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## HEALTH AND SAFETY COMMISSION

### Proposal to Amend the Asbestos (Prohibitions) Regulations 1992

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#### Issue

1. Report on the outcome of consultation on proposals to amend the ban on the importation of asbestos to apply only to materials where asbestos has been intentionally added. Agreement to amend the Asbestos (Prohibitions) Regulations and to submit draft Regulations to the Minister.

#### Timing

2. Urgent. EC infraction proceedings were initiated against the UK in relation to the Regulations, which it concludes are in breach of single market rules. Proceedings have not moved forward to Reasoned Opinion stage following a commitment from HSE to amend the Regulations by June 2003.

#### Recommendation

3. The Commission is invited to:
  - (a) note the issues raised by respondents to the consultation and consider HSE's proposed response on the more significant issues; (**Annex A** and paragraphs 12 to 15);
  - (b) note the revised Regulatory Impact Assessment (**Annex B**);
  - (c) approve the draft Asbestos (Prohibitions) Regulations (As Amended) 2003;
  - (d) agree the draft covering letter (**Annex D**) for the Chair to send the Minister of State.

#### Background

4. European Commission Directive 1999/77/EC was adopted in July 1999. This Directive required Member States to ban the placing on the market and use of asbestos and products containing asbestos by 1 January 2005 (with certain exceptions). It allowed Member States to introduce a ban before this date if they so wished.
5. The Asbestos (Prohibitions) Regulations 1992 were amended in 1999 to ban the importation, supply and use of white asbestos (chrysotile), partly to implement Directive 1999/77/EC. At the same time existing prohibitions on the importation of amphibole asbestos (blue, brown and three lesser known forms) were extended to include any product containing such types of asbestos.
6. The Directive only required that placing on the market and use of asbestos be prohibited. However the GB Regulations extended the ban to importation, supply and use. At the request of HM Customs and Excise (HMCE), the enforcing body, the importation ban was extended to cover all products containing asbestos (whether or not it had been intentionally added). HMCE were concerned that they would not be able to enforce a provision that contained a term such as 'intentionally'. Currently, therefore, the importation ban is absolute, applying irrespective of the amount of asbestos fibre present in the product or the degree of risk it constitutes (if any).
7. In July 2001 the EC wrote to the DTI following a complaint that the UK legislation contravened European Single Market rules. The European Commission concluded that the effect of the Asbestos (Prohibitions) regulations was to ban the importation of a product that was allowed to be supplied and used within the UK (if the asbestos impurity had not been intentionally added). This constitutes a restriction on imports contrary to Article 28 of the Treaty establishing the European Community. Legal advice received by HSE confirmed that the EC view was correct.
8. A substantive reply was sent to the European Commission by UKREP on 11 February 2002. A 226 letter was then received from the EC (paper HSC/02/84, Annex A) to which UKREP responded. On the basis of advice from HSE's International Branch, the letter included a programme that committed the UK to introduce new legislation by 31 October 2002.
9. At the Commission meeting of 25 June 2002, HSE submitted three options to resolve this issue;
  1. A de minimis limit to specify the maximum amount of asbestos impurity which would be allowed to be imported, supplied or used,
  2. Insertion of the phrase 'intentionally added' to the text such that the ban on importation would come into line with that presently on supply and use,
  3. Addition of the word 'added' to the text such that the ban was limited to asbestos and products to which asbestos had been added.

10. The Commissioners agreed with HSE that option 2 was the preferred solution and the Consultation Document (CD186) was produced on that basis. CD186 outlined the options considered and set out the following proposals:
- To amend the Regulations to include the phrase ‘intentionally added’
  - To continue research into the viability of a de minimis limit
  - To undertake an awareness-raising campaign as detailed below (see paragraphs 20 – 23)
11. However, the UK was simultaneously and separately introducing a new legal duty to manage asbestos in premises. Those proposals were controversial and a Parliamentary debate on the issue was called for, which took place on 24 October 2002. It was not appropriate to undertake a public consultation on an asbestos issue until the debate had taken place, and therefore publication of the CD186 was postponed until after the debate. The consultation period therefore ran from 30 November 2002 to 28 February 2003.
12. At the DTI’s annual “package” meeting with the EC, on 13 December 2002, HSE updated EC officials on progress in dealing with the infraction case. The European Commission notes of the meeting concluded that the case is classified as ‘close to resolution’, suspending further action on infraction proceedings on the assumption that progress to amendment of the regulations would continue without unnecessary delay.

## Argument

13. Twenty-nine responses to consultation were received. These were from a range of interested bodies such as Local Councils, Trade Unions, Federation of Small Business, Environmental Health institutions, relevant businesses and business consultancies. A detailed summary of the views expressed and HSE’s responses is attached in **Annex A**. The following paragraphs outline the key issues and outcomes.
14. The majority of respondents:
- a) supported HSE’s long term aim of basing the regulations on a de minimis limit where materials with small quantities of asbestos in them are exempt; and
  - b) agreed that the Regulations should be amended in the shorter term to prohibit the importation of any product to which asbestos had been intentionally added.
15. Whilst there are concerns from some quarters (for example see paragraph 17, consultation with HM Customs & Excise) it was generally accepted by respondents to the consultation that, as an interim measure, amending the regulations to include the term ‘intentionally added’ would not significantly increase the risks to employees or the general public.
16. The issue of a de minimis limit is a complex one. There are two fundamental issues to be resolved: developing a suitable testing method to measure the level of asbestos present in a bulk mineral load, and determining the appropriate legal maximum amount of impurity. The research being done by Health and Safety Laboratory (HSL) on a testing method is showing promise. However further work is needed. The study will

also need to look at exposure data for a variety of uses of the minerals concerned and following this the socio-economic effects of introducing a de minimis level will need to be investigated. All of this may take some time. Consultation will also be necessary to ensure any changes are reasonably practicable. It is therefore unrealistic to attempt to move to a de minimis limit as an amendment to the regulations at this stage. The Commission will be kept informed of developments on this issue.

17. Throughout the process discussions have been taking place with HM Customs and Excise officials on whether regulations containing the phrase 'intentionally added' would be legally enforceable (see paragraph 6, above). Agreement has been reached in principle to include a defining clause in the regulations explaining the meaning of 'intentionally added'. This additional text will be included in Regulation 2 (Interpretation and Application) in order to clarify the circumstances under which a product would be considered to contain intentionally added asbestos. HSE solicitors and HMCE legal advisers are currently negotiating a form of words that will meet HM Customs reservations whilst still fully meeting Single Market obligations. The draft regulations, as included in CD186 are attached (**Annex C**) for information, and the final text will be tabled at the Commission meeting on 13 May 2003.
18. Any amendment would not affect employers' duties under the Health and Safety at Work Act (1974) which requires suppliers and importers to produce information on the hazards of any material, to test any substance which could pose a risk and pass on all information down the supply chain. Companies also have duties under the CHIP Regulations (2002) to provide safety data sheets and appropriate labelling for any product containing more than 0.1% by weight of asbestos. In addition, Regulation 10 of the Control of Asbestos at Work Regulations 2002 (CAWR) requires all employers to prevent employee exposure to asbestos so far as is reasonably practicable and then to reduce the exposure to asbestos to the lowest level reasonably practical.

## **Consultation**

19. Copies of the CD were sent to 236 organisations and individuals and the document was available on the website. Internal consultation has taken place with other Divisions within HSE including Field Operations Directorate, Asbestos Licensing Unit, HSL and International Branch. A number of the larger importers were also consulted directly as part of the development of the proposed amendment.

## **Presentation**

20. A commitment was made, in CD186, to undertake a publicity campaign to raise awareness of those minerals that could contain asbestos as a natural impurity and the responsibilities on those using them.
21. HSL research has determined that ten minerals commonly in use can, from time to time, be found to contain quantities of asbestos from some source(s). These are: Olivine, Vermiculite, Talc, Dolomite, Hematite, Basalt, Marble, Chrome ore, Magnetite, Wollastonite. The publicity campaign will be based on the commercial users and suppliers of these materials.

22. A press campaign will be initiated, targeted at the relevant trade media outlining the following messages:  
HSE intends to initiate a press campaign, targeting the relevant trade media, outlining the following messages:
- i) Some quarried or mined minerals contain small amounts of asbestos as a naturally impurity from some sources. (A list of the main minerals identified will be included, together with their most common uses)
  - ii) The possible presence of asbestos only gives cause for concern if the processes involved have the potential to release fibres (i.e. higher energy uses)
  - iii) If both of the above apply, then the user should discuss with their suppliers whether the materials have been tested for asbestos impurities and the results of those tests.
  - iv) End user companies will then need to respond to any risk highlighted as a result of supplier information, increasing control measures if appropriate.
23. In addition, the suppliers of imported bulk minerals will be contacted (either directly or through trade periodicals) to highlight their responsibilities to undertake appropriate risk assessments and that the relevant labelling and data sheets are provided.

### **Costs and Benefits**

24. In practical terms the impact of amending the regulations to include the term 'intentionally added' would be very slight, either on costs or benefits, as there would be very little real change with regard to the quantities and types of minerals imported and used in the UK.
25. It is possible that there could be increased imports of materials that contain relatively high levels of naturally present asbestos. This could present importers with additional testing and labelling costs under the CHIP regulations.
26. However, the RIA (**Annex B**) indicates that the larger suppliers of imported bulk minerals already have a rigorous testing and labelling regime in place and use 'asbestos-free' sources as a rule. Also, in the current climate there would not be a market for minerals with higher levels of asbestos contamination.
27. It is possible that there will be some increase in costs due to heightened control measures being put in place where increased compliance by suppliers and importers leads to awareness of asbestos impurity where it was previously unknown. However, this theoretical increase is very difficult to quantify.
28. HSE, in conjunction with the Small Business Service, has tried to identify small firms whom this amendment will affect. However, finding small businesses in the wide variety of sectors that potentially use asbestos-containing minerals has proved very difficult and, given HSE's expectation that they will not incur significant costs, did not justify further resource allocation.

## Financial/Resource Implications for HSE

29. In the short to medium term the financial implications for HSE are limited, but, as shown in the RIA, there is the potential for some additional enforcement costs to both HSE and HMCE as a wider range of products containing asbestos could be imported.
30. The financial and resource implications to the HSE of working towards the long-term aim of a *de minimis* limit are significant. There is substantial scientific work that will be required from HSL as well as work from the Economic and Statistical Analysis Unit and the Solicitors Unit.

## Environmental Implications

31. Although there is a theoretical risk of increased levels of asbestos entering the country as impurities in other minerals, it is not likely that, in practice, this amendment would lead to any significant rise in asbestos being imported into the UK.

## Other Implications

32. **European** – Although infraction proceedings are currently suspended, the EC can be expected to resume action if the matter is not resolved swiftly.
33. **Devolution** – The amendment to the Regulations will apply across the UK and there are no additional implications for Scotland, Wales or Northern Ireland.
34. **SMEs** – The amendment to the Regulations does not have a disproportionate effect on SMEs.

## Action

35. If the Commission approves the proposed Amendment to the Asbestos (Prohibitions) Regulations, HSE will arrange for:
  - (a) the Chair to submit the draft Amendment to the Regulations to the Minister for approval; and subject to that approval
  - (b) the Amendment to be laid before parliament;
  - (c) once the Amendment is made press releases to be issued.