

STOCKHOLM CONVENTION AND THE REACH ANNEX XIV ISSUE. THE CASE OF HBCD (HEXABROMOCYCLODODECANE)

Stockholm Convention:

In mid 2008 the Government of Norway has submitted a proposal to list hexabromocyclododecane in Annex A to the Stockholm Convention in accordance with Article 8 (1)¹ to the Convention. The Secretariat verified that the proposal contained information specified in Annex D (article 8 paragraph 2)² and forwarded it to the POPRC (Persistent Organic Pollutants Review Committee) for consideration. In the sixth ordinary meeting of the Conference of the Parties to the Stockholm Convention on Persistent Organic Pollutants, which was held at the Geneva International Conference Centre from 28 April to 10 May 2013, decided the listing of hexabromocyclododecane³. In particular, the sixth Conference of the Parties having considered the risk profile and the risk management evaluation and its addendum for hexabromocyclododecane as transmitted by the Persistent Organic Pollutants Review Committee^{4,5,6}, taking note of the recommendation by the Persistent Organic Pollutants Review Committee to list hexabromocyclododecane in Annex A to the Convention with specific exemptions for production and use in expanded polystyrene and extruded polystyrene in buildings⁷, decided to amend part I of Annex A to the Stockholm Convention on Persistent Organic Pollutants⁸ by inserting the following row:

¹ Art. 8(1): A Party may submit a proposal to the Secretariat for listing a chemical in Annexes A, B and/or C. The proposal shall contain the information specified in Annex D. In developing a proposal, a Party may be assisted by other Parties and/or by the Secretariat.

² The Secretariat shall verify whether the proposal contains the information specified in Annex D. If the Secretariat is satisfied that the proposal contains the information so specified, it shall forward the proposal to the Persistent Organic Pollutants Review Committee.

³ SC-6/13: Listing of hexabromocyclododecane

⁴ UNEP/POPS/POPRC.6/13/Add.2 (Geneva, 11–15 October 2010): Addendum - Risk profile on hexabromocyclododecane At its sixth meeting, the Persistent Organic Pollutants Review Committee adopted a risk profile on hexabromocyclododecane, on the basis of the draft risk profile contained in document UNEP/POPS/POPRC.6/10.

⁵ UNEP/POPS/POPRC.7/19/Add.1 (Geneva, 10–14 October 2011): Addendum - Risk management evaluation on hexabromocyclododecane At its seventh meeting, the Persistent Organic Pollutants Review Committee adopted a risk management evaluation on hexabromocyclododecane on the basis of the draft contained in document UNEP/POPS/POPRC.7/5, as amended.

⁶ UNEP/POPS/POPRC.8/16/Add.3: (Geneva, 15–19 October 2012): Addendum to the risk management evaluation on hexabromocyclododecane At its seventh meeting, the Persistent Organic Pollutants Review Committee, by its decision POPRC-7/1, adopted a risk management evaluation on hexabromocyclododecane (see UNEP/POPS/POPRC.7/19/Add.1). At its eighth meeting, by its decision POPRC-8/3, the Committee adopted an addendum to that evaluation.

⁷ Decision POPRC-8/3.

⁸ UNEP/POPS/COP.6/33 Decision SC-6/13 (Conference of the Parties to the Stockholm Convention on Persistent Organic Pollutants Sixth meeting Geneva, 28 April–10 May 2013).

Chemical	Activity	Specific exemption
Hexabromocyclododecane	Production	As allowed for the parties listed in the Register in accordance with the provisions of Part VII of this Annex
	Use	Expanded polystyrene and extruded polystyrene in buildings in accordance with the provisions of Part VII of this Annex

COP6 also decided to insert a definition for hexabromocyclododecane in part III of Annex A as follows:

“(c) “Hexabromocyclododecane” means hexabromocyclododecane (CASNo: 25637-99-4), 1,2,5,6,9,10-hexabromocyclododecane (CAS No: 3194-55-6) and its main diastereoisomers: alpha-hexabromocyclododecane (CAS No: 134237-50-6); beta-hexabromocyclododecane (CAS No: 134237-51-7); and gamma-hexabromocyclododecane (CAS No: 134237-52-8).”

Furthermore decided to insert a new part VII in Annex A as follows:

Part VII

Hexabromocyclododecane

Each Party that has registered for the exemption pursuant to Article 4 for the production and use of hexabromocyclododecane for expanded polystyrene and extruded polystyrene in buildings shall take necessary measures to ensure that expanded polystyrene and extruded polystyrene containing hexabromocyclododecane can be easily identified by labelling or other means throughout its life-cycle.

In principle, the amendment to Annexes A for listing of hexabromocyclododecane will enter into force one year after the communication by the Depository of the adoption of the amendments and therefore presumably in late 2014.

REACH:

Hexabromocyclododecane was included in the Candidate List of Substances of Very High Concern (SVHC) for Authorisation on the 28th October 2008 due to its PBT properties in accordance with art. 57 (d). Pursuant to Article 58(3) of the Regulation (EC) No 1907/2006, the Agency (ECHA) prioritised hexabromocyclododecane (mainly for its PBT properties through a scoring algorithm and consideration of relevant information regarding regulatory coherence and effectiveness). A decision was taken to include in Annex XIV the substance at issue in accordance with the procedure referred to in Article 133(4). The outcome of the procedure is the

REGULATION (EU) No 143/2011 of 17 February 2011⁹. In general, in the aforesaid decision to include a substance in Annex XIV, it is specified the date (sunset date)¹⁰ from which the placing on the market and the use of the substance shall be prohibited unless an authorisation is granted and the deadline for the applications¹¹. In the case of hexabromocyclododecane the dates are 21 August 2015 and 21 February 2014 respectively. There are no categories of uses exempted.

Foreword:

Definition:

Stockholm convention does not define the terms "use" and "production".

On one hand REACH defines "use" as "... *any processing, formulation, consumption, storage, keeping, treatment, filling into containers, transfer from one container to another, mixing, production of an article or any other utilisation*" and on the other we can relate the REACH definition of "manufacturing"¹² to the term "production" of the SC which we deem to be the activity of manufacturing a substance.

Possible scenarios:

whereas:

- Acknowledging the expiry of one year after the communication (probably late 2014) by the depositary of the adoption of the amendments for most of the Parties¹³;
- Mindful of the application date for authorisation under REACH: 21st February 2014;
- Aware of the sunset date under REACH: 21st August 2014;
- Considering the implementation of Stockholm Convention through the amendment of REGULATION (EC) No 850/2004¹⁴;
- Taking into account art. 61(6)¹⁵ of REACH Regulation;

⁹ COMMISSION REGULATION (EU) No 143/2011 of 17 February 2011 amending Annex XIV to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals ('REACH') corrected by Corrigendum, OJ L 49, 24.2.2011, p. 52 (143/2011).

¹⁰ Article 58(1)(c)(i): the date(s) from which the placing on the market and the use of the substance shall be prohibited unless an authorisation is granted (hereinafter referred to as the sunset date) which should take into account, where appropriate, the production cycle specified for that use;

¹¹ Article 58(1)(c)(ii): a date or dates at least 18 months before the sunset date(s) by which applications must be received if the applicant wishes to continue to use the substance or place it on the market for certain uses after the sunset date(s); these continued uses shall be allowed after the sunset date until a decision on the application for authorisation is taken;

¹² Article 3(8): means production or extraction of substances in the natural state

¹³ Article 22 (3)(c): On the expiry of one year from the date of the communication by the depositary of the adoption of an additional annex, the annex shall enter into force for all Parties that have not submitted a notification in accordance with the provisions of subparagraph (b).

¹⁴ REGULATION (EC) No 850/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC.

¹⁵ If a use of a substance is subsequently prohibited or otherwise restricted in Regulation (EC) No 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants (1), the Commission shall withdraw the authorisation for that use.

EU Commission may avail any of the following possibilities:

1. The EU Commission can rely on paragraph 3(b) of Article 22 of the Stockholm Convention¹⁶. EU Commission shall notify to the depositary that it is unable to accept the amendment to annex A for the inclusion of hexabromocyclododecane, which therefore does not enter into force. In this case the EU Commission can rely on article 60 for granting of authorisations with no obligation with respect such amendment of Annex A of the Stockholm Convention. Forthcoming amendment to Regulation (EC) No 850/2004 shall take into account the waiving at issue.
2. The EU Commission can rely on paragraph 4 of article 22 of the Convention¹⁷. EU Commission shall make a declaration in accordance with paragraph 4 of Article 25 of the Convention¹⁸. In this case, such amendment to Annex A shall enter into force for EU only on the ninetieth day after the date of deposit with the depositary of its instrument of ratification, acceptance, approval or accession with respect to such amendment. Therefore, if Commission will recall article 22(4), they can rely on article 60 for granting of authorisations with no obligation with respect such amendment of Annex A of the Stockholm Convention. Forthcoming amendment to Regulation (EC) No 850/2004 shall take into account the transitional period at issue.
3. The EU Commission shall submit a notification for specific exemptions to the Secretariat as soon as possible after the entry into force of the amendment to annex A for the Party (EU Commission – regional economic integration organization) and in accordance with Article 4(3) of the Convention¹⁹. The Register of Specific Exemptions is, in principle, open for a period of five (5) years exemption. The exemption will expire five years from the date of the Depositary Notification of the amendment of Annex A with the inclusion of hexabromocyclododecane, unless an earlier date is indicated in the Register by a Party or an extension is granted pursuant to article 4 paragraph 7²⁰. According to the forthcoming new Annex A part VII, only production and use of hexabromocyclododecane for expanded polystyrene and extruded polystyrene in

¹⁶ Article 22 (3)(b): The following procedure shall apply to the proposal, adoption and entry into force of additional annexes to this Convention: Any Party that is unable to accept an additional annex shall so notify the depositary, in writing, within one year from the date of communication by the depositary of the adoption of the additional annex. The depositary shall without delay notify all Parties of any such notification received. A Party may at any time withdraw a previous notification of non-acceptance in respect of any additional annex, and the annex shall thereupon enter into force for that Party subject to subparagraph (c).

¹⁷ Article 22(4): The proposal, adoption and entry into force of amendments to Annex A, B or C shall be subject to the same procedures as for the proposal, adoption and entry into force of additional annexes to this Convention, except that an amendment to Annex A, B or C shall not enter into force with respect to any Party that has made a declaration with respect to amendment to those Annexes in accordance with paragraph 4 of Article 25, in which case any such amendment shall enter into force for such a Party on the ninetieth day after the date of deposit with the depositary of its instrument of ratification, acceptance, approval or accession with respect to such amendment.

¹⁸ Article 25(4): In its instrument of ratification, acceptance, approval or accession, any Party may declare that, with respect to it, any amendment to Annex A, B or C shall enter into force only upon the deposit of its instrument of ratification, acceptance, approval or accession with respect thereto.

¹⁹ Article 4(3): Any State may, on becoming a Party, by means of a notification in writing to the Secretariat, register for one or more types of specific exemptions listed in Annex A or Annex B.

²⁰ Article 4(7): The Conference of the Parties may, upon request from the Party concerned, decide to extend the expiry date of a specific exemption for a period of up to five years. In making its decision, the Conference of the Parties shall take due account of the special circumstances of the developing country Parties and Parties with economies in transition.

buildings can be exempted in regard to SC. Subsequently, exemption will also be implemented in the amendment of Regulation (EC) No 850/2004. Therefore, if EU Commission will rely on this option, they can grant authorisations only for the aforementioned production/uses.

4. EU Commission can decide on not submitting a notification for specific exemptions to the Secretariat and wait for the amendment of Regulation (EC) No 850/2004. Therefore, from the date of the Depositary Notification to the date of the coming into force of the relevant amendment to Regulation (EC) No 850/2004, EU Commission will not issue any authorisation pursuant to art. 60 (state of oblivion, limbo). This would trigger pitfalls in regard to the payment of the fee in accordance to article 62(7). Once Regulation (EC) No 850/2004 will come into force, EU Commission can grant authorisations only for expanded polystyrene and extruded polystyrene in buildings which is the foreseeable exemption to be implemented in Regulation (EC) No 850/2004 as amended.

It should be noted that Italy and Malta have never ratified the Stockholm Convention. One could argue that they are bound to Stockholm Convention provisions according to first paragraph of article 25(2)²¹ which I deem not that clear. If we understand that non-Parties have no obligation towards Stockholm Convention despite they are part of a regional economic integration organization (i.e. European Union), EU Commission could grant authorisations for any use in compliance with article 60. Anyway, once the amended Regulation (EC) No 850/2004 will come into force both the aforementioned countries shall comply with the provisions stated thereof.

²¹ Any regional economic integration organization that becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under the Convention. In the case of such organizations, one or more of whose member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under the Convention concurrently.