

EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION WITHIN THE SCOPE OF THE UK/EU WITHDRAWAL AGREEMENT AND NORTHERN IRELAND PROTOCOL

12261/22 + ADD 1
C(2022) 6122 final + ANNEX

COMMISSION DELEGATED REGULATION (EU) .../... OF 8.9.2022 AMENDING ANNEX I TO REGULATION (EU) 2019/1021 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PERSISTENT ORGANIC POLLUTANTS, AS REGARDS HEXACHLOROBENZENE

Submitted by Department for Environment, Food and Rural Affairs

14 November 2022

SUBJECT MATTER

1. This EU legislative proposal will amend the listing for the Persistent Organic Pollutant (POP) Hexachlorobenzene (HCB) in Regulation (EU) 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants (recast) (the “EU POPs Regulation”) by adding an Unintentional Trace Contaminant (UTC) limit value to its listing. This Regulation implements the commitments of the EU under the Stockholm Convention on Persistent Organic Pollutants. The UK is a party to the Stockholm Convention in its own right. The UK’s retained Regulation (EU) 2019/1021, as amended by the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2020 (the “Retained POPs Regulation”), does not list a UTC limit value for HCB, hence a regulatory divergence.
2. POPs are substances that remain intact in the environment for long periods, become widely distributed geographically, bio-accumulate in the fatty tissue of humans and wildlife, and have harmful impacts on human health or on the environment. Examples of POPs include polychlorinated biphenyls (PCBs) and pesticides such as DDT.
3. Annex I of the EU POPs Regulation lists POPs which are prohibited from use, some of which also have exceptions for specified uses or a UTC limit value. A UTC limit value defines the level of a substance that is incidentally present in a substance, mixture or article in a minimal amount.
4. HCB is listed in Annex I of the EU POPs Regulation without a UTC limit value. HCB was primarily used in the EU as a pesticide. At the time of the listing in the EU POPs

Regulation in 2004, it was considered that no limit value was needed because it was not expected that HCB would be found in substances, mixtures or articles.

5. However, research by the European Chemicals Agency (ECHA) has found that HCB appears as an impurity in some substances, including some forming a constituent in inks, coatings, paints and toners, use in wood application, in textile application and in plastics.
6. The EU determined that the absence of a UTC limit value for HCB results in legal uncertainty since stakeholders do not know whether a limit value applies nor which value. They determined that the EU POPs Regulation would be interpreted as if the limit of detection applies for HCB. This would prevent the placing on the market of any substance, mixture or article containing detectable levels of HCB.
7. In view of this information, the Commission considered the setting of a limit value for the presence of HCB as a UTC in substances, mixtures or articles as appropriate. Including such a UTC limit by amending the entry for HCB in Annex I of the EU POPs Regulation would clarify the legal situation and would facilitate harmonised enforcement throughout the EU.
8. The limit value of the UTC will be set at 10 mg/kg (0.001 % by weight) for the presence of HCB as a UTC in substances, mixtures and articles.

SCRUTINY HISTORY

9. The Parliamentary scrutiny history is contained in the attached Annex A.

MINISTERIAL RESPONSIBILITY

10. The Secretary of State for Environment, Food and Rural Affairs has responsibility for this policy area.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

11. The management and enforcement of the Retained POPs Regulation is devolved. Northern Ireland is responsible for implementing these changes to the EU POPs Regulation in Northern Ireland. Scottish Government Ministers, Welsh Government Ministers, and the Secretary of State for Environment, Food and Rural Affairs will have an interest as they are the appropriate authorities with powers to amend Annex I of the Retained POPs Regulation that applies in Great Britain (GB).
12. There are also certain reporting responsibilities placed on Competent Authorities by Article 13(1)(a) of the Retained POPs Regulation. These responsibilities require

competent authorities to provide annual statistical data on the actual or estimated total production and placing on the market of any substance listed in Annex 1 or 2.

13. This proposal covers a policy area that is subject to the Common Framework on Chemicals and Pesticides. The devolved administrations have been consulted in the preparation of this Explanatory Memorandum (EM). Officials from Wales and Scotland had nothing to add and were content with the return. Northern Ireland officials provided the input at point 14.
14. Officials from the Department of Agriculture, Environment and Rural Affairs (DAERA) have an interest in this proposal as it falls within the scope of the Protocol on Ireland/Northern Ireland. Officials do not envisage any detrimental impacts related to this proposal and continue to liaise on issues of divergence with their UKG policy counterparts in Defra and HSE to identify any emerging impacts the proposed law may have in NI and if any action may be required. Input has been provided at official level and does not represent the views of NI Ministers.

LEGAL AND PROCEDURAL ISSUES

15.

i. Legal Base

The legal basis for this proposal is the Treaty on the Functioning of the European Union, having regard to the EU POPs Regulation, and in particular Article 15(1) thereof.

Article 15(1) of the EU POPs Regulation empowers the Commission to adopt delegated acts to modify existing entries of Annex I of the EU POPs Regulation to adapt them to scientific and technical progress. The power to adopt delegated acts under Article 15(1) is subject to the general requirements set out in Article 18.

Under Article 18(6), the proposed delegated act shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period can be extended by two months at the initiative of the European Parliament or of the Council.

ii. Voting Procedure

We understand this to be qualified majority voting, though have not been able to confirm.

iii. Timetable for adoption and implementation

The proposed delegated act was adopted on 8 September 2022 and is currently undergoing a scrutiny period of two months, concluding in November 2022. We expect the EU legislative procedure to be completed in late 2022/early 2023. This proposed delegated act shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

The Northern Ireland Protocol provides that limited areas of EU law will continue to apply to and in the UK in respect of Northern Ireland. This proposed delegated act (C(2022)6122) will amend the EU POPs Regulation, which is made applicable to and in NI by the Northern Ireland Protocol to the Withdrawal Agreement. Article 13(3) of the NI Protocol confirms that a reference to Union legislation in the NI Protocol is a reference to that legislation as amended or replaced. Therefore, once the EU POPs Regulation is amended, it will apply to and in Northern Ireland by operation of Article 13(3).

POLICY IMPLICATIONS

16. This EU legislative proposal will amend the EU POPs Regulation, which is made applicable to and in NI by the Northern Ireland Protocol to the Withdrawal Agreement. Under the Northern Ireland Protocol, the EU POPs Regulation applies directly in Northern Ireland (NI).
17. There is not currently a UTC limit for HCB specified in the Retained POPs Regulation applicable to GB. Therefore, there will be divergence between the regulations applicable in GB and NI.
18. Currently, the manufacturing, placing on market and use of articles containing HCB is prohibited in both GB and NI. With this proposed legislative change, there will be an exemption for articles containing trace levels of HCB below a new set limit in NI. This means that there is potential for articles containing trace levels of HCB to be placed on the market in NI, which cannot be placed on the market in GB.
19. Businesses in NI placing any relevant goods on the market or moving goods from NI to the EU would benefit from the clarity that the UTC in the EU POPs Regulation provides.
20. As these limits do not appear in the Retained POPs Regulation, any good containing measurable levels of HCB is unlawful in GB. The movement of goods containing HCB from NI to GB is currently banned so there will be no change to current arrangements and no interaction with unfettered market access policy.
21. The trans-boundary movement of POPs is controlled by the Prior Informed Consent (PIC) regime which regulates the export and import of certain hazardous

chemicals. HCB is listed on Part 4 of the GB PIC list, which contains POPs that are subject to an export ban.

22. In this scenario, a good – for example a pot of ink – which is tested and found to contain a trace level of HCB could move from NI to the EU and vice-versa but could not move from NI to GB as under the Retained POPs Regulations the good would be prohibited.
23. We see no reason that goods in GB would differ from those in the EU so we believe goods containing measurable levels of HCB are already in circulation in the EU and GB. However, the EU POPs Regulation and the Retained POPs Regulation do not require goods to be routinely tested for HCB and the Environment Agency have indicated that, HCB is not a priority substance for planned regulatory action in 2023. The Health and Safety Executive, which operates the GB PIC regime, has also indicated that there is no planned activity on HCB.
24. In addition, Defra has received no approaches from industry to suggest that they require a similar amendment in the Retained POPs Regulations. Further, the EU consultation on the changes – as mentioned below – received only three responses. For these reasons, and those listed in point 27, this does not represent a high priority for UKG.
25. This proposed EU amendment will regularise the status quo by providing industry with clarity on the permissible levels of HCB in products, where it appears as a UTC. We do not anticipate any practical changes to the manufacture, use or movement of goods.
26. Our next planned amendment to the Retained POPs Regulation will consider amendments to POPs UTC limits. The next planned amendment is in initial stages of development and will come into force no earlier than December 2023.
27. We are aware that the Protocol overall is causing real problems in Northern Ireland. It is our preference to find a solution and resolve these problems through talks. This would include fixing the domestic impact of the Protocol, stabilising the situation in Northern Ireland and forming an Executive, thereby protecting the Belfast (Good Friday) Agreement. Discussions are still ongoing and this could impact how this divergence is implemented and managed going forward.

CONSULTATION

28. This change was notified through the Joint Committee Working Group (JCWG) as a proposal which would impact on Northern Ireland. The proposal was categorised

as having a low impact and being low priority, therefore we have not sought to discuss it further in the JCWG.

29. The EU POPs expert group was consulted on the draft delegated act in two meetings on 8 June and 23 November 2021 and comments were taken into account. The group is composed of all the relevant stakeholders - representatives of Member States, the European Chemicals Agency (ECHA), the chemicals industry and civil society.

30. The EU Commission carried out a public consultation on the draft delegated act from 8 November to 6 December 2021. Two stakeholders asked for a higher UTC limit value, while one requested a lower UTC limit value. Taking into account all available information, including that received through the various consultations, and after further discussion with the POPs expert group on 2 June 2022, the Commission concluded to proceed with the limit value originally proposed.

FINANCIAL IMPLICATIONS

31. The proposed legislative measure has no budgetary implications for the UK Government.



**REBECCA POW MP
PARLIAMENTARY UNDER SECRETARY OF STATE
DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS**

PARLIAMENTARY SCRUTINY HISTORY RELEVANT TO A:

COMMISSION DELEGATED REGULATION (EU) .../... OF 8.9.2022 AMENDING ANNEX I TO REGULATION (EU) 2019/1021 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PERSISTENT ORGANIC POLLUTANTS, AS REGARDS HEXACHLOROBENZENE

COM(2021) 656 FINAL + ANNEX; SWD(2021) 299 FINAL;SWD(2021) 300 FINAL PART 1/2 + PART 2/2;SWD(2021) 301 FINAL AND SEC(2021) 379 FINAL

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING ANNEXES IV AND V TO REGULATION (EU) 2019/1021 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PERSISTENT ORGANIC POLLUTANTS

COMMISSION STAFF WORKING DOCUMENT SUBSIDIARITY GRID ACCOMPANYING THE DOCUMENT PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING ANNEXES IV AND V TO REGULATION (EU) 2019/1021 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PERSISTENT ORGANIC POLLUTANTS

COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT ACCOMPANYING THE DOCUMENT PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING ANNEXES IV AND V TO REGULATION (EU) 2019/1021 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PERSISTENT ORGANIC POLLUTANTS

COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT REPORT ACCOMPANYING THE DOCUMENT PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING ANNEXES IV AND V TO REGULATION (EU) 2019/1021 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PERSISTENT ORGANIC POLLUTANTS

REGULATORY SCRUTINY BOARD OPINION PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING

ANNEXES IV AND V TO REGULATION (EU) 2019/1021 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PERSISTENT ORGANIC POLLUTANTS

DATE EM SIGNED: 23/11/2021

SCRUTINY COMMITTEES' RECOMMENDATIONS:

| COMMONS | LORDS |
|---|--|
| SCRUTINY COMPLETED (OUTCOME AGENDA NO 28 9/2/22) | CLEARED BY HOL LETTER DATED 24/2/2022. SIFTED FOR SCRUTINY TO THE PROTOCOL ON IRELAND/NORTHERN IRELAND SUB-COMMITTEE (AT CHAIR'S SIFT NO 11; 2/12/21) |

EM 7470/18, COM(18)144: PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PERSISTENT ORGANIC POLLUTANTS (RECAST)

DATE EM SIGNED: 12/04/2018

SCRUTINY COMMITTEES' RECOMMENDATIONS:

| COMMONS | LORDS |
|--|--|
| REPORTED ON THREE OCCASIONS THAT THE PROPOSAL RAISED ISSUES OF POLITICAL IMPORTANCE (REPORTS 26, 32 & 48, 17/19) AND SCRUTINY WAS COMPLETED ON 12 DECEMBER 2028 | THE PROPOSALS WAS SIFTED FOR EXAMINATION TO THE ENERGY AND ENVIRONMENT SUB-COMMITTEE (SIFT 1689) AND SCRUTINY WAS COMPLETED ON 22 MAY 2019. |