kit Malthouse has made the following statement:

“The Construction Products (Amendment etc.) (EU Exit) Regulations 2019 do not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or any subordinate legislation made under either of those Acts”.

- 3.2 The Minister of State for Housing, Communities and Local Government, Kit Malthouse has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the Construction Products (Amendment etc.) (EU Exit) Regulations 2019, I, Kit Malthouse, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

4. Explanations

- 4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.