

Health and Safety Executive Board			HSE/08/19
Meeting Date:	28 th May 2008	FOI Status:	Open
Type of Paper:	Below the Line	Trim Ref:	
Exemptions:			
The Export and Import of Dangerous Chemicals EC Regulation 2008			

Purpose of the paper

1. To seek the Board's clearance of a draft DWP write around letter informing other Government Departments of the new EC Export and Import of Dangerous Chemicals EC Regulation 2008. The new SI proposed in the write around must be laid before the summer recess.

Background

2. The new EC Regulation implements the provisions of the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) within the European Community. To achieve this the Regulation places requirements and prohibitions on the export and import of banned and/or severely restricted chemicals within the EU to or from countries outside the EU. It also aims to improve the information that is exchanged about the characteristics of such chemicals. Both these approaches aim to protect human health and the environment and to contribute to the sound use of chemicals. HSE has been the Designated National Authority for this Regulation since 2003.
3. The new Regulation replaces Regulation 304/2003/EC, annulled by the Court of Justice of the European Communities in its judgment in Case C-178/03 (*Commission v Parliament and Council*) of 10 January 2006. In annulling Regulation 304/2003/EC, the Court ruled that the Regulation should have both Articles 133 (external trade) and 175 (1) (environment), as its joint legal base. The Court made clear that although annulled, the provisions of 304/2003/EC continue to have effect until the adoption of a new Regulation with the appropriate legal bases.
4. Margaret Beckett wrote to Lord McKenzie on 28 March 2007 to say that her colleagues agreed with our negotiating strategy for the new Regulation.
5. Following advice from HSC in early 2007, the Government's negotiating strategy was to ensure, in the first instance, that the new Regulation implemented the Rotterdam Convention and where possible enhances the flexibility related to the consent procedure for allowing the export of certain chemicals.
6. Like 304/2003/EC, the new Regulation goes beyond the requirements of the Rotterdam Convention. The proposal not only relates to chemicals listed in the Rotterdam Convention (called part 3 of Annex I) but also creates restrictions and obligations for the international trade of chemicals restricted in the EU (called part 2 of Annex I). The UK and other Member States share this ambition for the EU to be a world leader in the responsible trade of dangerous chemicals. HSE worked closely over the latter half of 2007 with other member

states, particularly Germany, to ensure that the new Regulation improved on the flexibility of Regulation 304/2003 while providing adequate protection of human health and the environment. This was done to our satisfaction and the new Regulation was agreed by co-decision on xx.

Argument

7. The new Regulation makes some changes in light of experience, including altering a number of definitions and aligning the consent procedure to follow more closely the provisions of the Rotterdam Convention than 304/2003/EC. Annex C lists the main changes. Of most interest to exporters is that they can now export chemicals subject to this regulation after 60 days without explicit consent and where there is evidence the chemical has been licensed, registered or authorised in the destination country. This enhanced flexibility has been welcomed by those businesses who are involved in the trade of such chemicals.
8. We are not planning to issue an Impact Assessment accompanying this new Regulation because there are no new duties likely to impose costs. In the UK, only 20 companies notify exports under the existing system and there are about 100 notifications in total each year. Only 5, in 2005, may have benefited marginally from the changes to the consent system.
9. HSE is re-drafting the Statutory Instrument (see draft Annex D) to bring the enforcement regime into line with the new Regulation. We are working with lawyers to draft the Explanatory Memorandum and lay the new SI by July 2008 to ensure no gap in enforcement once the new Regulation comes into force (though as of 9 May UKREP have not confirmed the date for adoption). Once the new Regulation is adopted it will switch off the current SI.
10. Given that the new Regulation is made under European Communities Act there is no legal requirement to consult, unlike HSWA. Also, since the new SI only requires technical changes and current enforcement arrangements will be unchanged, a further consultation seemed unnecessary. However HSE has consulted and met with stakeholders during the process to develop the new Regulations.

Consultation

11. UKREP, Defra, HMRC, BERR, DFID.

Costs and Benefits

12. There is no Impact Assessment provided because this proposal replaces 304/2003/EC with only minor changes to the duties of stakeholders and consequently there are negligible costs involved. The changes are likely to affect very few transactions.

Action/Recommendation

13. The HSE Board are advised to:
 - Agree that the Chair write to Lord McKenzie (using the draft provided at Annex A) suggesting that he writes (using Annex B) to other Government Departments informing them of the new EC Export and Import of Dangerous Chemicals Regulations.

- Note HSE's work to re-draft the accompanying Statutory Instrument (Annex D) and lay before Parliament in time to maintain enforcement arrangements.

Paper Clearance

14. This paper was produced by Matthew Holder and was cleared by the SMT at its meeting on 7 May 2008.



From the Chair
Judith Hackitt

To
Lord McKenzie of Luton

**EC REGULATION ON THE EXPORT AND IMPORT OF DANGEROUS
CHEMICALS**

I am writing to request that you inform Ministerial colleagues that Regulation X was agreed by co-decision on XX. This replaces EC Regulation 2003/243, in force since it was annulled in 2006 by the European Court of Justice on the grounds that it needed a broader legal base. A letter and Regulation X are attached for you to send to your colleagues.

Regulation X implements the provisions of the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) within the European Community. The Rotterdam Convention arose out of concern over the export of dangerous chemicals to developing countries and the potential difficulty those countries face in managing for their safe use.

Regulation X retains most of the text of 304/2003, but includes changes reflecting the experiences member states have had over that last 4 years and which closely follows the negotiating strategy agreed by EP in March 2007.

Of most significance to exporters is the enhanced flexibility in the consent procedure, allowing for the export of both those chemicals restricted under the Rotterdam Convention and those severely restricted within the EU, as long as certain conditions are met. This is an improvement that is welcomed by UK business involved in the export and import of such chemicals. However, the requirements and prohibitions set out in Regulation X still go beyond what is required under the Rotterdam Convention and maintains the EU's position as a world leader in the responsible trade of dangerous chemicals.

If you are content I would ask that you write to your colleagues with Regulation X in HMRC, DEFRA, BERR, DFID and the Devolved Administrations.

DWP Minister
Lord McKenzie of Luton

To
HMRC, DEFRA, BERR, DFID and DAs

EC REGULATION ON THE EXPORT AND IMPORT OF DANGEROUS CHEMICALS

I am writing to inform you that Regulation X was agreed by co-decision on XX. This replaces EC Regulation 2003/243, in force since it was annulled in 2006 by the European Court of Justice on the grounds that it needed a broader legal base. I attach Regulation X with this letter.

Regulation X implements the provisions of the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) within the European Community. The Rotterdam Convention arose out of concern over the export of dangerous chemicals to developing countries and the potential difficulty those countries face in managing for their safe use.

Regulation X retains most the text of 304/2003, but includes changes reflecting the experiences member states have had over that last 4 years and which closely follows the negotiating strategy agreed by EP in March 2007.

Of most significance is the enhanced flexibility in the consent procedure, allowing for the export of both those chemicals restricted under the Rotterdam Convention (Part 3 chemicals) and those severely restricted within the EU (Part 2 chemicals), as long as certain conditions are met. This is an improvement on Regulation 304/2003 which prevented any export of Part 2 and 3 without consent and is welcomed by UK business involved in the export and import of such chemicals.

Regulation X now includes:

- Flexibility for Member States to export Annex 1 Part 2 and 3 chemicals if, after 60 days, there is no explicit consent from the importing country and if there is evidence that the chemical in question has been licensed, registered or authorised by the importing country.
- An obligation on each Member State DNA to consider, in consultation with the Commission, the possible impact on human health and the environment when deciding to export Part 3 chemicals.
- An export period of three calendar years for those chemicals where explicit consent was given. New explicit consent shall be required by the end of the third calendar year. However exports may continue for 12 months beyond the expiry of this date whilst waiting for a response to a new request for explicit consent. Where explicit consent was not been given then exports may continue for 12 months, unless a response to the request has been received

in the meantime. If the exporter wishes to continue exporting past this 12 month period then explicit consent will be required.

- Consent to export chemicals listed in Annex 1 Part 2 to OECD countries may not be required if the chemical is licensed, registered or authorised in that OECD country.
- When a chemical qualifies for PIC notification (Annex 1 Part 2) but the information provided is insufficient, the exporters or importers shall provide all relevant information within 60 days of a request being made.
- The option from Regulation 304/2003 continues for Member States to charge exporters an administrative fee for each export notification made. However this is now extended to include an option for Member States to charge exporters for each request they make for explicit consent.
- The status of mercury and arsenic under this Regulation is still pending. The Commission will adapt the relevant annex to the Regulation if metallic arsenic is banned or severely restricted in the Community. Work is also ongoing on a proposal for an export ban on mercury out of the Community.

The requirements and prohibitions set out in Regulation X still fully comply with what is required under the Rotterdam Convention and maintains the EU's position as a world leader in the responsible trade of dangerous chemicals.

I am copying this to

Lord McKenzie

Regulation of the European Parliament and of the Council concerning the export and import of dangerous chemicals.

The most significant changes to Regulation 304/2003 are:

1. The export of chemicals restricted within the EU (Annex 1 Part 2 chemicals) and those restricted under the Rotterdam Convention (Annex 1 Part 3) may proceed if no explicit consent has been received within 60 days of the request and if there is evidence from the importing Party or other country that the chemical has been licensed, registered or authorised.
2. An obligation is placed on each Member State DNA to consider, in consultation with the Commission, the possible impact on human health and the environment when deciding to export Part 3 chemicals.
3. Consent to export chemicals listed in Annex 1 Part 2 to OECD countries may not be required if the chemical is licensed, registered or authorised in that OECD country.
4. The validity of each explicit consent or waiver granted shall be subject to periodic reviews by the Commission in consultation with the Member States concerned. For those chemicals where explicit consent was given, a new explicit consent shall be required by the end of the third calendar year. However exports may continue for 12 months beyond the expiry of this date whilst waiting for a response to a new request for explicit consent. Where explicit consent was not given (see 1 above) then exports may continue for 12 months, unless a response was received in the meantime. Explicit consent to export will be required to continue past 12 months.
5. When a chemical qualifies for PIC notification (Annex 1 Part 2) but the information provided is insufficient to meet the requirements of Annex IV, the exporters or importers shall provide all relevant information within 60 days of a request being made.
6. The option from Regulation 304/2003 continues for Member States to charge exporters an administrative fee for each export notification made. However this is now extended to include an option for Member States to charge exporters for each request they make for explicit consent.
7. The status of mercury and arsenic under this Regulation is still pending. The Commission will adapt the relevant annex to the Regulation if metallic arsenic is banned or severely restricted in the Community. Work is also ongoing on a proposal for an export ban on mercury out of the Community.

DRAFT STATUTORY INSTRUMENTS

2008 No.

HEALTH AND SAFETY

The Export and Import of Dangerous Chemicals (Amendment) Regulations 2008*Made* - - - - - ****Laid before Parliament* ****Coming into force* - - - ***

The Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972⁽¹⁾ in relation to the control of the import and export of goods⁽²⁾, the notification and control of substances⁽³⁾, the regulation and control of classification, packaging and labelling of dangerous substances and preparations⁽⁴⁾, and measures relating to consumer protection⁽⁵⁾.

The Secretary of State makes these Regulations in exercise of the powers conferred on him by section 2(2) of, and paragraph 1A of Schedule 2 to, the 1972 Act.

These Regulations make provision for a purpose mentioned in section 2(2) of the 1972 Act and it appears to the Secretary of State that it is expedient for references in the Export and Import of Dangerous Chemicals Regulations 2005⁽⁶⁾ to Regulation (EC) No. XXX/2008 of the European Parliament and of the Council of XXXXXX 2008 concerning the export and import of dangerous chemicals⁽⁷⁾ to be construed as references to that instrument as amended from time to time.

Citation, Commencement and interpretation

1.—(1) These Regulations, which extend to Great Britain, may be cited as the Export and Import of Dangerous Chemicals (Amendment) Regulations 2008 and shall come into force on xxx.

(2) In these Regulations, “the principal Regulations” means the Export and Import of Dangerous Chemicals Regulations 2005.

⁽¹⁾ 1972 c.68; Schedule 2 was amended by section 28 of the Legislative and Regulatory Reform Act 2006 (c.51). As regards Scotland, see also section 57(1) of the Scotland Act 1998 (c.46), which provides that, despite the transfer to the Scottish Ministers by virtue of that Act of functions in relation to observing and implementing obligations under Community law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972.

⁽²⁾ S.I. 1983/1706

⁽³⁾ S.I. 1981/1536

⁽⁴⁾ S.I. 1976/897

⁽⁵⁾ S.I. 1993/2661

⁽⁶⁾ S.I. 2005/928

⁽⁷⁾ (EC) No. XXX/2008 of the European Parliament and of the Council of XXXXXX 2008 concerning the export and import of dangerous chemicals

Amendments to the Principal Regulations

2.—(1) In regulation 1(2) of the principal Regulations for the definition of “the Regulation” substitute—

““the Regulation” means Regulation (EC) No. XXX/2008 of the European Parliament and of the Council of XXXXXX 2008 concerning the export and import of dangerous chemicals⁽⁸⁾, as amended from time to time.”.

3. In regulation 5 for the references to “Regulation (EC) No. 304/2003 of the European Parliament and of the Council concerning the export and import of dangerous chemicals” substitute the reference “Regulation (EC) No.../2008 of the European Parliament and of the Council concerning the export and import of dangerous chemicals”.

Signed by the authority of the Secretary of State for Work and Pensions.

Address
Date

William D McKenzie
Parliamentary Under Secretary of State
Department for Work and Pensions

EXPLANATORY NOTE

(This note is not part of the Regulations)

1. These Regulations amend the Export and Import of Dangerous Chemicals Regulations 2005 to make provision as regards Great Britain for the operation of Regulation (EC) No. xxx/2008 of the European Parliament and of the Council concerning the export and import of dangerous chemicals (O.J. No. xxxxx) (“the Regulation”).

2. The 2005 Regulations made provision in Great Britain for the operation of Regulation (EC) No. 304/2003 of the European Parliament and of the Council concerning the export and import of dangerous chemicals (O.J. No. L63, 6.3.2003,p.1) as amended by Commission Regulation (EC) No. 1213/2003 of 7th July 2003 (O.J. No. L 169, 8.7.2003, p.27) and Commission Regulation (EC) No.775/2004 of 26th April 2004 (O.J. No. L 123, 27.4.2004, p.27). These EC Regulations implemented within the European Community the Rotterdam Convention on the prior informed consent procedure (PIC) procedure for certain hazardous chemicals and pesticides in international trade signed by the Community on 11th September 1998.

3. In its judgment of 10 January 2006 in Case C-178/03 (Commission v. Parliament and Council)⁽⁹⁾, the Court of Justice of the European Communities annulled Regulation (EC) No. 304/2003 as it was based solely on Article 175(1) of the Treaty of Nice, ruling that both Articles 133 and 175(1) were the appropriate legal bases. However, the Court also ruled that the effects of Regulation (EC) No. 304/2003 were to be maintained until the adoption of a new Regulation founded on the appropriate legal bases. The Regulation is based on both Articles 133 and 175(1). These Regulations amend the 2005 Regulations by substituting the reference to Regulation (EC) No. 304/2003 with Regulation (EC) No. xxx/2008.

4. The other significant changes effected by the Regulation are as follows:

- (a) the export of chemicals restricted within the European Union (Part 2 chemicals) and those restricted under the Rotterdam Convention (Part 3 chemicals) may now proceed if no explicit consent has been received within 60 days of the request and if there is evidence from the importing party or country that the chemical has been licensed, registered or authorised;
- (b) an obligation is placed on each Member State’s designated national authority to consider, in consultation with the European Commission, the possible impact on human health and the environment when deciding to export Part 3 chemicals;
- (c) the export of Part 2 chemicals to member countries of the Organisation for Economic Co-operation and Development (OECD) may be granted immediately if the chemical is licensed, registered or authorised in that OECD country;

⁽⁸⁾ O.J. No. L XXXXXX
⁽⁹⁾ ECR [2006], I-107

- (d) the validity of each explicit consent or waiver granted shall be subject to periodic reviews by the European Commission in consultation with the Member States concerned.;
 - (e) when a chemical qualifies for PIC notification (Part 2 or 3) but the information provided is insufficient, the exporters or importers shall provide all relevant information within 60 days; and
 - (f) whilst the option remains for Member States to charge exporters an administrative fee for each export notification made, there is now a further option for Member States to charge exporters for each request they make for explicit consent.
5. No Regulatory Impact Assessment has been prepared in relation to these Regulations.