

Net Zero, Energy and Transport Committee

26th Meeting, 2022 (Session 6), Tuesday 4
October 2022

UK statutory instruments - consideration of consent notification

Note by the Clerk

Introduction

1. This paper supports the Committee's consideration of a 'type 1' consent notification sent by the Scottish Government relating to the following proposed UK statutory instrument (SI) —

The Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2022

Process for parliamentary scrutiny of consent notifications for UK statutory instruments

2. The process for the Scottish Parliament's consideration of consent notifications is set out in a [Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit](#).
3. The protocol provides for the Scottish Parliament to scrutinise the Scottish Government's decisions to consent to certain secondary legislation made by the UK Government. Specifically, this relates to UK Government secondary legislation on matters which are within devolved competence and are in areas formerly governed by EU law.
4. The protocol establishes a proportionate scrutiny approach and categorises SIs as type 1 or type 2.
5. Type 2 applies where all aspects of the proposed instrument are clearly technical (e.g. they merely update references in legislation that are no longer appropriate following EU exit) or do not involve a policy decision. For type 2 SI notifications, the Scottish Government will notify the Scottish Parliament within five days *after* giving consent. The relevant Committee will be notified of the legislative proposal. But they do not need to formally consider it at a committee meeting. The protocol includes a number of review mechanisms and the categorisation of type 2 notifications will be monitored in this way.

6. All other proposals are type 1. In this case, the Scottish Parliament's agreement is sought *before* the Scottish Government gives consent to the UK Government making secondary legislation in this way. Unless they are classed as urgent, the Scottish Parliament has 28 days to consider them. Each type 1 notification must be considered by the relevant Committee
7. **The Committee's role in relation to type 1 notifications is to decide whether it agrees with the Scottish Government's proposal to consent to the UK Government making regulations within devolved competence, in the manner that the UK Government has indicated to the Scottish Government.**
8. If members are content for consent to be given, the Committee will write to the Scottish Government accordingly. The Committee may wish to note any issues in its response or request that it be kept up to date on any relevant developments.
9. If the Committee is not content with the proposal, however, it may make one of three recommendations—
 - (1) that the Scottish Government should not give its consent to the provision being made in a UK SI and that the Scottish Government should instead produce an alternative Scottish legislative solution;
 - (2) that the Scottish Government should not consent to the provision being made in a UK SI laid solely in the UK Parliament and should instead request that the provision be included in a UK SI laid in both Parliaments under the joint procedure; or
 - (3) that the provision should not be made at all (that is, that the Scottish Government should not consent to the provision being included in a UK SI, nor should the Scottish Government take forward an alternative Scottish legislative solution).

The Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2022

10. On 27 June 2022, the Minister for Environment and Land Reform wrote to the Committee to inform them of this forthcoming UK instrument. [Read the correspondence here](#) and in **Annexe A**. The SI Notification is available in **Annexe B** and the Summary Notification in **Annexe C**. The UK Government intend to lay this SI before Parliament on 19 October 2022.
11. The instrument relates to the new UK chemicals regulatory regime for persistent organic pollutants. The Scottish Government says that its purpose is to amend the retained version of the 2019 EU Regulation of the European Parliament and of the Council concerning the Persistent Organic Pollutants (POPs) in order to address remaining deficiencies and to correct previous amendments made by [the Persistent Organic Pollutants \(Amendment\) \(EU Exit\) Regulations 2020](#).

12. In particular, the instrument amends entries for substances listed in the UK POPs regulation that are prohibited from being manufactured, placed on the market and used, unless there is a relevant exemption.
13. The instrument also makes consequential amendments to the 2020 regulations to revoke previous amendments made that do not function because of changes in EU law that took effect before the UK transitioned away from the EU's laws and institutions on Implementation Period (IP) completion day on 31 December 2020.

For decision

- 14. The Committee is invited to consider whether it agrees with the Scottish Government that the provisions set out in the notification should be included in the UK SI.**

ANNEXE A

Letter from the Minister for Environment and Land Reform to the Convener, 27 June 2022

Dear Dean,

THE PERSISTENT ORGANIC POLLUTANTS (AMENDMENT) (EU EXIT) REGULATIONS 2022
EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to proposals by the Scottish Ministers to consent to the making of UK secondary legislation affecting devolved areas arising from EU Exit.

That protocol, as agreed between the Scottish Government and then Parliament, accompanied the letter from the then Cabinet Secretary for Government Business and Constitutional Relations, Michael Russell MSP, to the Conveners of the Finance & Constitution and Delegated Powers and Law Reform Committees on 4 November 2020 and replaced the previous protocol that was put in place in 2018.

I attach a Type 1 notification which sets out the details of the SI which the UK Government proposes to make and the reasons why I am content that Scottish devolved matters are to be included in this SI. The SI relates to the new UK chemicals regulatory regime for persistent organic pollutants. Please note, we are yet to have sight of the final SI and this is not available in the public domain at this stage. We will, in accordance with the protocol, advise you when the final SI is laid and advise you as to whether the final SI is in keeping with the terms of this notification.

I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I am, as ever, grateful for your consideration of the attached notification and look forward to hearing from you by 11 October 2022.

Yours sincerely,

MÀIRI MCALLAN

ANNEXE B

NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI(s)

The Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2022

Is the notification Type 1 or Type 2

Type 1

Brief overview of the SI (including reserved provision)

The Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2022 (“the 2022 regulations”) amend the retained version of Regulation (EU) 2019/1021 of the European Parliament and of the Council concerning the Persistent Organic Pollutants (POPs) (“the UK POPs regulation”) to address remaining deficiencies and to correct previous amendments made by the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2020 (“the 2020 regulations”). The 2020 regulations were notified to the Scottish Parliament on 4 September and consent to them was granted on 29 September 2020. This notification should be read alongside the notification that was provided for the 2020 regulations.

The UK Government Department for the Environment Food and Rural Affairs intend to lay the 2022 regulations at Westminster under the affirmative procedure on 19 October 2022.

Details of the provisions that Scottish Ministers are being asked to consent to.

Regulation (EU) 2019/1021 of the European Parliament and of the Council on Persistent Organic Pollutants (“the EU POPs regulation”) is the mechanism by which the EU and its member states, including the UK while it was a member state, implemented the provisions of the Stockholm convention on Persistent Organic Pollutants through the elimination and restriction of the use of chemicals that have been internationally recognised as toxic, persistent, bio-accumulative and highly mobile. On IP completion day, the EU POPs regulation was converted into retained EU law and became the UK POPs regulation.

Substances listed in Annex I of the UK POPs regulation are prohibited from being manufactured, placed on the market and used, unless there is a relevant exemption. Amendments were previously made to the UK POPs regulation, including Annex I, by the 2020 regulations to ensure that it functioned in the UK on IP completion day. Those amendments failed to address every deficiency in Annex I, partly due to the coming into effect of EU amendments to the EU POPs regulation prior to IP completion day. The 2022 regulations therefore make further amendments to Annex I of the UK POPs regulation to address outstanding deficiencies and correct previous amendments made by the 2020 regulations.

The 2020 regulations removed erroneously an exemption for bis (pentabromophenyl) ether (decabromodiphenyl ether; decaBDE) that is used in the manufacture of aircraft, spare parts for aircraft or motor vehicles, and electric and electronic equipment. An amended version of this exemption is reintroduced by the 2022 regulations.

Amendments were also made to an exemption for the use of perfluorooctane sulfonic acid and its derivatives (PFOS) by the 2020 regulations. Those amendments sought to transfer functions related to the continued use of the exemption from EU member states and the European Commission to the Governments of the UK and their respective environmental agencies. Those amendments, however, did not take into account further amendments made to the EU POPs regulation by Commission Delegated Regulation (EU) 2020/1203 which came into effect before IP completion day. The 2022 regulations amend the exemption in the UK POPs regulation to take into account these EU amendments and revoke the earlier amendments made by the 2020 regulations that were made redundant by the EU amendments. The effect of the amendments made by 2022 regulations, as the exemption applies in Scotland, is that SEPA must report to the Scottish Ministers on progress made to eliminate PFOS and justify the continuing need for its use, and the Scottish Ministers must subsequently review the need for any prolongation of exemption.

The EU POPs regulation was also amended by Commission Delegated Regulation (EU) 2020/784 which came into effect before IP completion day. The 2022 regulations amend the UK POPs regulation to take into account these EU amendments by replacing the reference to “Commission” with “appropriate authority” in the exemption for the use of perfluorooctanoic acid (PFOA) in the production of pharmaceutical products. Under the UK POPs regulation, the Scottish Ministers are the appropriate authority in relation to Scotland, unless they consent to the Secretary of State exercising this review function. The effect of this amendment is that the Scottish Ministers will be responsible for the review and assessment of this exemption.

Summary of the proposals

The objective of Regulation (EU) 2019/1021 of the European Parliament and of the Council concerning the Persistent Organic Pollutants (POPs) (“the EU POPs regulation”) is to protect human health and the environment from persistent organic pollutants by prohibiting, phasing out as soon as possible, or restricting the manufacturing, placing on the market and use of substances subject to the Stockholm Convention on Persistent Organic Pollutants. At the end of the implementation period, the UK ceased to be part of the EU POPs regime and the EU POPs regulation became retained EU law, as provided for in section 3 of the European Union (Withdrawal) Act 2018. The UK POPs regime does not apply to Northern Ireland which remains subject to the EU POPs regime as required by the Protocol on Northern Ireland.

To enable the UK POPs regulation to function as UK law, deficiency fixes were made in advance of IP Completion Day by the 2020 regulations. Previously, on 3 September 2019, the Scottish Parliament recommended that the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2019 (“the 2019 regulations”) should

include Scottish devolved matters, as set out in the notification provided by the Scottish Government on 13 June 2019. Those 2019 regulations were not progressed in the UK Parliament due to holding of the UK General Election on 12 December 2019. Instead, the necessary amendments to the UK POPs regulation (together with some further amendments to take account of the Northern Ireland Protocol) were made by the 2020 regulations. The 2020 regulations revoked earlier amendments which were to be made by the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2018 and Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019 to the EU Regulation which was replaced by Regulation (EU) 2019/1021. Previous notifications were made to the Scottish Parliament for each of those sets of regulations on 8 November 2018 and 27 November 2018, respectively. The Scottish Parliament had also agreed with Scottish Ministers' intention to consent to those regulations, although they did not ultimately come into force given that the underlying EU Regulation had been replaced.

The purpose of this SI is to make further amendments to the UK POPs regulation and correct previously-made deficiency fixes made by the 2020 regulations to allow the UK POPs regime to operate effectively as retained EU law. The details of those provisions are set out above.

Chemicals policy, including in relation to POPs, engages a complex mixture of reserved and devolved competence. Environmental protection, waste management and public health are devolved while product safety, animal testing as well as health and safety at work are reserved.

Does the SI relate to a common framework or other scheme?

Yes. The UK POPs regulation forms part of the relevant regulations set out within the scope of the Chemicals and Pesticides Common Framework.

Summary of stakeholder engagement/consultation

We have previously written to our stakeholders setting out the general approach we are taking to correcting deficiencies in environmental legislation. However, these measures are aimed solely at ensuring the functioning of the UK POPs regulation and, therefore, we have not undertaken any engagement, or any formal consultation, about these specific amendments. Stakeholder interest in correcting these deficiencies is likely to be limited. Stakeholders will potentially question how these deficiencies arose, although the outcome of the changes will ensure adherence to the requirements of the Stockholm Convention. This is a particularly complex area of legislation and regulation, and we would expect industry and regulators to welcome government departments working together on making amendments of this nature. DEFRA have liaised with the affected companies from aerospace and motor sectors in relation to the exemption for the substance decaBDE.

A note of other impact assessments, (if available)

No additional impact assessment has been prepared. The proposals do not constitute a policy change and are aimed at ensuring effective operation of the UK POPs regulation.

Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislation

Scottish Ministers consider that consenting to the 2022 regulations is the most effective and transparent way to make these amendments as it has been agreed that the UK POPs regulation will operate consistently across GB. Officials have worked with Defra to ensure the drafting delivers for our interests and respects devolved competence in Scotland, and so Scottish Ministers propose to agree to a UK approach for these deficiencies.

Intended laying date (if known) of instruments likely to arise

This instrument is subject to the affirmative procedure and will be laid for sifting at Westminster on 19 October 2022.

If the Scottish Parliament does not have 28 days to scrutinise Scottish Ministers' proposal to consent, why not?

The Scottish Parliament has 28 days to scrutinise this proposal.

Information about any time dependency associated with the proposal

The 2022 regulations are made using powers in the European Union (Withdrawal) Act 2018. Those powers expire after two years of IP completion day. The 2022 regulations will therefore need to be made during 2022.

Are there any broader governance issues in relation to this proposal, and how will these be regulated and monitored post-withdrawal?

None.

Any significant financial implications?

None.

ANNEXE C

SI NOTIFICATION: SUMMARY

Title of the SI

The Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2022

Proposed laying date at Westminster

19 October 2022

Date by which Committee has been asked to respond

11 October 2022

Power(s) under which SI is to be made

Section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018.

Categorisation under SI Protocol

Type 1

Purpose

The purpose of this instrument is to amend the retained version of Regulation (EU) 2019/1021 of the European Parliament and of the Council concerning the Persistent Organic Pollutants (POPs) (“the UK POPs regulation”) to address remaining deficiencies and to correct previous amendments made by the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2020 (“the 2020 regulations”).

This instrument amends the entries for three substances listed in Annex 1 of the UK POPs regulation. Substances listed in Annex 1 of the UK POPs regulation are prohibited from being manufactured, placed on the market and used, unless there is a relevant exemption. To this end, this instrument: (1) reintroduces the exemption for the use of Decabromodiphenyl ether (decaBDE) in the manufacture of aircraft, spare parts for aircraft or motor vehicles, and electric and electronic equipment, which was omitted erroneously by the 2020 regulations; (2) corrects previous amendments made by the 2020 regulations to the entry for perfluorooctane sulfonic acid and its derivatives (PFOS), which did not function because they did not take into account further amendments made by the EU before IP completion day; (3) replaces the reference to “Commission” with “appropriate authority” in the requirement to review the exemption for the use of perfluorooctanoic acid (PFOA) in the production of pharmaceutical products.

The instrument also makes consequential amendments to the 2020 regulations to revoke the previous amendments made that do not function because of changes in EU law that took effect before IP completion day.

Other information

This notification should be read alongside the notification that was provided for the 2020 regulations.