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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subsidiarity Grid
Accompanying the document
Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Annexes IV and V to Regulation (EU) 2019/1021 of the European Parliament and of the Council on persistent organic pollutants

Delegations will find attached document SWD(2021) 299 final.

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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

**Proposal for a
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Annexes IV and V to Regulation (EU) 2019/1021 of the European Parliament
and of the Council on persistent organic pollutants**

{COM(2021) 656 final} - {SEC(2021) 379 final} - {SWD(2021) 300 final} -
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Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
<p>The legal basis of the POPs Regulation is Article 192 of the Treaty on the Functioning of the European Union that effectively sets the manner in which Article 191 of the Treaty should be implemented. Article 191 addresses EU policy on the environment that must contribute to pursuit of the following objectives:</p> <ul style="list-style-type: none">- preserving, protecting and improving the quality of the environment,- protecting human health,- prudent and rational utilisation of natural resources,- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
<p>In accordance with the Article 5 of the TFEU, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. In the area of environmental policy, including regulating POP substances, the Union's competence is shared. The necessity of the POPs Regulation and its EU-added value have been clearly recognised throughout the years.</p>
<p><i>Subsidiarity does not apply for policy areas where the Union has exclusive competence as defined in Article 3 TFEU¹. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU² sets out the areas where competence is shared between the Union and the Member States. Article 6 TFEU³ sets out the areas for which the Unions has competence only to support the actions of the Member States.</i></p>
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2⁴:
<ul style="list-style-type: none">- Has there been a wide consultation before proposing the act?- Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?
<p>The inception Impact Assessment accompanying this measure was subject to a thorough stakeholder consultation to ensure that the views of different organisation were duly represented and considered. Given the technical nature of the measure being considered, and its high granularity, the exercise was primarily addressed to professional, academic and industrial/sectorial stakeholders, as well as to representatives of the civil society such as NGOs, consumer associations and trade unions. In addition, a targeted stakeholder consultation was carried out in the context of the study carried out in support of Impact Assessment, comprising all aspects relevant to said assessment, including</p>

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E003&from=EN>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E004&from=EN>

³ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML>

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

socio-economic elements. This was done by means of an electronic questionnaire and interviews with stakeholders representing key sectors and organisations concerned. A derogation from performing the 12-week public consultation prescribed by the Better Regulation Guidelines was granted by the Cabinet of the Commissioner for Interinstitutional Relations and Foresight. The rationale for this exception lies in the fact that a public consultation regarding the societal concern about substances of concern in recycled materials had recently been performed addressing the broader, less technical aspects of this measure and therefore, this information was already available and would be used in support of the current measure. A summary report of that consultation was published on 28 February 2019.

The explanatory memorandum and the impact assessment (chapter 3) for the review of the Waste annexes of the POPs Regulation contain a section on the principle of subsidiarity. Please see the reply to question 2.2 below

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

POP substances are transported across internal EU boundaries far from their sources. Avoiding releases from waste is a priority in this respect. The protection of the environment and of human health through a system that guarantees the sound management of POP waste can only be efficient if common rules are defined and established at the EU level. Therefore, the objectives of the proposal cannot be achieved by the Member States on their own because a harmonised approach is needed to ensure that the Union, as a Party to the Stockholm Convention, meets its international obligations.

It should be noted that the obligations regarding the review of Annexes IV and V of the POPs Regulation stem from the existing legal framework and, therefore, considerations regarding subsidiarity were already assessed by the co-legislator, upon adoption of the basic Act.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

As indicated above, the objectives of the proposal cannot be achieved by the Member States on their own because a harmonised approach is needed to ensure that the Union, as a Party to the Stockholm Convention, meets its international obligations.

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

The problems caused by POP substances, including those in scope of this proposal, are related to their intrinsic physical and chemical properties, to how and where they have been used and to the adverse effects that their progressive release has on the health of human beings, of ecosystems and on the services these provide. In one way or another all POP substances are recognised to have adverse, generally long-term, effects upon living organisms. They persist for a very long time in the environment and in our bodies and can be transported unchanged to almost any remote point of the globe, far away from where they were produced or used. This global distribution of pollution caused by POPs and their long-range transport and transnational relevance is one of the main reasons that motivated the creation of the Stockholm Convention and which justify the need for EU action.

<p>(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty⁵ or significantly damage the interests of other Member States?</p>
<p>The possibility to achieve a harmonised implementation of the environmental and human health protection objectives of the Treaty, as regards the management of waste containing or contaminated with POP substances, would be largely undermined via uneven implementation if this action was left to the individual action of the Member States, rather than to action at EU level that is already required under the POPs Regulation.</p>
<p>(c) To what extent do Member States have the ability or possibility to enact appropriate measures?</p>
<p>Most of the provisions under the POPs Regulation lead to ‘maximum harmonisation’ and do not make it possible for Member States to deviate from them. The recitals of the POPs Regulation state that for an adequate achievement of the objectives of the Regulation it is necessary to ensure ‘coherent and effective implementation of the Union obligations’ at international level and that the Regulation establishes a ‘framework for Union assessment and authorisation schemes’. As regards waste recital 14 in particular states that ‘to ensure a high level of protection, common concentration limits [...] should be established, monitored and enforced’. Consequently, any deviation from having EU-wide assessments and decisions could endanger the necessary coherence and effectiveness of the measures taken at Union level.</p>
<p>(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?</p>
<p>Pollution by POPs and their adverse effects on the health of humans and of the environment has a global dimension given the persistence, previous widespread use and long-range transport of the POP substances concerned. Therefore, although there may be specific national, regional or local considerations (e.g. regarding the number and location of contaminated sites), the regulation and management of POP waste has a global dimension that requires action at EU level.</p>
<p>(e) Is the problem widespread across the EU or limited to a few Member States?</p>
<p>Given the persistence, previous widespread use and long-range transport of the POP substances concerned, the problem affects all EU Member States.</p>
<p>(f) Are Member States overstretched in achieving the objectives of the planned measure?</p>
<p>The general objectives of the planned measure are those already established under the POPs Regulation. These are further achieved by the listing of new POP substances in Annexes IV and V, thereby ensuring the sound management of waste consisting or contaminated by the POP substances concerned. Member States implement and report on the implementation of their obligations under the POPs Regulation since the year 2004, when the Regulation was adopted.</p>
<p>(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?</p>
<p>The POPs Regulation implements the EUs international commitments under the Stockholm Convention and addresses a problem which is global in nature. To our knowledge there are no significant discrepancies in terms of the policy that underpins the POPs Regulation among national, regional or local authorities.</p>

⁵ https://europa.eu/european-union/about-eu/eu-in-brief_en

2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?

The objectives of the proposal cannot be achieved by the Member States on their own because a harmonised approach is needed to ensure that the Union, as a Party to the Stockholm Convention, meets its international obligations.

(a) Are there clear benefits from EU level action?

Article 3(6) of the POPs Regulation determines that waste consisting of, containing or contaminated “by any substance listed in Annex IV”, is regulated by Article 7. That article determines how POP waste should be controlled and managed in the Union. Together with Annexes IV and V, Article 7 provides the framework to implement the obligation of ensuring environmentally sound management of waste, established under the Stockholm Convention (and under the Basel Convention). If the limit values for POPs in waste proposed in this measure were to be derived and enacted by national measures, there is a clear risk of disharmonised implementation, resulting in differing levels of environmental and human health protection and differences in the way in which such waste would be managed in the different Member States. Therefore there is a clear benefit of EU level action, already recognised by the co-legislator in the POPs Regulation. The current measure contributes to implementing existing provisions via technical amendments of Annexes IV and V.

(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?

If national regulations were in place, cross-border effects could appear such as imbalances in the level of treatment of POP waste and there would be a risk of fragmentation of the Internal Market for the associated waste and recovered materials, leading to unfair competition and uneven protection of human health and the environment.

(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?

Following from the reasoning above, providing common limits and treatment standards for POP waste, including those that enable the recycling of certain materials from POP waste, provides a common level of human health and environmental protection, as regards management of POPs waste, throughout the EU. In addition it also provides legal certainty and thereby contributes to enhancing the recycling of materials from waste, for instance from waste electrical and electronic equipment (WEEE), and the uptake of secondary raw materials in the EU.

(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?

For the reason of harmonised implementation of the international obligations of the EU and in order to provide a common level of protection and clear rules on the management of the POP waste concerned, the benefits of EU level action outweigh any possible loss of competence of the Member States on this matter. The obligations under the POPs Regulation, and the (limited) flexibility that Member States have in applying some of its provisions is contained in the existing Regulation and was recently reviewed and validated by the co-legislator during the recast of the POPs Regulation in 2019.

(e) Will there be improved legal clarity for those having to implement the legislation?

Yes. Common limit values for the management of POP waste brings harmonisation and legal clarity as regards what can and cannot be done with POP Waste, providing a level playing field throughout the EU.

3. Proportionality: How the EU should act

3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

The POPs Regulation requires the consideration of proportionality as indicated in its recital 34. The principle of proportionality, as laid down in Article 5 of the Treaty on European Union, seeks to set actions taken by EU institutions within specified bounds. The measures proposed are limited to what is necessary to achieve its objectives and take into account the provisions in Article 5 of Protocol number 2 to the Treaty, on the application of the principles of subsidiarity and proportionality, which indicate that *"draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved"*.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

All aspects regarding the general motivation to act, the instrument chosen and similar considerations were addressed and validated by the co-legislator during the recast of the POPs Regulation in the year 2019. In revising Annexes IV and V the Commission has limited room of manoeuvre. In practice the Commission has to propose the listing of new substances identified as POPs under the Stockholm Convention in Annex IV and V (to meet its international commitments under the Convention). For substances listed in Annex IV (and V) the Commission has discretion on the choice of the numerical values that will be proposed (in establishing a value for the first time or in deciding to review it), given that the "low POP content" values provisionally listed in Table 2 of the General POPs Technical Guidelines developed under the Basel Convention are not legally binding. The possible values for these limits define the different options considered in the impact assessment supporting the initiative.

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

Yes. It should be noted that in revising Annexes IV and V of the POPs Regulation, the Commission has limited room of manoeuvre. In practice the Commission has to propose the listing of new substances identified as POPs under the Stockholm Convention in Annex IV and V (to meet its international commitments under the Convention). For substances listed in Annex IV (and V) the Commission has discretion on the choice of the numerical values that will be proposed, this being the subject of the different options analysed in the impact assessment. See further explanation on the added value of EU action in section 2.4.

(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

Under Article 15(2) of the POPs Regulation, the Commission must, where appropriate, make legislative proposals to amend Annexes IV and V to the Regulation in order to adapt them to the changes to the list of substances set out in the Annexes to the Convention or the Protocol or to modify existing entries or provisions in the Annexes to this Regulation in order to adapt them to scientific and technical progress. Consequently the Commission has no choice in the instrument to amend Annexes IV and V of the Regulation, given such instrument (a legislative proposal for a Regulation) is already defined under existing provisions under the Regulation.

(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)

The proposed measure proposes limits for certain POP substances in waste, according to the rules and with the flexibility mechanisms validated by the co-legislator in the POPs Regulation. The choice of the substances listed results from the EUs international commitments under the Stockholm Convention and the imposition of common limit values is considered to be the minimum requirement to ensure harmonised implementation. Article 7(4)(b) of the POPs Regulation enables Member States to allow certain types of waste exceeding the values set in Annex IV of the Regulation, to be treated differently, in a way that that does not ensure the destruction of the POP substances in the waste.

(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?

The proposed initiative does not create additional financial or administrative costs for the Union. It does however have some negative economic impacts on industry stakeholders, including waste operators, many of which are distributional in nature. These impacts are concluded to be proportionate and commensurate with the objectives proposed.

The principle of proportionality has been duly considered in the impact assessment supporting the measure. The methodology to set the limit values, explained in Annex IV of the impact assessment, ensures that limit values are feasible and implementable for all relevant waste streams. When assessing the proportionality of the proposed limit values, an assessment of economic feasibility for the main operators affected is carried-out. Each assessment is case-specific and made on the basis of available information. Aspects such as the number, size and nature of stakeholders affected and their estimated capacity to absorb additional costs and investments, are taken into account, normally based on a qualitative analysis. An analysis of the impacts of the preferred policy options (representing an Annex IV limit value for each substance in scope) is summarised in section 8.2 of the impact assessment report.

(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?

As indicated above, Article 7(4)(b) of the POPs Regulation enables Member States' competent authorities to allow certain types of waste exceeding the values set in Annex IV of the Regulation, subject to certain conditions, to be treated differently, in a way that that does not ensure the destruction of the POP substances in the waste. This allows to take into account certain national specificities associated to certain types of waste and treatment capacities available.