

EXPLANATORY MEMORANDUM TO

THE MARKET SURVEILLANCE (NORTHERN IRELAND) REGULATIONS 2021

2021 No. XXXX

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to implement an obligation arising from the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement (“the Protocol”).
- 2.2 This SI implements aspects of Regulation (EU) 2019/1020 on Market Surveillance and Compliance (“MSC”) which comes into force on 16 July 2021 in Northern Ireland. MSC is part of the EU regulatory framework for goods, replacing the market surveillance provisions (Articles 16-29) of the Regulation on Accreditation and Market Surveillance (“RAMS”, Regulation (EC) No 765/2008).
- 2.3 Most provisions of MSC will be directly applicable, but certain provisions require further implementation to take effect. This instrument will make provision in respect of market surveillance for the products placed on the market in Northern Ireland.

Explanations

What did any relevant EU law do before exit day?

- 2.4 Since coming into force in 2010, RAMS has been the EU Regulation that set out the framework for market surveillance for harmonised products in the EU, including (up to and after the United Kingdom’s exit from the European Union) Northern Ireland. A harmonised product is a product that is subject to common rules across the EU. These are set out in product specific legislation at EU level and implemented by Member States at national level, and these EU instruments are referred to as ‘Union harmonisation legislation’. Manufacturers must follow these rules in order to place their products on the market in the EU. Harmonised products must comply with the rules relevant to that product and the national authorities carry out market surveillance activity to enforce the obligations that exist in product-specific legislation. Where no specific rules exist, national authorities must carry out the market surveillance activities required under RAMS which applied instead.
- 2.5 RAMS provided that authorities carrying out market surveillance must conduct risk-based checks and carry out further enforcement if a product is found to be unsafe or non-compliant. It set out the responsibilities for authorities in charge of the control of products placed on and entering the Union market and provided for reporting and notification of risks and control measures. RAMS, as retained EU law, will persist in Great Britain, as now set out in Schedule 33 (Amendment of Regulation (EC) No. 765/2008) of the Product Safety and Metrology etc. (Amendment etc) (EU Exit) Regulations 2019. In Northern Ireland, from 16 July 2021, market surveillance activity will continue to be required and enforced through MSC.

Why is it being changed?

- 2.6 The Commission elected to refresh the market surveillance requirements set out in RAMS to update requirements relating to the traceability of goods, in particular to address the changing landscape surrounding online sales and new types of economic operators (businesses carrying out certain functions in the supply chain) in the manufactured goods market. The new MSC Regulation provides relevant market surveillance authorities with the relevant powers and sanctions to implement these changes. It establishes a common set of powers for market surveillance authorities responsible for Union harmonised goods legislation. Article 4 of the EU Regulations is directly applicable and lays down new rules for economic operators.
- 2.7 This statutory instrument is needed to ensure that the UK fulfils its obligations under the Northern Ireland Protocol to implement EU goods legislation, which has the aim of avoiding a hard border for goods on the island of Ireland.

What will it now do?

- 2.8 This legislation will provide (to the extent that these are not already available) an appropriate suite of investigatory and enforcement powers for authorities responsible for specific legislation relating to goods. This is to enable them to undertake risk-based market surveillance activities as required by MSC and the relevant Union harmonisation legislation. It provides for an effective, proportionate and dissuasive penalty regime for breaches of the Regulation.

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 is limited to Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is Northern Ireland.
- 4.2 The territorial application of this instrument is Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State (Minister for Small Business, Consumers and Labour Markets), Paul Scully, has made the following statement regarding Human Rights:

“In my view the provisions of the Market Surveillance (Northern Ireland) Regulations 2021 are compatible with the Convention rights.”

6. Legislative Context

RAMS is included in paragraph 8 of Annex 2 to the Protocol. The legislation in Annex 2 of the Protocol is directly applicable in Northern Ireland by virtue of section 7A to the European Union (Withdrawal Agreement) Act 2018. Article 13(3) of the Protocol further provides that “unless otherwise provided, where this Protocol makes

reference to a Union act, that reference shall be read as referring to that Union act as amended or replaced.”

- 6.1 On 16 July 2021, MSC will come into force in the EU and, under the Protocol, in Northern Ireland. It repeals and replaces Chapter 3 of RAMS, and accordingly, is not considered a “new” EU obligation under the Protocol, and this means it will be directly applicable in Northern Ireland without the need to be further agreed by the Joint Committee.
- 6.2 For the most part, the provisions of MSC do not require any further steps to implement the Regulation. However, certain provisions place obligations on the relevant State to make arrangements at national level to implement MSC: these relate to the provision of powers for regulators (Article 14 MSC) and the imposition of penalties for contraventions of the requirements (Article 41 MSC), and these will apply in Northern Ireland.
- 6.3 Regulation 2 of the SI specifies which enforcement authorities will be responsible for enforcing MSC – these are the named enforcers and certain others authorised by them to carry out enforcement functions. They are responsible for carrying out market surveillance activity in the product areas for which they have enforcement powers either directly derived from the domestic product-specific legislation, or for which they are named as an enforcer in the table (together, these instruments are the “enforcer’s legislation”).
- 6.4 The “Union harmonisation legislation” covers 70 EU instruments in the area of product legislation which are listed in Annex 1 of MSC. Regulation 3 of this instrument provides that the SI applies to the products covered by almost all of those EU instruments, with a few exceptions where inclusion of the product area is not strictly required:

EU instruments listed in Annex I of MSC but not included in the Protocol

- Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles
- Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment
- Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91

EU instruments which are included in the Protocol but for which there are no market surveillance obligations to be observed or enforced

- Directive 2014/90/EU of the European Parliament and of the Council of 23 July 2014 on marine equipment and repealing Council Directive 96/98/EC
- Regulation 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel

EU instruments which are included in the Protocol and implemented but for which the domestic regime is already highly regulated and enforced

- Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC
- 6.5 The powers described in Article 14(4) are to be provided to all MSAs and therefore these will be extended to all enforcers covering these product areas. These investigatory and enforcement powers are to be exercised for the purposes of enforcing both MSC itself and the Union harmonisation legislation – the obligations arising from the sector-specific legislation listed at Annex I of the Regulation. MSC does not distinguish between a “market surveillance authority” and an “enforcing authority”, even though this distinction has been made in a number of UK domestic instruments. Regulation 4 deems all enforcers to be “market surveillance authorities” for the purpose of fulfilling the requirements and carrying out the functions specified in MSC, but this does not affect the existing designation of roles and responsibilities set out in the product-specific legislation.
- 6.6 Regulation 5 provides that the enforcers may exercise the enforcement and investigatory powers set out in Schedules 1-5 in respect of a product for which they are the responsible enforcer. The *lex specialis* principle applies to the exercise of these powers: an enforcer may only exercise these powers to the extent that there is no other provision in the enforcer’s legislation which has the same objective. This follows on from Article 2.1 MSC which applies the Regulation (apart from Articles 25-28) to products where there is no specific provision with the same objective in the Union harmonisation legislation listed at Annex I. This provision has the effect that where there are specific requirements in the product-specific legislation either at EU or national level, those provisions will take priority over the provisions of MSC (and this SI) and will continue to apply. This SI only supplies enforcement and investigatory powers to the extent necessary to address a gap where the enforcer’s legislation does not provide for sufficient powers to achieve the effect of the powers described in Article 14.4.
- 6.7 Schedule 1 sets out the investigatory powers of enforcers – powers to require the production of information, powers to acquire products for testing, powers to seize goods or documents and powers of entry to premises. It also provides for two offences – an offence of obstruction of an officer of an enforcer and an offence of purporting to be an officer of an enforcer. These investigatory powers are modelled on Schedule 5 to the Consumer Rights Act 2015, which is a similarly cross-cutting enactment and is widely adopted throughout the UK product safety and compliance regime.
- 6.8 Schedule 2 provides that enforcers may elect to use certain powers in the Consumer Protection Act 1987 to enforce MSC and the enforcer’s legislation. These provide for the service of prohibition notices and notices to warn, and powers for enforcers to make test purchases and powers of search and detention of goods. These powers will also be familiar to enforcers in the goods sphere – many of the product specific instruments are “safety regulations” made under section 11 of that Act and the powers in the 1987 Act have been adopted with modifications for a number of other pieces of good’s legislation.
- 6.9 Schedule 3 applies where the enforcer is entitled to exercise any powers under the Health and Safety at Work (Northern Ireland) Order 1978 (a “HSAW enforcer”). The

HSAW enforcer may exercise the powers in the 1978 Order as modified by this SI to enforce the requirements of MSC for those products in respect of which it is entitled to exercise those powers. The named HSAW enforcers do not act as HSAW enforcers in respect of all products for which they are enforcers. In some cases, the named enforcers may act with another enforcer designated in the enforcer's legislation to carry out market surveillance activities in respect of different aspects of a product (for example, consumer use and use in the workplace). So, where a named HSAW enforcer is a HSAW enforcer in respect of one product but not another or has limited powers in respect of a particular product, the HSAW enforcer may only exercise the powers under the 1978 Order to the extent that they are authorised to do so under the existing product-specific or health and safety legislation.

- 6.10 Schedule 4 sets out the mechanism for issuing enforcement notices under these Regulations. This Schedule applies only to the extent that there is not another specific power to do so under the enforcer's legislation. The enforcer may issue a compliance notice to require an economic operator to remedy a breach of its obligations under the product-specific legislation or MSC. If that is not complied with, it may issue a recall or withdrawal notice in order that the non-compliant product is removed from the market and no longer available to consumers. Failure to comply with either the recall or withdrawal notice is an offence.
- 6.11 Schedule 5 relates to an information society service provider ("ISSP") who has a role in the supply of goods through online services. An ISSP is a provider of services delivered entirely online, such as online sales platforms. The requirements in Article 7.2 and Article 14.4(k)(ii) MSC which relate to such online marketplaces are partly framed as involving a requirement on the part of the ISSP, but also a power on the part of the market surveillance authority (MSA) to make a request of the ISSP in relation to products presenting a risk. The provision may, in light of the exclusion of services from the Protocol, be seen as over-implementing MSC. However, the primary aim of the provisions is a power for the MSA to make requests for the ISSP to assist in the removal of products presenting a risk and that is in line with the overriding objective of the Protocol, which is to avoid a hard border for goods on the island of Ireland.
- 6.12 Enforcement authorities in the goods sphere do not currently impose sanctions on ISSPs or initiate enforcement action as a regulator. Schedule 5 does not make further provision in that respect as ISSPs are not economic operators and there is no requirement to impose sanctions under Article 41 MSC (penalties).
- 6.13 Schedule 6 creates offences for contraventions of requirements under MSC, and of withdrawal and recall notices under Schedule 4. The offences under Schedule 6 for contraventions of MSC apply only to the extent that the same behaviour is not a breach of or offence under the enforcer's legislation. The offences under Schedules 1 and 6 are summary only (i.e., offences will only be tried in a magistrate's court) and give rise to a maximum fine of up to level 5 (currently, £5,000) or up to level 3 (currently, £1,000) on the standard scale, depending on the offence, with no provision for imprisonment. Paragraphs 3-5 of Schedule 6 make provision for a due diligence defence, liability of a third party or body corporate, and extending the time limit to prosecute. These provisions apply to all offences under the instrument.
- 6.14 The SI does not make provision in respect of penalties for infringements of the EU legislation listed in Annex II to MSC, as there is adequate provision in existing legislation to meet the requirements of Article 41.

7. Policy background

What is being done and why?

- 7.1 On 16 July 2021, the provisions of RAMS will no longer have effect in Northern Ireland, and authorities who derive powers from RAMS to carry out market surveillance and enforce product safety and compliance will no longer have access to those powers.
- 7.2 From that date MSC, the new Market Surveillance Regulation, comes into force in Northern Ireland. Authorities will now carry out market surveillance activity and enforce product safety and compliance through the powers conferred under this SI in line with the regulatory requirements of the Regulation.
- 7.3 MSC seeks to improve traceability of economic operators outside the European Union, to increase cooperation between the authorities and economic operators and to clarify the range of enforcement powers available for market surveillance authorities to exercise both on the market and at the border, on premises and online. The principal new requirements include:
- 7.4 Article 4 requires economic operators to have a person established in the EU responsible for compliance activities when placing certain products on the EU (including NI) market. This Article applies to certain economic operators, including manufacturers, importers, authorised representatives (AR) and fulfilment services. This aims to increase accountability for product safety and compliance and aid the operations of the authorities carrying out market surveillance activity. Article 5 sets out minimum requirements for the relationship between the manufacturer and AR when an AR is appointed to undertake compliance tasks.
- 7.5 Article 7 requires economic operators and information society service providers to cooperate with market surveillance authorities to eliminate or mitigate risks in products made available on the market. This aims to further protect the end user from harm by strengthening the cooperation obligations that market surveillance authorities can rely on.
- 7.6 Articles 25 – 28 set out the responsibilities for authorities in charge of the control of products at the border when products first enter the Union market, and the procedures to be followed in assessing the risk presented by those products and the steps to be taken when considering its release from customs procedures (discharge for free circulation). These Articles specify a requirement to designate border control authorities (these designated authorities have been notified to the Commission), the procedures for the risk-based controls which must be performed by market surveillance authorities and reporting requirements which now includes recording each incidence of interception, regardless of whether the product is found to be in or out of compliance. This aims to improve the efficiency of controls at the border and improve cooperation between border control authorities, market surveillance authorities and the EU Commission.
- 7.7 The UK's market surveillance policy is to ensure that the approach to regulation responds to changing needs of the product safety landscape and for NI this includes the implementation of any new regulations brought in through obligations under the NI Protocol. Within the UK we aim to implement a cohesive framework to ensure consistency across the board. Therefore, the policy intention is to maintain an effective regulatory regime for manufactured products in the UK, including in

Northern Ireland, and to ensure there are effective, proportionate, and dissuasive sanctions for economic operators who do not comply with their obligations.

- 7.8 This legislation provides an appropriate suite of investigatory and enforcement powers for authorities responsible for specific legislation relating to goods. This is to enable them to continue to undertake risk-based market surveillance activities as required by MSC and the relevant Union harmonisation legislation. These activities comprise a range of administrative, civil and criminal sanctioning options included in these regulations providing continuity with UK domestic goods legislation. The focus for authorities will continue to be securing compliance and seeking the removal of unsafe products from the market using administrative and civil powers. The administrative and civil powers are supported by criminal sanctions to support compliance and are available to deal with the more serious cases, such as egregious breaches and repeat offenders. The level of criminal and civil sanctions detailed within this legislation remain consistent with the existing UK wide sanctions regime.
- 7.9 As such, paragraph 1 of Schedule 6 to these Regulations provides that proceedings must not be commenced against a person if the person has been given a time period within which to comply or take action, and that time period has not expired. This reflects the fact that in most cases enforcement will be by dialogue and encouraging compliance not criminal penalties. This remains in line with the expectations on authorities set out in the Regulators' Code.
- 7.10 The Government is currently undertaking a wider review of the UK product safety system, including approaches to securing compliance and the role of criminal sanctions in product safety regulation, and the scope for greater use of civil sanctions.
- 7.11 The Government's approach is to ensure that the implementation of EU obligations under the Protocol seeks to minimise the impact on UK traders and regulators, including in Northern Ireland. For that reason, the new powers in this SI are closely linked to the range of enforcement powers available to regulators in the existing suite of product safety legislation; and the SI provides for criminal offences for certain breaches of MSC, as for breaches of other product safety legislation, with penalties at the lower level of the range in existing legislation. However, as the SI works on a *lex specialis* principle, where there is a more specific provision in the sectorial legislation, this will take priority to ensure specific requirements of that legislation will still apply.
- 7.12 The United Kingdom left the European Union on 31 January 2020, and the Transition Period ended on 31 December 2020. From 1 January 2021, no new EU legislation applies to Great Britain. By virtue of the Protocol to the Withdrawal Agreement, certain EU legal instruments which relate to trade in goods will continue to apply in NI. Accordingly, the Government will continue to implement EU obligations under the Protocol in Northern Ireland for the duration of the Protocol arrangements, in accordance with its commitment to avoiding a hard border on the island of Ireland.
- 7.13 This instrument implements aspects of Regulation (EU) 2019/1020 on market surveillance and compliance of products (MSC) in Northern Ireland. The SI ensures that authorities have the necessary powers (as described in Article 14) and penalties (as required by Article 41) under the new Regulation to effectively enforce EU requirements for product safety and compliance in Northern Ireland.

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

8.1 This instrument is made using powers under section 8C of the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 No consolidation is required.

10. Consultation outcome

10.1 The Government did not undertake a public consultation given that this instrument's provisions are limited to implementing the Protocol and ensuring that Northern Ireland continues to implement EU derived product safety frameworks for these manufactured goods.

10.2 The Department has undertaken engagement with a cross-representation of stakeholders, including market surveillance authorities, local authorities, other government departments and the Northern Ireland Office. There has also been engagement with the Northern Ireland Executive on this instrument.

11. Guidance

11.1 Guidance on the UK's approach to the Protocol was published on 20 May 2020 and is available on the GOV.UK website.

11.2 Guidance on the MSC Regulation in Northern Ireland, and guidance for businesses on Article 4 of MSC will be published in due course and will be available on the GOV.UK website.

12. Impact

12.1 There is no, or no significant, impact in scope, on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact in scope, on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because measures resulting from the Northern Ireland Protocol are out of scope of assessment. The Northern Ireland Protocol has already been given effect in legislation through the European Union (Withdrawal Agreement) Act 2020, which adds provisions and powers to the European Union (Withdrawal) Act 2018.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise the regulatory burdens on small businesses.

13.3 The legal requirements do not differentiate between businesses in terms of their size; application of MSC depends on the type and nature of product being produced and placed on the market. Therefore, we are unable to take any mitigating actions to reduce burdens on small business.

14. Monitoring & review

- 14.1 The Department does not intend to monitor this instrument.
- 14.2 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

- 15.1 Amy Mathias at the Department for Business, Energy and Industrial Strategy
Telephone: 020 7215 8891 Email: amy.mathias2@beis.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Sarah Smith, Deputy Director for Regulation & Market Surveillance, the Office for Product Safety and Standards, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Paul Scully, Parliamentary Under Secretary of State (Minister for Small Business, Consumers and Labour Markets), at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.