

Net Zero, Energy and Transport Committee

23rd Meeting, 2023 (Session 6)

Tuesday 27 June 2023

UK subordinate legislation: consideration of consent notification

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)—

- Persistent Organic Pollutants (Amendment) Regulations 2023

Process for parliamentary scrutiny of consent notifications in relation to 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 subordinate legislation made by the UK Government: specifically, UK Government subordinate legislation on matters within devolved competence and in areas formerly governed by EU law. It sets out a proportionate scrutiny approach and categorises SIs as 'type 1' or 'type 2'.

4. 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 consent 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.

5. 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 subordinate 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.

6. 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.

7. If Members are content for consent to be given, the Committee will write to the Scottish Government accordingly. The Committee may also wish to note any issues in its response or request that it be kept up to date on any relevant developments.

8. If the Committee is not content with the proposal, however, it may make one of three recommendations—

- I. 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;
- II. 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
- III. 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).

Persistent Organic Pollutants

9. On 18 June 2023, the Cabinet Secretary for Transport, Net Zero and Just Transition wrote to the Committee to notify the UK SI. This correspondence is in **Annexe A**. The SI notification is available in **Annexe B** and the summary notification in **Annexe C**. The UK Government intends to lay the UK SI on **29 June 2023**.

10. The Scottish Government has asked the Committee to respond to the consent notification by **28 June 2023**.

Next steps

11. Following a request by the Convener, the Cabinet Secretary for Transport, Net Zero and Just Transition, Màiri McAllan MSP, has agreed to give evidence on the consent notification sent 18 June and to provide the Committee with an opportunity to ask questions relating to the proposed UK SI before the Committee is asked to respond by 28 June.

12. Following the evidence session, the Committee will consider next steps in relation to the UK SI as a separate agenda item.

13. If the Committee wishes to consent to the Regulations, it may, in doing so, set out any observations or concerns in its letter to the Scottish Government that it thinks are relevant.

14. If the Committee recommends that the Scottish Government should not consent, it should write to the Scottish Government, setting out which of the three options for non-consent (see paragraph 8), reflects its view. The Scottish Ministers have 14 days under the Protocol to respond. They could—

- Agree. If so, the Secretary of State could not proceed with legislating on the devolved provision set out in the proposed instrument.
- Not agree. If so, Parliament will debate the issue.

15. If the Parliament agrees to the Committee’s recommendation—

- The Protocol provides that the Scottish Ministers should “normally not consent” to the UKSI or should “consider and formulate an alternative Scottish legislative solution”, depending on what the Committee recommended.
- However, the Protocol also provides that if the Scottish Ministers consider that the Committee’s proposed alternative cannot be achieved, they may consent to the UK SI. If so, they must explain why they are doing so to the Scottish Parliament.

Clerks
 Net Zero, Energy and Transport Committee

Annexe A: Letter from the Cabinet Secretary for Transport, Net Zero and Just Transition, 18 June 2023

Sir Edward Mountain MSP
Convener of the Net Zero, Energy and
Transport Committee
Scottish Parliament
Edinburgh
EH99 1SP

18 June 2023

Dear Sir Edward,

THE PERSISTENT ORGANIC POLLUTANTS (AMENDMENT) REGULATIONS 2023 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.

You will note that the request is for the Committee to consider the proposals by 28 June, rather than allowing for the agreed 28 days minimum for review. Whilst officials endeavour to follow the agreed protocol, in this instance an urgent SI was proposed by UK Government on 9 June. I have agreed to this timescale as the Persistent Organic Pollutants Regulation amendments necessary for maintaining environmental protections across GB whilst allowing continued but limited access for a specific use of a substance listed as a persistent organic pollutant under the legislation. I would be most grateful if the Committee would accommodate the consideration of the notification of this urgent SI, The Persistent Organic Pollutants (Amendment) Regulations 2023, in the requested timeframe.

I attach a Type 1 notification which sets out the details of The Persistent Organic Pollutants (Amendment) Regulations 2023 which the UK Government proposes to make and further details the reasons why I am content that Scottish devolved matters are to be included in this SI. The SI relates to the UK chemicals regulatory regime for persistent organic pollutants that operates in Great Britain (in Northern Ireland the equivalent EU legislation continues to apply). 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 28 June 2023.

Yours sincerely,

MÀIRI MCALLAN

Annexe B: Notification to the Scottish Parliament

NOTIFICATION TO THE SCOTTISH PARLIAMENT

Name of the SI(s)

The Persistent Organic Pollutants (Amendment) Regulations 2023

Is the notification Type 1 or Type 2

Type 1

Brief overview of the SI (including reserved provision)

The Persistent Organic Pollutants (Amendment) Regulations 2023 (“the 2023 regulations”) amend the retained version of Regulation (EU) 2019/1021 of the European Parliament and of the Council on Persistent Organic Pollutants (recast) (POPs) (“the UK POPs regulation”) to reflect a change in the expiry date of a specific exemption for a chemical substance listed as a POP. The specific exemption relates to use of the substance in “textiles for oil- and water-repellency for the protection of workers from dangerous liquids that comprise risks to their health and safety, until 4 July 2023”.

The UK Government Department for the Environment Food and Rural Affairs intends to make and lay the 2023 regulations on 29 June 2023 at Westminster; they are subject to the negative procedure. The 2023 regulations are due to come into force on 4 July 2023.

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 (“the Stockholm Convention”). This convention is a global treaty with the objective to eliminate or heavily restrict the use of chemicals that have been internationally recognised as toxic, persistent, bio-accumulative and subject to long range transport in the environment. On IP completion day, the EU POPs regulation was converted into retained EU law and became the UK POPs regulation. The UK POPs regulation has previously been amended in 2020 and 2022 to correct deficiencies to ensure the functioning of the UK POPs regulation on EU exit. The retained version of the UK POPs regulation replicated the provisions of the EU POPs regulation at the end of the implementation period and contained the same restrictions on production, placing on the market, and use of POPs and also set out the same exemptions to those restrictions, including the exemption expiry date which the 2023 regulations propose to extend. While it is the UK that is a signatory country to the convention, the UK POPs regulation applies in GB while the EU POPs regulation continues to apply in Northern Ireland under the NI Protocol and subsequent arrangements.

The 2023 regulations will be made under article 15(1), as read with article 2A, of the UK POPs regulation. Article 15(1) allows the appropriate authority to amend Annex I of the UK POPs regulation; article 2A defines the appropriate authority in relation to Scotland as the Scottish Ministers, or the Secretary of State with the consent of Scottish Ministers.

Substances listed in Annex I of the UK POPs regulation are prohibited from being manufactured, placed on the market and used on their own or in products, unless there is a relevant exemption. Perfluorooctanoic acid (PFOA) and its salts is listed in Annex I (substances subject to elimination). PFOA was marketed in a number of forms (chemical salts and precursors) and the Stockholm Convention listing reflects this by capturing all known and relevant forms of PFOA and its precursors. A number of exemptions are included for essential uses of PFOA for which scientific research suggests that only PFOA currently has the properties necessary for these uses. One exemption relates to “textiles for oil- and water-repellency for the protection of workers from dangerous liquids that comprise risks to their health and safety”.

The sole purpose of this proposed amendment is to amend the entry for PFOA in Part A of Annex 1 of the UK POPs regulation to extend the expiry date of this exemption from 4 July 2023 (as currently listed in point 5(c) in the fourth column under the entry for PFOA) to 3 December 2025. Under the Stockholm Convention signatory countries can notify the Convention of their intention to allow any exemptions from the restrictions set out in the Convention for a maximum of five years from the date of a substance’s listing, which in this case extends to 3 December 2025. The expiry date of 4 July 2023 for this exemption for PFOA had been notified to the Stockholm Convention when the UK was still part of the EU. The UK Government plans to notify the convention that it is extending the expiry date to 3 December 2025 in advance of making the 2023 regulations.

Summary of the proposals

The United Kingdom is a party to the Stockholm Convention. The UK POPs regulation implements the UK’s obligations under the Stockholm Convention in Great Britain, while the EU POPs regulation continues to apply in Northern Ireland. Annex I to the UK POPs regulation contains the substances listed in the Stockholm Convention and in the Protocol to it that are subject to elimination, alongside specific exemptions on continuing necessary uses of those substances.

The substance perfluorooctanoic acid (PFOA) and its derivatives, a chemical substance in the class of substances known as per- and polyfluorinated substances (PFAS), was listed as a POP under the Convention in 2019 and is subject to elimination. This means it cannot be made, imported, sold, or used on its own or in products in signatory countries. Various time-limited exemptions are included in its listing, reflecting the continued need for its use in a number of critical applications in signatory countries, including the use referred to above for specialist “textiles for oil- and water-repellency for the protection of workers from dangerous liquids that otherwise compromise risks to their health and safety.”

The extension of the expiry date for the use of PFOA is required because one of the PFOA family of chemicals is required in small quantities for niche protective equipment for personnel responding to acute emergencies. Current scientific

research suggests that only PFOA provides the high level of protection required for this niche protective equipment, and the technical progress made on alternatives does not yet allow for a sufficiently effective solution in this particular use.

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 on POPs in Great Britain as a result of legislative changes precipitated by the UK's exit from the EU.

We have not consulted or engaged with stakeholders on this UKSI. This measure concerns the extension of an expiry date in relation to a limited, well defined use for which any risk for the environment is likely to be very low.

Stakeholder interest in amending this exemption is likely to be limited. Stakeholders will potentially question why this specific exemption is being extended, although the outcome of this change will still mean the UK is adhering to the requirements of the Stockholm Convention which allows the exemption to be used until 3 December 2025.

A note of other impact assessments, (if available)

No impact assessment has been prepared because no significant impact on business is anticipated.

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

Scottish Ministers consider that consenting to the 2023 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 in line with the common frameworks approach. 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 GB-wide approach.

With reference to the specific use, technical progress on alternatives does not yet allow for a sufficiently effective solution in this case. Officials understand the risk to the environment from this use to be very low, based on the low quantities used and manner in which the use occurs.

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

This instrument is subject to the negative procedure and is scheduled to be made and laid at Westminster on 29 June 2023.

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

The request for the Scottish Parliament to scrutinise this proposal by 28 June 2023, rather than allow for the agreed minimum 28 days scrutiny period, is due to the urgent nature of this UK SI proposed by UK Government on 9 June 2023 and required to come into force from 4 July 2023. The responsible UKG department, Defra, only becoming aware of the need for extension of the expiry date shortly before this, and UK Government will be required to lay the SI in the UK Parliament in breach of the normal procedural rules for scrutiny to ensure legislation is in place on the current expiry date. The Persistent Organic Pollutants Regulation is a GB wide regime and the amendment is necessary to maintain a consistent approach to GB environmental protections.

Information about any time dependency associated with the proposal

The 2023 regulations will extend this specific exemption from 4 July 2023 to 3 December 2025, as permitted under the Stockholm Convention. The 2023 regulations will therefore need to be laid in the UK Parliament on 29 June 2023.

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: Summary

SI NOTIFICATION: SUMMARY

<p>Title of Instrument</p> <p>The Persistent Organic Pollutants (Amendment) Regulations 2023</p>
<p>Proposed laying date at Westminster</p> <p>29 June 2023</p>
<p>Date by which Committee has been asked to respond</p> <p>28 June 2023</p>
<p>Power(s) under which SI is to be made</p> <p>Article 15(1), as read with article 2(A), of Regulation (EU) 2019/1021 of the European Parliament and of the Council on persistent organic pollutants (recast).</p>
<p>Categorisation under SI Protocol</p> <p>Type 1</p>
<p>Purpose</p> <p>The purpose of this instrument is to amend the retained version of Regulation (EU) 2019/1021 of the European Parliament and of the Council on Persistent Organic Pollutants (POPs) Regulation (recast) (“the UK POPs regulation”) to extend the expiry date of a specific exemption as allowed under the Stockholm Convention on Persistent Organic Pollutants (“the Stockholm Convention”).</p> <p>The United Kingdom is a party to the Stockholm Convention. The UK POPs regulation implements the UK’s obligations under the Stockholm Convention in Great Britain (in Northern Ireland the EU POPs regulation continues to apply). Annex I to the UK POPs regulation contains the substances listed in the Stockholm Convention and in the Protocol to it that are subject to elimination, alongside specific exemptions on intermediate and essential use of those substances. Perfluorooctanoic acid (PFOA), its salts and PFOA-precursor chemicals are one of the groups of listed chemicals. A specific exemption is provided for its use until 4 July 2023 in textiles for oil- and water-repellency for the protection of workers from dangerous liquids that comprise risks to their health and safety. The EU POPs regulation which became the retained UK POPs regulation provided for a specific exemption for this use, and that had been notified to the Stockholm Convention when the UK was still part of the EU; this SI amends the entry in the UK POPs Regulation to extend this date until 3 December 2025, as permitted under the Convention.</p>

Other information

The UK Government plans to notify the Stockholm Convention of this change before the instrument is laid. The UK Government will be required to lay the SI in the UK Parliament in breach of the normal procedural rules for scrutiny to ensure the legislation is in place before the current expiry date.