

Net Zero, Energy and Transport Committee

28th Meeting, 2023 (Session 6)

Tuesday, 3 October 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)— The Persistent Organic Pollutants (Amendment) (No. 2) 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 in areas formerly governed by EU law. It sets out a proportionate scrutiny approach and categorises SI notifications 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. These are notified retrospectively, after the Scottish Government has given its consent.

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. 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 recommend that the Scottish Government should not give its consent (more detail on the options available to the Committee in relation to this particular notification is given below). In that event, the Scottish Ministers have 14 days under the Protocol to respond to the Committee's recommendation. They could—

- Agree. If so, the Scottish Ministers would then withhold their consent.
- Not agree. If so, Parliament will debate the issue.

9. If the Parliament agrees to the Committee's recommendation that the Scottish Ministers should not consent, the Protocol provides that the Scottish Ministers should "normally not consent" to the UKSI. 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.

The Persistent Organic Pollutants (Amendment) (No. 2) Regulations 2023

10. On 6 September 2023, the Cabinet Secretary for Transport, Net Zero and Just Transition wrote to the Committee to notify the Scottish Government's proposal to consent to 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 **16 October**.

11. The Scottish Government has asked the Committee to respond to the consent notification by **4 October**.

12. The proposed SI uses powers in retained EU law to create restrictions on a chemical pollutant, perfluorohexane sulfonic acid ("PFHxS") and related compounds, in Great Britain. This will be done by adding it to the list of banned substances, with an exemption for when it is present as an unintentional trace contaminant. This is being done because the chemical has been added to the list of banned substances in an international convention to which the UK is a signatory, the Stockholm Convention on Persistent Organic Pollutants.

13. SPICe has reviewed the SI notification and has no policy concerns to raise. The SI notification explains that these changes are necessary for compliance with the Stockholm Convention on Persistent Organic Pollutants (POPs).

14. Regarding EU alignment, the SI notification flags one difference with EU implementation of this international law – in that the EU limit is subject to review by the Commission within 3 years after entry into force. SPICe requested further

information on the reason for this divergence from Scottish Government officials. Officials explained that the information collected by Defra indicated that PFHxS is not intentionally manufactured or used in GB, and UK REACH data indicates that there are no GB manufacturers, downstream users or distributors of PFHxS, its salts, or PFHxS-related compounds in quantities above 1 tonne/year and industry engagement did not identify any concerns related to the listing. As a result, no specified date to review unintentional trace contamination (UTC) was considered necessary.

15. SPICe also noted that this SI was being progressed in advance of publication of [responses to the Defra consultation on POPs](#) (which included proposals on PFHxS in addition to a range of other proposals). Scottish Government officials have explained that due to timings, this SI is being laid now to meet the implementation requirement (31 October 2023) under the Stockholm Convention. For the other proposed policy options in the Defra consultation there are no deadlines for implementation, hence consideration for a second SI will be dependent on the analysis of the consultation responses.

16. Under article 2A of the UK POP regulation, the Secretary of State could not proceed with legislating on the devolved provision set out in the proposed SI unless the Scottish Ministers consent.

Next steps

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

18. If the Committee is not content with the proposal, however, it may make one of the following 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 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).

19. If the Committee recommends that the Scottish Government should not consent, it should write to the Scottish Government, setting out which of the options for non-consent (see above), reflects its view.

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Net Zero, Energy and Transport Committee

Annexe A: Correspondence from the Cabinet Secretary for Transport, Net Zero and Just Transition

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

6 September 2023

Dear Sir Edward,

**THE PERSISTENT ORGANIC POLLUTANTS (AMENDMENT) (No. 2)
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.

I attach a Type 1 notification which sets out the details of the SI which the UK Government propose 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 UK chemicals regulatory regime for persistent organic pollutants that operates in Great Britain (in Northern Ireland the equivalent EU legislation continues to apply). We have received a copy of the final draft of this SI and I am content that 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 look forward to hearing from you by 4th October 2023.

Yours sincerely,

MAIRI MCALLAN

Annexe B: NOTIFICATION TO THE SCOTTISH PARLIAMENT**Name of the SI(s)**

The Persistent Organic Pollutants (Amendment) (No. 2) 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) (No. 2) Regulations 2023 (“the 2023 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 enact a required change due to a change in the list of substances set out in Annex A to the Stockholm Convention on Persistent Organic Pollutants (POPs). The 2023 regulations amend Annex I to the UK POPs Regulation to include the substance perfluorohexane sulfonic acid (PFHxS), its salts and PFHxS-related compounds, in accordance with an agreement made under the Stockholm Convention in June 2022.

The UK Government Department for the Environment Food and Rural Affairs intend to lay the 2023 regulations at Westminster under the affirmative procedure on 16 October 2023, and they will come into force on the day after the day on which they are made once they have been approved by the UK Parliament..

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 manufacture and 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 Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2020 to ensure that it functioned in the UK on IP completion day. Subsequently the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2022 made further amendments to Annex I of the UK POPs regulation to address outstanding deficiencies and correct previous amendments made by the 2020 regulations.

The 2023 regulations are made under articles 15(1) and 18(1) of the UK POPs Regulation. They amend the UK POPs regulation to implement the changes adopted by the Conference of Parties to the Stockholm Convention, at its tenth meeting in June 2022, which amended Annex A of the Convention to list PFHxS, its salts and related compounds. Specifically, the 2023 regulations will amend Annex I of the UK POPs regulation to include perfluorohexane sulfonic acid (PFHxS), its salts and PFHxS-related compounds. In addition, the 2023 regulations will insert into Annex I column 4 (Specific exemption on intermediate use or other specification) for the new entry of PFHxS, its salts and PFHxS-related compounds, certain values for concentration limits for the substance as unintentional trace contaminant (UTC) in other substances, mixtures or articles. The UTC limits are set as 0.025 mg/kg for PFHxS and its salts where present in substances, mixtures or articles; an equivalent of 1 mg/kg for PFHxS-related compounds; and 0.1 mg/kg for PFHxS, its salts, and PFHxS-related compounds where present in concentrated fire-fighting foam mixtures. The addition of these UTC values is necessary to provide regulatory certainty for industry for processes and products that may include the substance as unintentional trace contaminants (listing makes the intentional use of the substance an offence).

PFHxS is a very resistant substance, which does not degrade readily by thermal or biological process, and hence is very persistent in the environment. PFHxS is the third (after PFOS and PFOA) most frequently detected PFAS in blood-based samples taken from the general population. Exposure to PFHxS by humans is mainly through the intake of food and drinking water.

Based on UK Government led stakeholder engagement, there is no indication the PFHxS, its salts, or PFHxS-related compounds are intentionally produced or used in GB. Historically, PFHxS, its salts and PFHxS related compounds would have been used in the following: for fire-fighting in the Aqueous Film-Forming Foam (AFFFs); metal plating; textiles, leather and upholstery; polishing and cleaning/washing agents; coatings; and during the manufacturing of electronics and semiconductors. Other potential uses of PFHxS, its salts and PFHxS related compounds include pesticides, flame retardants, paper and packing and hydraulic fluids. It is noted that PFHxS has been used in many applications as a replacement to PFOS. Alternatives to PFHxS its salts and PFHxS related compounds are available for all potential applications.

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 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. 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.

The purpose of this SI is to eliminate perfluorohexane sulfonic acid (PFHxS), its salts and PFHxS-related compounds, together with an exemption for when the substance is present as an unintentional trace contaminant in other substances, mixtures or articles. 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.

The 2023 regulations align with Commission Delegated Regulation (EU) 2023/1608 of 30 May 2023 amending Annex I to Regulation (EU) 2019/1021 of the European Parliament and of the Council as regards the listing of perfluorohexane sulfonic acid (PFHxS), its salts and PFHxS-related compounds. Specifically, alignment occurs with regard to the substance and its derivatives being added to the Annex I, and the associated exemption designed to allow the presence of the substances in very low levels as an unintentional trace contaminant in certain products. The single difference is that the EU amendment commits the EU Commission to reviewing and assessing the exemption by 28 August 2026 for concentrations of the substance and its derivatives in firefighting foam mixtures. However, this is not a requirement of the Stockholm Convention.

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 provisional 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.

Following the initial proposal of PFHxS as a POP in 2017, stakeholders have had a number of opportunities to feed into UK or Convention-led public engagement / consultations. This included public calls for information and opportunities to comment on draft risk profile and risk management evaluation documents. The UK-led public engagement sought to understand if any relevant exemptions would need to be applied for to the Convention secretariat, it is understood that PFHxS, its salts and PFHxS-related compounds are not intentionally produced or used in GB.

Also, UK Government held a consultation (March – April 2023) on other potential amendments to the POPs Regulation, which included the obligation to meet the Convention's amendment to include PFHxS, its salts and PFHxS-related compounds in Annex A.

Stakeholder interest in the addition of this substance to Annex I is likely to be limited. Stakeholders will potentially question why this specific substance is being eliminated, and question the wider approach to managing PFAS chemicals. 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.

A note of other impact assessments, (if available)

No Scottish impact assessment has been prepared as no significant impact on business is anticipated. UK Government have indicated that this amendment is not expected to have an impact on business, as PFHxS, its salts and PFHxS-related compounds are not intentionally produced or used in GB. Any impacts would be due to one-off familiarisation costs.

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.

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 16 October 2023.

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.

In order to enable the appropriate parliamentary scrutiny from both the Scottish Parliament and the UK Government and to meet the UK's international obligation to bring into effect the change to the Annex to the Stockholm Convention on Persistent Organic Pollutants the SI is to be laid at Westminster on 16 October 2023.

Information about any time dependency associated with the proposal

Change to the Stockholm Convention on Persistent Organic Pollutants was adopted in Decision SC-10/13 (Listing of perfluorohexane sulfonic acid (PFHxS), its salts and

PFHxS-related compounds) and was notified to parties to the Convention under Depository Notification Number 401. Signatories have one year to enact these changes, specifically by 16 November 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.

Lead Official: Phil Leeks
Environmental Quality & Resilience

SGLD lawyer: Ailsa Heine

Annexe C: SI NOTIFICATION: SUMMARY

<p>Title of Instrument</p> <p>The Persistent Organic Pollutants (Amendment) (No. 2) Regulations 2023</p>
<p>Proposed laying date at Westminster</p> <p>16 October 2023</p>
<p>Date by which Committee has been asked to respond</p> <p>04 October 2023</p>
<p>Power(s) under which SI is to be made</p> <p>Articles 15(1) and 18(1) 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 concerning the Persistent Organic Pollutants (POPs) (“the UK POPs regulation”) to implement the change to the list of substances set out in Annex A to the Stockholm Convention on Persistent Organic Pollutants (POPs).</p> <p>This instrument amends Annex I of the UK POPs regulation to include the listing of perfluorohexane sulfonic acid (PFHxS), its salts and PFHxS-related compounds. 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 defines perfluorohexane sulfonic acid (PFHxS), its salts and PFHxS-related compounds, together with an exemption for when the substance is present as an unintentional trace contaminant (UTC) in substances, mixtures or articles. The UTC limits are set as 0.025 mg/kg for PFHxS and its salts where present in substances, mixtures or articles; an equivalent of 1 mg/kg for PFHxS-related compounds; and 0.1 mg/kg for PFHxS, its salts, and PFHxS-related compounds where present in concentrated fire-fighting foam mixtures.</p>
<p>Other information</p>
<p>SG Policy contact:</p> <p>Phil Leeks</p> <p>SGLD lawyer: Ailsa Heine</p>