



Department
for Environment
Food & Rural Affairs

www.gov.uk/defra

Consultation on the Marketing and Use of Second-Hand Articles containing Asbestos

Summary of responses

October 2013

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Introduction

This consultation sought views on amending the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Enforcement Regulations 2008, to adopt a derogation from EU legislation to allow the sale of second-hand articles containing asbestos.

The sale and use of asbestos has been restricted in the UK and the EU for many years. However, under the EU REACH Regulation, the scope of the restriction was unintentionally extended to cover the sale and use of second-hand articles containing asbestos. They now must have the asbestos content removed if placed on the market - creating potential health risks from disturbing otherwise secure asbestos. Alternatively they may be disposed of before the end of their useful life. This imposes unnecessary costs on business and others.

A derogation under EU law is available which allows for Member States to provide for exemptions so that second-hand articles containing asbestos can still be placed on the market, subject to conditions to ensure a high level of protection of human health.

The UK proposed to adopt this by amending the REACH Enforcement Regulations 2008, depending on the outcome of public consultation, which took place between 18 July 2013 and 15 August 2013.

Responses to the consultation were broadly supportive. The Government is amending the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Enforcement Regulations 2008, to adopt the derogation from EU legislation to allow the sale of second-hand articles containing asbestos.

This paper contains the summary of responses, followed by the government response to the consultation.

Overview of responses

A total of 27 responses were received from a range of sectors, demonstrated in Figure 1. 20 responses were submitted online *via* Citizenspace, 6 *via* email, and 1 postal reply was received.

The majority of responses followed the format provided. In those cases where respondents commented in general terms, their replies have been placed under the relevant questions.

Several comments have been placed under different questions to aid in the clarity of the document.

Figure 1: Breakdown of respondents by industry

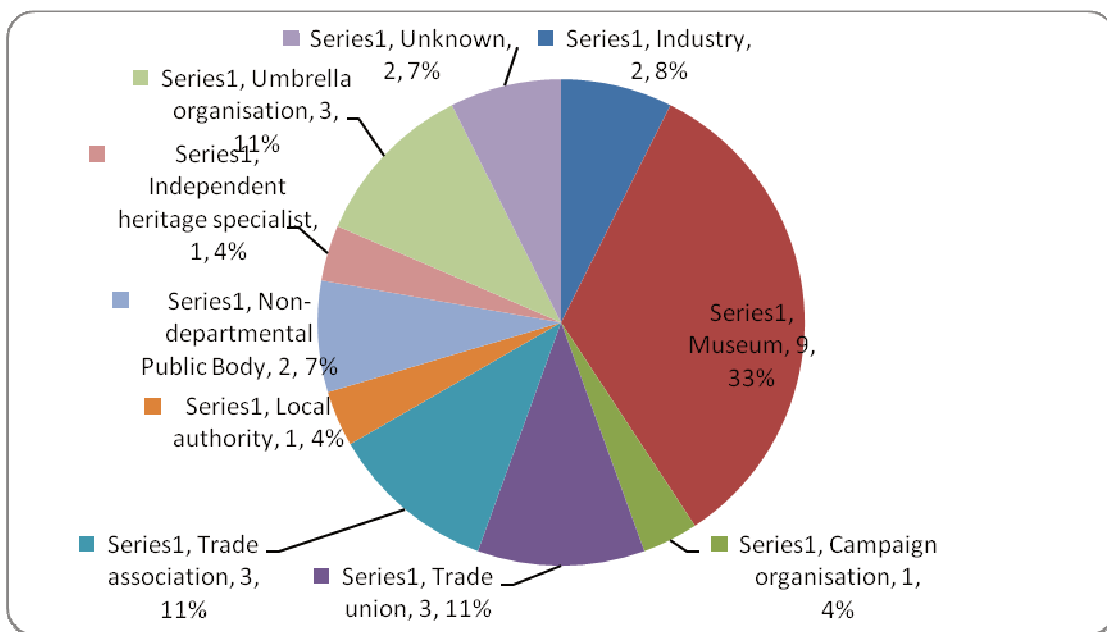
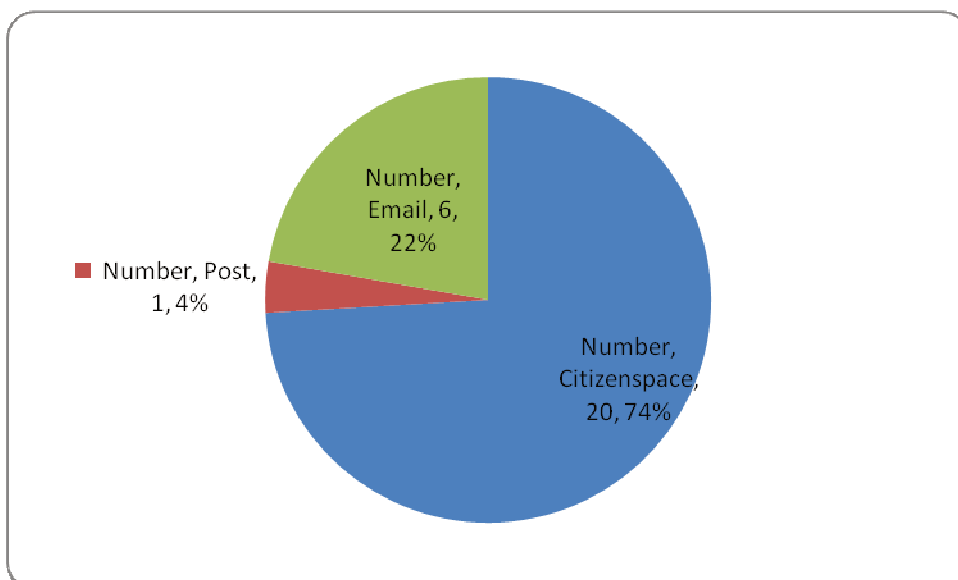


Figure 2: Method of submission



Summary of responses to questions

Q1. A large majority of respondents were in favour of the UK adopting the derogation.

Q2. There was a mixed response to the question of whether the sectors which may be affected by the REACH restriction on asbestos had been properly identified. Most respondents agreed that their own sector had been correctly identified, but could not comment on others'. Respondents suggested that the defence and aerospace sector, certain types of agricultural and industrial equipment, the antiques and auction trade, and special interest historical groups would also be affected by the REACH restriction.

Q3. Almost all respondents agreed that formal responsibility for exemptions from the asbestos restriction belongs with HSE, the HSENI, the Office of Rail Regulation, and the formal REACH Competent Authorities, depending on their respective responsibilities.

Q4. Almost all respondents agreed that HSE and HSENI, as the agencies with the most practical experience of administering asbestos exemptions, should be able to issue exemptions at the request of and on behalf of the formal Competent Authorities, and under their oversight, and so should issue exemptions which other regulators may enforce.

Q5. Most respondents agreed with the assumptions that had been made in the Impact Assessment with respect to their own sectors. The largest disagreement came from the museums and heritage sector, which felt that the Impact Assessment did not adequately cover the range of asbestos-containing items which can be found in the sector.

Q6. Most respondents agreed that the Impact Assessment gave an accurate representation of the costs and benefits of the impact that implementing this derogation may have. Some commented that the costs and benefits were conservative.

Q7. There was a mixed response to the question of whether the estimated costs associated with applying for an exemption certificate were valid representations of (1) the time taken, and (2) the managerial position of the applicant. Whilst responses were equally split between those who agreed and those who disagreed, a number of respondents from the museum and heritage sector commented that the exemption process in general would be too expensive for the sector.

Analysis of responses to each question

Q1. Do you agree that the UK Government should take up the derogation so that exemptions can be issued from the asbestos restriction?

There were 27 responses. 21 respondents were in favour of the UK Government adopting the derogation. 4 respondents disagreed entirely. 1 broadly agreed, but stated that exemptions should be strictly controlled to ensure the protection of human health. 1 broadly disagreed, stating that the proposal was too wide and insufficiently developed, but supported a limited derogation for certain items in specific circumstances.

General comments in favour of the derogation stated that:

- There is adequate UK legislation already in place to reduce the risks arising from asbestos fibres in articles;
- The derogation would establish the position prior to the inadvertent extension of the restriction caused by REACH;
- A complete ban (particularly in the current economic climate) could encourage vendors to seek to remove otherwise secure asbestos from an article to allow a sale to go ahead, and increase the potential risk to health, which a derogation could mitigate.

Respondents from the museums and heritage sector were strongly in favour of the derogation, citing the following benefits for the sector:

- The ability to use collections to their best advantage, to transfer assets between museums, and to acquire new items for collections whilst ensuring that any hazards are safely managed;
- The preservation of items of historical and cultural value, whereas mandatory removal of asbestos could result in a valuable item being destroyed.
- The costs of removing the asbestos in any asbestos-containing articles would be severely detrimental to museums' finances, which a derogation could avoid.

Respondents from industry provided the following reasons for adopting the derogation:

- For the railway industry, the continued availability of rolling stock;
- The appropriate application of the waste hierarchy, and greater re-use or re-manufacture of existing equipment already in service before the restriction entered into force;
- Avoiding the need for on-site removal of non-accessible asbestos prior to transfer, which would cause a potential risk to human health that could otherwise be avoided;

- Avoiding unnecessary costs and administrative burdens.

Comments against adopting the derogation stated:

- The proposal appears to be driven by business concerns, rather than health risks, which have not been properly assessed.
- The proposal for a general exemption, rather than a case-by-case approach, is based on general expediency and cost rather than a desire to protect human health.
- The UK should be working towards the complete removal of asbestos over a set period. The derogation would delay this.
- Instead of the derogation, all rolling railway stock should undergo a systematic review to ensure the safe identification and removal of all asbestos, or the removal of those units where it is felt economically unviable.
- People must be protected from exposure to asbestos in railway carriages and buses.
- The burden of injuries, ill-health and death arising from exposure to asbestos is borne by society, not business alone.
- It is not possible to have confidence in the application of the consultation's proposal, without greater detail of what the regulations are likely to say.

However, some responses against the adoption of the derogation acknowledged that:

- There is a case for a limited derogation for acetylene cylinders, heritage items, and possibly classic cars, with strict controls in place, and subject to a time-limit.
- If the derogation is brought into force, it is important that asbestos-containing articles are properly surveyed, assessed and labelled, with a clear reminder of the duties and precautions for those who may come into contact with it. Additionally, restrictions should also be in place to ensure that items do not pose a risk in another jurisdiction where controls and enforcement may not be suitable.

One respondent disagreed with adopting the derogation as they believed it would allow the use of asbestos in buildings. However, buildings do not count as articles for the purposes of REACH so the restriction and hence the need for a derogation do not apply to them.

Lastly, one respondent disagreed with adopting the derogation but did not offer a reason why.

Government response:

The Government is amending the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Enforcement Regulations 2008, to adopt a derogation from EU

legislation to allow the sale of second-hand articles containing asbestos. The majority of responses to the consultation supported the adoption of the derogation.

The derogation will allow exemptions so that second-hand asbestos-containing articles, which were originally installed or in service before 1 January 2005, can be placed on the market under specific conditions ensuring a high level of protection of human health. The derogation does not affect the regulations governing the disposal of asbestos-containing articles once they reach the end of their useful life. It also does not affect the long-standing ban on the import or new use of asbestos, or the existing controls on the export of asbestos.

Many objections to adopting the derogation were based on the view that it is safer for human health to remove asbestos from articles than leave it *in situ*. This is contrary to the UK Government policy position, based on international scientific consensus, that asbestos in good condition is best managed *in situ* so as to protect workers and wider society from inadvertent exposure during removal. It is only when asbestos materials are damaged or disturbed that they can release dangerous fibres, so the placing on the market of articles with encapsulated asbestos content presents no additional exposure risk.

By contrast, if an article could only be placed on the market on condition that the asbestos were removed first, it would force the unnecessary disturbance of asbestos fibres that are currently safe and would increase the risk of exposure to dangerous fibres. This risk would be particularly great amongst members of the public who would not have the knowledge or expertise to carry out the task safely.

There are safeguards we would envisage using in applying this derogation. A person wishing to place a second-hand article containing asbestos on the market must demonstrate that any risks to human health have been properly assessed and are adequately controlled. They should take any reasonable opportunity to remove asbestos from the article to be placed on the market, unless it can be demonstrated that the removal of asbestos would increase the risk to human health. Records must be maintained of the location, type, and condition of asbestos in the second-hand article, and must be of sufficient clarity to allow another person to take appropriate precautions to control the risk of any exposure to asbestos. Second-hand articles containing asbestos will only be permitted to be placed on the market if they bear a warning label in accordance with the requirements listed in Appendix 7 of REACH. It is expected that both individual and class exemptions will be subject to a time limit.

The consultation was not accompanied by the Draft Regulations, as the consultation paper explained how they would be applied. The Regulations permitting the derogation can be found at the UK Government legislation website: <http://www.legislation.gov.uk/>

Q2. Have the sectors which may be affected by the REACH restriction on asbestos been properly identified?

There were 21 responses. 4 respondents agreed, with no further comment. 7 respondents agreed with respect to their own sectors (museums and heritage). 3 respondents from the

museums and heritage sector stated that museum collections need to be assessed properly to fully understand the impact on the sector. 1 respondent felt unable to answer the question without looking at the draft Regulations.

6 respondents further identified the following sectors to be affected by the REACH restriction on asbestos:

- The defence and aerospace sector;
- Certain types of machinery used in agriculture (tractors, trailers etc.);
- Industrial plant equipment and machinery;
- The antiques and auction trade;
- Special interest groups, such as historic re-enactment groups using, or displaying, asbestos-containing equipment;

Government response:

The Government acknowledges that the additional sectors identified by respondents may have been affected by the REACH restriction. The UK Regulations contain the necessary powers and safeguards to address these sectors, if required.

Q3. Do you agree that formal responsibility for exemptions from the asbestos restriction belongs with HSE, the HSENI, the Office of Rail Regulation, and the formal REACH Competent Authorities, depending on their respective responsibilities?

There were 22 responses. 21 respondents agreed; 1 offered a mixed response

Comments in agreement stated that this was a sensible proposal, as a similar process had worked effectively before unintended restriction came into place, and that the bodies named above were the most capable authorities to take responsibility for exemptions with HSE and HSENI already holding the required technical competence to grant exemptions.

1 respondent agreed, but suggested that with respect to the museums and heritage sector, HSE should assess exemptions alongside competent conservation and curatorial bodies, stating that these professional bodies would have a more detailed understanding of how museums store and handle items.

1 respondent from the museums and heritage sector suggested that its own organisation (a NDPB) be able to manage its own internal transfers and external acquisitions.

1 respondent agreed, but added that the derogation should not affect the Ministry of Defence's authority to issue defence exemptions.

Government response:

The Government has addressed comments under this question together with those under Q4.

Q4. Do you agree that in practice HSE and HSENI, as the agencies with the most practical experience of administering asbestos exemptions, should be able to issue exemptions at the request of and on behalf of the formal Competent Authorities, and under their oversight? And so should issue exemptions which other regulators may enforce?

There were 22 responses. 19 respondents agreed; 2 offered a mixed response; and 1 disagreed.

2 respondents stated that with respect to the museum and heritage industry, the International Council of Museums, and Arts Council England (professional bodies for the sector) should be allowed to issue exemptions with the HSE.

1 respondent broadly agreed, but questioned how the statement set out in section 3.2 of the consultation document would work in practice, which states that the formal competent authorities in the UK have all delegated day-to-day responsibility to the HSE. The respondent was concerned that unless the details of the day-to-day delegation were set out with a clear explanation of where responsibilities lie, this could lead to gaps in enforcement.

1 respondent neither agreed nor disagreed, but stated a concern that this responsibility may put unnecessary demands on HSE.

Government response:

The Government response addresses comments provided for both Q3 and Q4, as there is some overlap.

Exemptions:

Formal responsibility for exemptions from the asbestos restriction belongs with HSE, the HSENI, the Office of Rail Regulation, and the formal REACH Competent Authorities, depending on their respective responsibilities. The Government does not consider that it would be appropriate to increase the number of authorities with regulatory oversight of asbestos matters. HSE and HSENI are able to issue exemptions at the request of and on behalf of the formal Competent Authorities, and under their oversight. They can also issue exemptions which other regulators may enforce.

The derogation does not affect the Ministry of Defence's authority to issue defence exemptions.

Exempting authorities will enter into discussions with the museums and heritage sector to determine the precise scope of the class exemptions and the conditions that are to apply

in order to ensure a high level of protection of human health and the preservation of items of historical and cultural value.

Enforcement:

A document outlining how REACH enforcement is carried out in the UK, and the responsibilities of the various enforcing authorities, can be found here:

<http://www.hse.gov.uk/reach/resources/enforcementstrategy.pdf>.

In those circumstances where the marketing or use of a second-hand article was previously governed by the Control of Asbestos Regulations, HSE or HSENI will enforce in the event of the marketing or use of an article without an exemption, as well as when there is contravention of the conditions attached to an exemption. The Office of Rail Regulation will perform the enforcement function within the scope of its responsibilities.

The derogation is not expected to put unnecessary demands on HSE. Costs relating to enforcement action are expected to be minimal, and easily absorbed into other general inspection and enforcement effort.

Q5. Overall, do you agree with the assumptions that have been made in the Impact Assessment?

There were 20 responses. 8 respondents agreed and 5 respondents agreed with respect to their own sector. 2 offered a mixed response. 3 disagreed; and 2 disagreed with respect to their own sector.

3 respondents agreed with the assumptions made about the museums sector. However, 3 respondents disagreed with the assumptions made about the museums sector, stating that the range of asbestos-containing material has been underestimated – in some objects, asbestos is embedded within the matrix of the object, and cannot be removed. It was also suggested that many museums would not have the resources to carry out asbestos removal.

1 respondent disagreed with the assumptions made in Policy Option 1 (“do nothing”), and suggested that there are costs associated with the restriction remaining in force as it would prevent businesses realising the financial value of certain assets, result in the premature disposal of equipment that may have useful service life, and/or result in the loss of cultural heritage.

1 respondent agreed, but stated that it was difficult to make a full assessment of the Impact Assessment without further information.

1 respondent agreed that the impact on the sale of parts of equipment containing gaskets seemed reasonable.

1 respondent disagreed with the assumptions made, stating that the Impact Assessment did not consider the potential effect of the derogation on health.

Government response:

The Government has addressed comments under this question together with those under Q6.

Q6. Does the Impact Assessment give an accurate representation of the costs and benefits of the impact of implementing this derogation may have?

There were 19 responses. 6 respondents agreed with no further comment, and 5 respondents agreed with respect to their own sector. 4 respondents disagreed, and 4 respondents disagreed with respect to their own sector.

4 respondents stated that the cost-savings in the Impact Assessment were conservative, and that adopting the derogation would provide additional benefits.

2 respondents stated that as the Impact Assessment did not consider certain sectors (agricultural, defence and aerospace) it could be expected that both the overall costs and benefits are greater than recorded.

One respondent commented that the average values of £14 000 per mainline railway vehicle should be revised to approximately £21 000.

One respondent stated that since there will always be some variance in cost estimates set out in a consultation, and actual cost incurred when implementing new or amended legislation, the potential for issues to arise may lead to the actual costs to industry being higher than estimated.

5 respondents agreed with the assumptions made about the museum sector. One of these agreed that the Impact Assessment accurately described the consequences of not adopting the derogation for the museums and heritage sector. However, 3 respondents disagreed with the assumptions made about the museum sector, stating that the costs of implementing the derogation had not been examined properly.

A respondent from the Science Museum stated that the costs it gave in Annex 7 of the Impact Assessment should be revised from £14.2 m to £2.4m in light of further work done by the museum.

1 respondent disagreed entirely, stating that the figures in Table 1 of the Impact Assessment were given by those with an economic interest in making the case for adopting the derogation, and are therefore inflated. The respondent added that the Impact Assessment did not consider other possible options which may have greater safety benefits, and did not consider the health effects of adopting the derogation for those in other countries.

Government response:

The Government response addresses comments provided for both Q5 and Q6, as there was some overlap.

The Government acknowledges that both the costs and benefits of implementing the derogation may be higher than estimated, due to the additional sectors identified by the respondents.

The Impact Assessment stated that it would be disproportionate to attempt to quantify the effect of the restriction on the museums and heritage sector. However, as can be judged from the case studies and the responses to the consultation, it is acknowledged that the effect of the restriction on museums and heritage sector would be significant, as many organisations possess asbestos-containing items.

The Impact Assessment acknowledged that there may be an element of social desirability and/or biased answers given, such as inflated answers. However, the cost to business was not the sole factor in the UK government adopting the derogation: health and safety considerations were also involved, as well as the desirability of preserving items of cultural and historical value.

The Impact Assessment concluded that it was not possible to quantify the potential effect of the derogation on health. However, Government remains of the opinion that the benefit to human health will be significant, as the scope of the restriction and the consequential enforced asbestos removal work would affect many sectors as analysed in the Impact Assessment, and in the additional sectors identified by respondents.

Q7. Do you agree that the estimated costs associated with applying for an exemption certificate are valid representations of (1) the time taken, and (2) the managerial position of the applicant? If not, please indicate what you consider would be better estimates.

There were 17 responses to the question. 6 respondents agreed with no further comment. 5 respondents disagreed; 3 offered a mixed response; and 3 made general comments.

1 respondent agreed with (2), but commented that the time taken for (1) would vary from museum to museum, depending on the number of asbestos-containing items. It also noted that consultation with the issuing authority could take longer if personal visits are required.

1 respondent from the museums and heritage sector disagreed with the estimated costs as being slightly too high, but stated it could not offer any information to calculate a lower, revised figure.

5 respondents from the museum and heritage sector disagreed with the estimated costs as being too low, commenting that the costs to the sector had not been assessed properly, especially to museums with small budgets, and vulnerable collections. Respondents also commented that the fact that there is no single coordinating body for the museums and

heritage sector to negotiate class exemptions may lead to protracted discussions, and therefore increase the cost.

1 respondent from industry disagreed with the estimated costs as being too low. They stated that the costs of applying for an exemption certificate may be under-estimated due to the company's previous experience of preparing justifications for exemptions from the previous UK Asbestos Regulations; insufficient definition of the process (and level of rigour) required to prepare an exemption under the proposed amendment to the REACH Enforcement Regulations 2008; and that costs could be variable based upon the complexity of the article, the date of manufacture, and the availability of design information and maintenance records. However, they agreed with (2).

Some respondents did not answer the question, but offered comments on the overall costs of the exemption process. 1 respondent stated that a one-off cost of around £1700 for a generic exemption certificate for all museums and heritage organisations would be acceptable. 3 respondents from the heritage sector stated that they would not be able to afford the costs of applying for an exemption. 1 respondent from the museums/heritage sector stated that transfer of items between UK museums should be free.

2 respondents asked whether the issuing authority would be permitted to charge fees to recover its administrative costs; and if this were the case, this should be re-calculated in the Impact Assessment. Another respondent stated that being charged such costs would be unfair.

Government response:

The exemption process is outside the scope of the decision to proceed with the derogation. However, the exempting authorities will seek to engage with the relevant sectors as the costs to applicants will remain an important consideration in finalising the arrangements.

HSE and HSENI will be expected to enter into discussions with the sectors where class certificates will be appropriate. These discussions will be used to determine the precise scope of the class exemptions and the conditions that are to apply in order to ensure a high level of protection of human health.

It is recognised that in the case of the museum and heritage sector, there is no clear, single umbrella body as in the case of other industry sectors, but HSE and HSENI will enter into discussions with the sector to determine how exemptions would work.

The authority issuing the exemption would not charge fees to recover its administrative costs.

Other comments:

Consultation process:

3 respondents commented on the consultation process. Two commented that the list of consultees was not sufficiently comprehensive, with a number of important stakeholders missing. One commented that the consultation period and notice given was too short, and felt that it did not have enough time to consult internally and respond during the summer holiday period.

Government response:

A four week consultation period was considered to be feasible and acceptable given the close involvement of the affected sectors in preparing the detailed Impact Assessment. When the consultation was launched Defra informed members of the UK Chemicals Stakeholder Forum, which brings together representatives of environmental and other NGOs and the trades unions as well as industry sectors, and is Defra's primary route for spreading information about developments about REACH. Beyond those represented on the Forum, neither Defra nor HSE has specific contact details for environmental groups with a particular interest in asbestos-related issues or asbestos support groups, but it notified a number of trade unions who were not on the formal list of consultees about the consultation process.

Annex A – List of respondents

Aberdeenshire Council

ADS Group Limited

Amgueddfa Cymru - National Museum Wales

Associated Society of Locomotive Engineers and Firemen

Association of British Transport & Engineering Museums

Association of Personal Injury Lawyers

Building and Engineering Services Association

Chemical Industries Association

English Heritage

Federation of British Historic Vehicle Clubs

Hampshire County Council Arts and Museums Service

Heritage Railway Association

Museum of Science and Industry (Science Museum Group)

National Farmers Union

National Maritime Museum

National Railway Museum

Porterbrook Leasing Company Limited

Portsmouth Museums and Visitor Service

Saffron Walden Museum

Science Museum

Trades Union Congress

UNITE

Victoria & Albert Museum