



Plenary sitting

B9-0364/2020

18.11.2020

MOTION FOR A RESOLUTION

pursuant to Rule 112(2) and (3), and (4)(c) of the Rules of Procedure

on the draft Commission regulation amending Annex XVII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards lead in gunshot in or around wetlands (D064660/06 – 2020/2771(RPS))

Andrey Slabakov
on behalf of the ECR Group

Summary of rebuttals

Definition of wetlands: breach of the principle of proportionality and legal certainty

The draft measure uses the internationally recognised and comprehensive definition of wetlands. The opinions of ECHA's scientific committees were based on the use of this definition and limiting it would make the restriction significantly less effective, so that the benefits from the restriction would be much lower. The definition is clear and allows any person to ascertain what is covered; Member States can issue maps/tools to help citizens.

Enforcement

The draft measure takes into account the Forum's comments and recommendations as regard the definition of wetlands, but for the sake of proportionality does not provide a ban across all terrains as suggested by the Forum. The restriction must be interpreted in accordance with its objective (protection of waterbirds) and the principle of proportionality; Member States can issue guidance for this.

Principle of conferral

Addressing a REACH restriction to consumers fully falls within the Commission's implementing powers under REACH. There is a clear definition of "carrying". The Court of Justice has recognised that the Commission has wide discretion when adopting acts, including REACH restrictions.

Lack of socio-economic assessment

The impacts on lead gunshot manufacturers and on farmers were assessed by ECHA. Shooting ranges are reported to cause lead releases to the environment. They were in the scope of the restriction from the beginning and ECHA's scientific committees did not recommend exempting them.

ECHA's opinion disregarded

The Commission took full account of ECHA's opinion which proposed banning possession/carrying, but made it more proportionate, and using the Ramsar definition of wetlands. ECHA recommended buffer zones without quantifying them; in the interest of legal certainty, enforceability and proportionality the Commission quantified them at 100 metres. The Commission followed ECHA's scientific Risk Assessment Committee's opinion strongly supporting a 24-month transition period in the light of the estimated annual impact.

The reversal of the presumption of innocence

The rebuttable legal presumption related to carrying lead gunshot does not reverse the presumption of innocence. On the contrary, it helps to ensure the proportionality of the draft measure by allowing those carrying lead gunshot to show that they were merely crossing wetlands, not shooting there, and therefore not breaching the restriction. There are multiple examples of such rebuttable legal presumptions not going against fundamental law principles.

Conclusion

The draft Regulation addresses the risks from lead gunshot in wetlands, in full respect of the Commission's implementing powers, the content of the REACH Regulation and the principle of proportionality. It fulfils a long-standing EU commitment under the Agreement on the Conservation of African-Eurasian Migratory Waterbirds.

B9-0364/2020

European Parliament resolution on the draft Commission regulation amending Annex XVII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards lead in gunshot in or around wetlands (D064660/06 – 2020/2771(RPS))

The European Parliament,

- having regard to the draft Commission regulation amending Annex XVII to Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards lead in gunshot in or around wetlands (D064660/06),
- having regard to regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC¹ ('the REACH Regulation'), and in particular Article 68(1) thereof,
- having regard to the opinion delivered on 3 September 2020 by the committee referred to in Article 133 of the REACH Regulation,
- having regard to the principle of proportionality enshrined in Article 5 of the Treaty on European Union and Protocol No 2 on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union,
- having regard to the Annex XV Restriction Report of the European Chemicals Agency (ECHA) on lead in shot published on 21 June 2017,
- having regard to the advice of the Forum for Exchange of Information on Enforcement of ECHA on the enforceability of a proposed Annex XVII restriction regarding lead gunshot adopted on 15 September 2017,
- having regard to the opinion of the Committee for Risk Assessment (RAC) of ECHA on an Annex XV dossier proposing restrictions on lead in gunshots adopted on 9 March 2018,
- having regard to the opinion of the Committee for Socio-economic Analysis (SEAC) of ECHA on an Annex XV dossier proposing restrictions on lead in shot adopted on 14 June 2018,
- having regard to the opinions of RAC and SEAC of ECHA on an Annex XV dossier

¹ OJ L 396, 30.12.2006, p. 1.

proposing restrictions on lead in gunshots submitted to the Commission on 17 August 2018,

- having regard to Article 5a(3)(b) of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission²,
- having regard to Rule 112(2) and (3), and (4)(c) of its Rules of Procedure,

Definition of wetlands: breach of the principle of proportionality and legal certainty

- A. whereas phasing out the use of lead gunshot for hunting in wetlands is a well justified and long standing objective in line with paragraph 4.1.4 of the Action Plan annexed to the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) and applied by 23 Member States;

Agreed

- B. whereas the scope of the draft Commission regulation is based on the broad definition of wetlands provided by the Convention on Wetlands of International Importance (Ramsar Convention), which is used to designate wetlands of international importance;

Agreed

- C. whereas the definition of wetlands under the Ramsar Convention is intentionally broad to provide contracting parties to that Convention with ample opportunity to identify and designate wetland sites of international importance; whereas the opinion of 9 March 2018 of RAC and the draft Commission regulation apply the Ramsar Convention definition in a way that was never legally intended, thereby expanding its scope in a disproportionate manner that would create legal uncertainty;

The Commission Regulation is not meant to implement the Ramsar Convention, which is indeed about designating wetlands of international importance. It is meant, inter alia, to implement the AEWA Agreement, which is about conservation of waterbirds and indeed requires phasing out the use of lead gunshot for hunting in wetlands (whether of international importance or not). There is no legal reason why the readily available international wetlands definition from the Ramsar Convention could not be used for the purposes of such a Commission Regulation, if that definition is deemed suitable. The Commission did not expand the scope of the Ramsar definition but copied it word for word.

The opinion of the Risk Assessment Committee (RAC) on the effectiveness of the restriction was based on the use of the Ramsar definition. Limiting that definition would make the restriction significantly less effective: the annual reduction of lead emission would be much less and the benefits from the restriction would be much lower.

- D. whereas, in addition to the Ramsar Convention definition, the draft Commission regulation applies an additional 100 metre buffer zone; whereas buffer zones, in the sense of total exclusion zones, are only used in very few Member States that have clear

²OJ L 184, 17.7.1999, p. 23.

and precise definitions of wetlands, i.e. obvious and permanent wetland features, while noting that SEAC did not have sufficient information to assess the socio-economic impacts of buffer zones;

The Commission Regulation intends to harmonise the differing practices. It cannot do so based on the lowest common denominator(s) of current Member State approaches, as Article 114(3) TFEU requires the Commission to take as a basis a high level of protection in its proposals concerning health, safety and environmental protection. The EP and the Council are required to achieve the same objective.

Buffer zones are necessary to prevent lead gunshot discharged close to a wetland, but not in a wetland, from falling into the wetland and being ingested by birds, causing their death. ECHA did recommend to establish buffer zones, even though they did not quantify them. The restriction would be significantly less effective if we only banned the use of lead gunshot in wetlands themselves, without any buffer zone.

As mentioned in the proposed restriction, the Commission introduced fixed buffer zones based on enforcement and compliance considerations, proportionality and effectiveness of the restriction. The Socio-economic Analysis Committee (SEAC) provides scientific advice based on scientific factors, but weighing political, economic, social and enforcement considerations remains for the Commission in proposing a measure, as assisted by the REACH committee.

- E. whereas applying this legal definition in conjunction with the 100 metre buffer zone means that every puddle must have a circular perimeter with a surface area in excess of three hectares, where both the possession and use of lead gunshot is prohibited; whereas there should be no legal ambiguity as to whether a given area at a given time is subject to the intended restriction or not, irrespective of the weather;

As to legal certainty, the Commission services take the view that the Ramsar definition is clear and allows any person to ascertain what is covered. Union law has to be interpreted in accordance with its objectives, in accordance with the consistent case law of the Court of Justice. Hence, national authorities must, and Courts can be expected to interpret the Ramsar definition of wetlands proportionately and in accordance with the objective of the restriction, namely the protection of waterbirds. For example, a puddle on a city street cannot be interpreted to be caught by the wetland definition where it would be irrelevant to the objectives of the measure because it could not be a waterbird habitat or relevant to the protection of waterbirds. National authorities may find it appropriate to issue guidance to shooters on how the definition of wetlands, as laid down in the draft Regulation, and wetland area boundaries should be correctly interpreted in line with the objectives of the measure and the principle of proportionality. The Commission services consider that national authorities are best placed to take into account the specificities of the different territories and that guidance at national level could therefore be more helpful, specific and of greater practical use. See also Commission's response to Parliamentary Question P-4924/20.

The possibility to implement the restriction for areas of wetlands not permanently covered by water is addressed under point K.

- F. whereas the Commission proposes, for the first time under the REACH Regulation, that consumers (i.e. hunters) shall not discharge (i.e. shoot) certain consumer products (i.e. lead gunshots), which have been lawfully placed on the Union market, in or within 100

metres of wetlands; whereas the existing restrictions are addressed not to consumers but to manufacturers, importers and distributors;

There are examples of existing restrictions addressing consumer uses. Even if this were not the case, there is no legal impediment to address consumers: in contrast to the registration, evaluation and authorisation titles of REACH, the restrictions title does not specify or limit the types of legal subjects that can be subjected to obligations under this title. Moreover, the definition of “use” under REACH also includes “consumption”.

G. whereas the draft Commission regulation proposes to amend the REACH Regulation by creating the new obligation on consumers (i.e. hunters) not to carry lead gunshots (i.e. consumer products) in or within 100 metres of wetlands; whereas there is no clear definition of ‘carrying’;

There is a clear definition of carrying in paragraph [22] point (e) of the proposal: ‘ “carrying” means any carrying on the person or carrying or transporting by any other means’. The Commission services do not perceive any unclarity in this definition.

H. whereas the wetland areas covered by the Ramsar Convention are identified not only by the definition itself, but by the specific areas designated (i.e. mapped) by the contracting parties;

As stated above, the Commission Regulation is not meant to implement the Ramsar Convention. It is meant, inter alia, to implement the AEWA Agreement. To this end, it uses an available and well-established definition.

I. whereas the advice of 15 September 2017 of the Forum for Exchange of Information on Enforcement and the opinion of 14 June 2018 of SEAC, which highlighted clear problems with the Ramsar Convention definition of wetlands, were not taken into account by the Commission;

When reading the Forum advice in full, it emerges that their concern is not with the Ramsar definition of wetlands, but rather with the limitation of the scope of the restriction to wetlands only (regardless of how wetlands are defined), cf. page 4, sixth paragraph, and page 7, second paragraph, of the Forum advice. In fact, the Forum recommends stricter measures than the current restriction proposal: either a prohibition of placing on the market of lead gunshot or a ban of lead gunshot in general, across all terrain types. This is because enforcing a market ban or a restriction without geographical boundaries is easier than having to verify whether the shooter is in or within 100 m from a wetland.

The Commission considered the Forum advice but favoured a narrower scope of the restriction to make the measure even more proportionate. Nevertheless, considering that the narrower scope of the restriction may give rise to particular difficulties in Member States with a significant proportion of wetlands in their territory, those Member States are given the option to prohibit the placing on the market of lead gunshot and a ban on lead gunshot in general, across all terrain types, in their territory.

However, we did take into account the Forum’s advice that, in order to avoid misinterpretation of the definition of “wetlands”, the proposal should include the full text of the definition and

clarify that the definition is not only applicable to officially identified Ramsar wetlands, cf. page 6, third bullet point, of the Forum advice.

- J. whereas the intended prohibition covers all water, including the accumulation of surface water regardless of the size, such as a 1 square metre (or even smaller) area of temporary water which appears in an otherwise dry field after rain, as confirmed by the Commission;

Union law must be interpreted in accordance with its objectives, in accordance with the consistent case law of the Court of Justice. Hence, national authorities must, and Courts can be expected to interpret the Ramsar definition of wetlands proportionately and in accordance with the objective of the restriction, namely the protection of waterbirds.

- K. whereas the draft Commission regulation does not include a specific definition of ‘peatland’ and thereby fails to take into account the complexity of identifying and mapping peatlands, especially those that do not contain visible water and, unlike bodies of water, the fact that peatlands rarely have clear observable borders; whereas SEAC acknowledged this concern, stating that the inclusion of peatland causes difficulties in identifying certain types of wetlands in practice, for example, peatlands, marshes and fens, which could therefore cause difficulties for those shooting to know whether they are in compliance with the restriction or not, for example, in areas with a large extent of peatland and which are used for agricultural or forestry purposes;

EU land classification systems (for example, the Corine Land Use programme) include land categories that, when considered together, are broadly consistent with the Ramsar wetland definition. The resolution of the mapping is considered sufficient to know the location of a wetland (including peatlands). Integration of these data with common consumer geo-localisation services (e.g. internet maps) to alert hunters of their location and shooting direction would be relatively straightforward, either by authorities in Member States or by third parties (e.g. hunting associations or commercial mapping data providers). Specifically on peatlands, because of their importance for biodiversity and as carbon sinks, additional databases are available. In 2006, the JRC (European Soil Data Centre) produced an analysis of peatland soils occurrence in the EU 27³ (based on soil organic carbon content).

In 2017, the International Mire Conservation Group and International Peatland Society published ‘The Peatland Map of Europe’⁴. Activities to map peatlands are also on-going at national level. An example is the Finnish peatland inventory⁵.

- L. whereas the draft Commission regulation would be, in effect, impossible to comply with and enforce in practice because the areas covered by the definition are, without further specifications, not only vague but also coincidental, such as areas with small temporary bodies of standing water subject to changing weather conditions;

³ https://esdac.jrc.ec.europa.eu/ESDB_Archive/octop/Peatland.html

⁴ http://roar.uel.ac.uk/6565/1/map_19_22.pdf

⁵ https://gtkdata.gtk.fi/Turvevarojen_tilinpito/index.html

The Commission services believe that the restriction is enforceable because, as explained, detailed maps of the soil categories included in the wetland definition are available, also for areas with non-permanent visible water.

Enforcement

M. whereas the scope of the draft Commission regulation is therefore far too broad, and based on an unworkable definition of wetlands, which would be problematic to implement and disproportionate to the objective pursued;

See above.

N. whereas the advice of 15 September 2017 of the Forum for Exchange of Information on Enforcement stated that ‘The scope of the proposed restriction, based on the Ramsar Convention (wetland), would pose serious problems from the enforcement perspective’;

See above, under point “I”, on the importance of reading the Forum advice in full.

O. whereas the draft Commission regulation does not comply with the principle of legal certainty as it does not enable those concerned to know precisely the extent of the obligations imposed on them in order to be able to ascertain unequivocally what their rights and obligations are and to take steps accordingly;

As stated in the Commission’s response to Parliamentary Question P-4924/20, geographical and climatic conditions and types of terrain vary in Member States. National authorities may find it appropriate to issue guidance to shooters on how the definition of wetlands, as laid down in the draft Regulation, and wetland area boundaries should be correctly interpreted in line with the objectives of the measure and the principle of proportionality. Member States also can help their citizens comply with the restriction in very practical ways, for example by making available maps of wetlands or mobile applications or other forms of guidance to help people verify whether they are in wetlands or buffer zones.

P. whereas the definition of wetlands explicitly includes artificial areas of water and makes no exemption for bodies of water present in municipal areas, thereby expanding the restriction on the possession and use of lead gunshot to fixed buffer zones of 100 metres around urban water features including rivers, canals, fountains and ponds, which could have implications for the use of lead gunshot by the police;

Like any piece of EU legislation, the definition of wetlands, as laid down in the draft Regulation should be interpreted in line with the objectives of the measure and the principle of proportionality. No relevant use of lead gunshot by the police was identified, cf page 10 of the Annex XV restriction report.

Principle of conferral

Q. whereas the draft Commission regulation exceeds the implementing powers conferred by Articles 67 to 73 of the REACH Regulation by introducing additional obligations and new essential elements in such a manner that the Commission ignores the limits that are inherent to an implementing act;

There are no new essential elements being introduced, nor additional obligations beyond the limits that are inherent in an implementing act under the regulatory procedure with scrutiny.

R. whereas Articles 67 to 73 of the REACH Regulation confer on the Commission certain implementing powers to restrict manufacturing, placing on the market and use of certain dangerous substances, mixtures and articles;

Agreed

S. whereas the Commission does not have wide discretion when amending Annex XVII (Restrictions on the manufacture, placing on the market and use of certain dangerous substances, mixtures and articles) to the REACH Regulation; whereas restrictions are to be adopted under Articles 69 to 73 of the REACH Regulation when there is an unacceptable risk to human health or the environment, arising from the manufacture, use or placing on the market of substances, which needs to be addressed on a Union-wide basis;

As recognised by the Court of Justice, in an area of evolving and complex technology, the Commission has a broad discretion, in particular as to the assessment of highly complex and technical facts in order to determine the nature and scope of the measures which it adopts, including when amending Annex XVII of the REACH Regulation (e.g. Case T-368/11, Case T-456/11).

In this case, the Commission did so acting on the basis of ECHA's Annex XV restriction report and the opinions of its scientific committees, RAC and SEAC, which concluded that the restriction proposed by ECHA is an appropriate Union-wide measure to address the identified risks to the environment and a potential risk to human health stemming from the discharge of lead gunshot in or around wetlands.

Lack of socio-economic assessment

T. whereas while ECHA's advice of 17 August 2018 for a 36 month transition period was informed by a socio-economic assessment, taking into account the experience of Member States that phased out lead gunshot over wetlands and that five Member States have yet to legislate for the use of lead gunshot in wetlands, the Commission has proposed a much shorter transition period of 24 months without justification;

The justification for the shorter transition period of 24 months is provided in recitals (11) and (25) of the Commission proposal. On the one hand, RAC strongly supported a shorter transition period, as each year of delay would result in approximately 4000 additional tonnes of lead being released into wetland areas, resulting in the death of somewhere in the order of 1 million birds (cf. page 10, second bullet point, of the compiled RAC-SEAC opinion). On the other hand, the Commission took into account this estimated annual impact, as well as the view expressed by SEAC regarding the feasibility and appropriateness of a shorter period than three years (cf. page 46-47 of the compiled RAC-SEAC opinion).

U. whereas the Commission has proposed an option for Member States where at least 20 % of their territory is made up of wetlands to prohibit the placing on the market of gunshot containing lead without having made any socio-economic assessment of the impact on the ammunition manufacturing sector of this stricter measure;

The option was introduced due to the specific geographical conditions in some Member States causing particular difficulties there. For Member States with a significant proportion of wetlands, the proposed restriction could in practice have a similar effect to a total ban and the resources for the enforcement of a targeted restriction may be greater than the resources for the enforcement of a restriction covering the whole territory. This is why the option allows those Member States to take more time, 36 months instead of 24 months, to impose a restriction covering their whole territory. This is simple and fair on the hunting community as a whole.

- V. whereas the scope of the restriction is expanded substantially in the draft Commission regulation without any additional socio-economic assessment on how industry and related sectors (namely, firearms manufacturers, resellers, shippers, users, etc.) would be directly and indirectly affected by the restriction; whereas the ammunition industry is highly dependent on the European Economic Area (EEA) market (70 % turnover) and 82 % is currently reliant on lead gunshot; whereas the insufficient availability of adequate, safe and affordable substitutes for the restricted gunshot might further impact the preparedness of this industry and related sectors for such a market restriction;

The proposed restriction does not aim to ban or limit hunting or shooting, it aims to restrict the use of a particularly toxic type of ammunition, namely lead-containing gunshot. Adequate, safe and affordable alternatives (gunshot containing steel, bismuth, etc.) are available and used in a number of Member States as analysed and demonstrated by ECHA, cf pages 65-79 of the Annex XV restriction report and Annex E sections E.2 and E.3 to the Background document to the compiled RAC-SEAC opinion. Most of the main manufacturers have separate production lines for alternative gunshot and there would be no major need for opening new production lines, cf page 41 of the compiled RAC-SEAC opinion. The proposed restriction therefore offers opportunities to the ammunition industry, as well as firearms manufacturers. To note, moreover, that following the proposed restriction, lead-containing gunshot can still be marketed for use in other terrains. Moreover, the industry will have a transitional period of 24 months to adapt to the restriction.

- W. whereas there has been no socio-economic assessment on the impact of this restriction on farmers; whereas farmers might be obliged to replace their shotguns in order to be able to use alternative gunshot that can be more expensive than lead gunshot; whereas the costs to replace shotguns for farmers has not been adequately assessed;

The ECHA Annex XV restriction report comprised a socio-economic assessment, as recognised by point “T” above. The report took into account that “(h)unting is also practiced as part of agricultural and wildlife management (pest and predator control)” (page 61 of the report), which covers the main use of lead gunshot by farmers. In other words, in covering hunting, the socio-economic assessment, which assessed the costs of replacement of guns, also covered farmers. As to prices of alternative gunshot, the assessment concluded that prices of lead and steel gunshot are comparable.

- X. whereas international clay shooting competitions are based on rules that only permit the use of lead gunshot;

Clay shooting competitions not taking place in wetlands or buffer zones are not affected by the proposed restriction.

The EU usually takes pride in having the strictest and most ambitious chemicals legislation in the world. Its approach is already influencing other jurisdictions' approaches to chemicals management. The ECHA Annex XV restriction report expressly provides that "(t)he proposed restriction also includes a ban on the use of lead gunshot for shooting at targets (e.g. clay pigeons), rather than live quarry, within a wetland or where spent gunshot would land within a wetland" (page 61 of the report). Neither of the Committees recommended a derogation for international competitions.

- Y. whereas there has been no risk or socio-economic assessment by ECHA or by the Commission on the impact of this restriction on clay shooting; whereas this issue has not been assessed even though clay shooting within 100 metres of wetlands is, by definition, wetland shooting, which is a clear manifest error of assessment by the Commission;

The Annexes to the Background Document to the compiled RAC-SEAC opinion report lead releases to the environment from shooting ranges and lead shot density in shooting ranges higher than the one due to mobile hunting (cf page 91 and pages 95-96 of the Annexes). The ECHA Annex XV restriction report expressly provides that "(t)he proposed restriction also includes a ban on the use of lead gunshot for shooting at targets (e.g. clay pigeons), rather than live quarry, within a wetland or where spent gunshot would land within a wetland" (page 61 of the report). Neither of the Committees recommended a derogation from the restriction.

- Z. whereas the draft Commission regulation neglects the fact that all shooting ranges in the Union will be affected when temporary patches of water appear after rainfall, as over 600 shooting ranges have permanent water features within the 100 metre buffer zone of wetlands, which would prevent EEA countries from hosting (and athletes training for) competitive World Cup and Olympic clay shooting disciplines;

The Commission does not perceive how shooting ranges with permanent water features would be affected by the occurrence of temporary patches of water after rainfall. On international competitions, see above, under point "X".

- AA. whereas the lack of legal certainty caused by the imprecise definition of 'wetlands' and the absence of a socio-economic assessment on the effects on shooting ranges and international shooting events means that the Commission has infringed the principle of proportionality under Article 5(4) of the Treaty on European Union;

See above.

ECHA's opinion disregarded

- AB. whereas the scientific opinion of ECHA was disregarded by the Commission with respect to the following aspects in the draft Commission regulation: the inclusion of buffer zones,

ECHA's original proposal did not suggest a fixed buffer zone. Instead, it suggested applying a flexible approach by prohibiting use in gunshot for shooting "where spent gunshot would land within a wetland" which amounts to a buffer zone. The Commission services noted RAC's view that, with the flexible approach, it is the responsibility of the hunter/shooter, based on their expertise and local knowledge, to ensure that no lead is deposited in wetlands when

hunting/shooting, cf. p. 9, third bullet point, of the compiled RAC-SEAC opinion, also referring to the Forum's indication of enforcement difficulties with this flexible approach. In the interest of legal certainty and clarity, and to make the restriction easier to enforce than would be possible with vague wording referring to "where spent gunshot would land within a wetland", it was deemed preferable to provide for a fixed buffer zone in the draft Commission Regulation, in line with support in RAC for quantitatively defining a fixed buffer zone, cf. page 9, third bullet point, of the compiled RAC-SEAC opinion. The distance most referred to in the RAC opinion was 300 metres and it was also mentioned by the Forum as a reasonable distance. Nevertheless, to ensure proportionality, the Commission proposal reduced the size of the fixed buffer zone to 100 metres.

and the banning of the possession of lead gunshot, which ECHA did not propose;

ECHA's original proposal was to ban any possession of lead gunshot in wetlands, cf. page 2, "Proposed restriction" of the Annex XV restriction report: "Lead gunshot shall not be in the possession of persons in wetlands." As commented in the public consultation, this could also prohibit keeping at home or whilst driving or walking through wetlands to hunting/shooting areas, so that refinement should be considered, so as to be more specific to the shooting/hunting context, cf. page 31-32 of the compiled RAC-SEAC opinion.

RAC suggested that the restriction on possession should be interpreted as "possession while hunting/sport shooting", cf. page 10, first bullet point, of the compiled RAC-SEAC opinion. SEAC observed that it was necessary to distinguish possession where the intention is to use lead gunshot in wetlands resulting in releases of lead gunshot and where not, e.g. when transporting lead gunshot to another area thereby passing a wetland, cf. page 11 of the compiled RAC-SEAC opinion.

In order to take into account these concerns, and as highlighted in recital (18), the Commission proposal restricts possession only "where this occurs while out wetland shooting or as part of going wetland shooting." This avoids that, for example, a person whose home is located within a wetland or the fixed buffer zone around it, is violating the restriction when gunshot is present e.g. in his home or in the booth of his car when returning from shopping at the sports store. This is not the type of possession intended to be caught by the restriction; instead, to be caught by the restriction, the possession must be possession while out wetland shooting or as part of wetland shooting.

However, such wording in itself is still not able to ensure straightforward enforcement, as a person caught in possession of lead gunshot in wetlands while out shooting or as part of shooting could nevertheless argue that he was merely passing through with the intention to do his shooting outside the wetland or the fixed buffer zone around it. In order to aid enforcement, and as highlighted in recital (19), the Commission proposal therefore creates a legal presumption that, if a person is caught in possession of lead gunshot in or within 100 metres of wetlands while out shooting or as part of going shooting, the shooting concerned is presumed to be wetland shooting. This legal presumption is reversible however: the person concerned can prove by any means acceptable to the enforcement authorities that it is another type of shooting.

the introduction of a 24 month transition period, instead of 36 months as proposed by ECHA,

ECHA's original proposal indeed suggested a three-year transition period. However, the scientific committee RAC - which is specifically in charge of providing opinions on whether restrictions are appropriate for reducing the risk to human health and/or the environment - strongly supported a shorter period than three years, because each year of delay would result in +/- 4000 additional tonnes of lead being released into wetland areas, resulting in the death of in the order of 1 million birds (cf. page 10, second bullet point, of the compiled RAC-SEAC opinion). As highlighted in recital (25) of the Commission proposal, the Commission took into account this estimated annual impact, as well as the view expressed by SEAC regarding the feasibility and appropriateness of a shorter period than three years (cf. page 46-47 of the compiled RAC-SEAC opinion). It needs to be added that in general transitional periods for restrictions are comprised between 18 and 24 months, which again shows that this restriction is proportionate. As regards the possibility for certain Member States to proceed to a restriction covering their whole territory, the transitional period of three years is retained.

and the interpretation of the Ramsar Convention definition of wetlands, which the Commission interpreted as any body of water regardless of size;

ECHA's original proposal provided for the definition of "wetlands" used in the Ramsar Convention. ECHA's original proposal did not interpret the Ramsar definition, but proposed to simply refer to it (cf. page 8 of the compiled RAC-SEAC opinion, paragraph 3 final bullet point under "Conditions of restriction"). The Commission did not interpret the Ramsar definition either, but rather than simply referring to it, included the full wording of the definition, as suggested by RAC (cf. page 9, first bullet point, of the compiled RAC-SEAC opinion).

The reversal of the presumption of innocence

AC. whereas Article 126 of the REACH Regulation does not stipulate procedural provisions on the means of enforcement which fall within the procedural autonomy of Member States; whereas the draft Commission regulation removes the presumption of innocence and reverses the burden of proof; whereas a person found in possession of lead gunshot within the 100 metre buffer zone must prove that he or she intended to use that ammunition elsewhere than in a wetland or buffer zone;

As commented in the public consultation, a ban on possession or carrying of lead gunshot in wetlands could also prohibit keeping at home or whilst driving or walking through wetlands to hunting/shooting areas, so that refinement should be considered, so as to be more specific to the shooting/hunting context, cf. page 31-32 of the compiled RAC-SEAC opinion. RAC suggested "possession while hunting/sport shooting", cf. page 10, first bullet point, of the compiled RAC-SEAC opinion. SEAC observed that it was necessary to distinguish possession where the intention is to use lead gunshot in wetlands resulting in releases of lead gunshot and where not, cf. page 11 of the compiled RAC-SEAC opinion. In order to take into account these concerns, the Commission proposal restricts possession only "where this occurs while out wetland shooting or as part of going wetland shooting."

However, such wording in itself is still not able to ensure straightforward enforcement, as a person caught in possession of lead gunshot in wetlands while out shooting or as part of shooting could nevertheless argue that he was merely passing through with the intention to do his shooting outside the wetland or the fixed buffer zone around it. In order to aid enforcement,

and as highlighted in recital (19), the Commission proposal therefore creates a legal presumption that, if a person is caught in possession of lead gunshot in or within 100 metres of wetlands while out shooting or as part of going shooting, the shooting concerned is presumed to be wetland shooting. This legal presumption is reversible however: the person concerned can prove by any means acceptable to the enforcement authorities that it is another type of shooting.

AD. whereas the presumption of innocence is laid down in Article 3 and Article 6(2) of Directive (EU) 2016/343 of the European Parliament and of the Council⁶, Article 48(1) of the Charter of Fundamental Rights of the European Union, and Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the draft Commission regulation is not an implementing measure but rather a policy decision restricted to the legislature;

The rebuttable presumption being created does not imply the reversal of any presumption of innocence. Recital (22) of Directive (EU) 2016/343 recognises that the presumption of innocence is “without prejudice to (...) the use of presumptions of fact or law concerning the criminal liability of a suspect or accused person” and that “such presumptions should be rebuttable”. The legal presumption created in the proposed restriction is indeed rebuttable. Both the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms provide for the proof of guilt to be “according to the law”. For more detailed explanations and examples of other legal presumptions not reversing the presumption of innocence, please see the Annex at the end of this document.

The form of the act is a Commission Regulation to be adopted under the regulatory procedure with scrutiny. The content of the act is based on ECHA’s scientific, social and economic assessment. That said, the Commission’s decision making enjoys a wide margin of discretion and can deviate for ECHA’s assessment where justified.

AE. whereas enforcement is helped by establishing clear rules and conditions; whereas the draft Commission regulation introduces serious legal ambiguity with regard to the interpretation of possession, an ambiguity that has also been acknowledged by SEAC and the Forum for Exchange of Information on Enforcement;

The opinion of SEAC is dated 14 June 2018 and the advice of the Forum is dated 15 September 2017. The Commission proposal was developed after receipt of the RAC-SEAC opinions on 17 August 2018 and presented to the REACH Committee meeting of November 2019. SEAC and the Forum could therefore not have acknowledged anything on the Commission regulation, as it did not exist at the time when they provided their opinions.

Rather, the Commission proposal took into account the concerns of SEAC that it was necessary to distinguish possession where the intention is to use lead gunshot in wetlands resulting in releases of lead gunshot and where not, e.g. when transporting lead gunshot to another area

⁶ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11.3.2016, p. 1).

thereby passing a wetland, cf. page 11 of the compiled RAC-SEAC opinion. This demonstrates again the Commission's aim to take a proportionate measure.

AF. whereas restrictions on the possession of lead gunshot would undermine legal clarity and predictability because in some Member States the offence is considered a criminal offence, while in others only gives rise to an administrative fine, and because possession and intention to use are two very different legal concepts;

The Commission does not perceive how legal clarity and predictability would be undermined because in some Member States the offence is considered criminal, while in others it only gives rise to an administrative fine. In each respective Member State, the consequences of an offence will be clear and predictable. REACH does not intervene with Member State competences with regard to penalties, other than requiring that they be effective, proportionate and dissuasive (Article 126 REACH).

It is correct that possession and intention to use are very different legal concepts. This does not prevent them from being combined with each other, especially in the light of the concerns raised in the public consultation that a ban on possession or carrying of lead gunshot in wetlands could also prohibit keeping at home or whilst driving or walking through wetlands to hunting/shooting areas, and the concerns of SEAC that it was necessary to distinguish possession where the intention is to use lead gunshot in wetlands resulting in releases of lead gunshot and where not, e.g. when transporting lead gunshot to another area thereby passing a wetland, cf. page 11 of the compiled RAC-SEAC opinion.

1. Opposes adoption of the draft Commission regulation;
2. Considers that the draft Commission regulation exceeds the implementing powers provided for in the REACH Regulation;

The draft Regulation does not go beyond what is strictly necessary and the procedural rules have been followed.

3. Considers that the draft Commission regulation is not compatible with the content of the REACH Regulation;

The draft Regulation is fully compatible with the aim and the content of REACH. As demonstrated above, the restriction is the result of careful scientific and economic analysis, checked against the legal requirements and taking into account enforcement constraints. Moreover, the Commission is fulfilling a long-standing commitment under the AEWA Agreement.

4. Considers that the draft Commission regulation goes beyond what is necessary and proportionate to address environmental risks arising from the use of lead gunshot in or around wetlands and that it therefore fails to respect the principle of proportionality;

See above

5. Calls on the Commission to withdraw the draft regulation and submit a new one to the committee without delay;

See above

6. Calls on the Commission to modify the Annex to the draft Commission regulation by amending ‘24 months’ to ‘36 months’ in the first subparagraph of paragraph 20;

See above

7. Calls on the Commission to modify the Annex to the draft Commission regulation by amending point (a) of paragraph 22 by adding the following text (underlined and *italics*) to the Ramsar Convention definition of wetlands: ‘areas of marsh, fen, *or* peatland *with visible surface water*, or *surface* water *bodies greater than 3 metres in width*, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres’;

See above

8. Calls on the Commission to modify the Annex to the draft Commission regulation by deleting point (b) of the first subparagraph of paragraph 20, point (c) of the second subparagraph of paragraph 20 and points (e) and (f) of paragraph 22;

See above. The scope of the restriction would be too limited to be effective if it were to be narrowed down to only cover the ‘discharging’ and not the ‘carrying ... where this occurs while out wetland shooting or as part of going wetland shooting’.

9. Calls on the Commission to modify the Annex to the draft Commission regulation by adding a new paragraph that exempts shooting ranges and international shooting competitions subject to the completion of an appropriate socio-economic assessment within 2 years of the adoption of that regulation;

See above

10. Calls on the Commission to review the measure after 24 months from the date of entry into force of the Commission amending regulation;
11. Instructs its President to forward this resolution to the Council and the Commission, and to the governments and parliaments of the Member States.

Annex

Lead in shot in wetlands – No reversal or violation of any presumption of innocence

First of all, let us recall the reasons for including the legal presumption laid down in recital (19) and paragraph [20] (c) into the draft Regulation:

As commented in the public consultation, a ban on possession or carrying of lead gunshot in wetlands could also prohibit keeping at home or whilst driving or walking through wetlands to hunting/shooting areas, so that refinement should be considered, so as to be more specific to the shooting/hunting context, cf. page 31-32 of the compiled RAC-SEAC opinion. ECHA's Risk Assessment Committee RAC suggested "possession while hunting/sport shooting", cf. page 10, first bullet point, of the compiled RAC-SEAC opinion. ECHA's Socio-economic Analysis Committee SEAC observed that it was necessary to distinguish possession where the intention is to use lead gunshot in wetlands resulting in releases of lead gunshot and where not, cf. page 11 of the compiled RAC-SEAC opinion. In order to take into account these concerns, the Commission proposal restricts carrying only "where this occurs while out wetland shooting or as part of going wetland shooting."

However, such wording in itself is still not able to ensure straightforward enforcement, as a person caught carrying lead gunshot in or around wetlands while out shooting or as part of shooting could nevertheless argue that he was merely passing through with the intention to do his shooting outside the wetland or the fixed buffer zone around it. In order to aid enforcement, and as highlighted in recital (19), the Commission proposal therefore creates a legal presumption that, if a person is caught in possession of lead gunshot in or within 100 metres of wetlands while out shooting or as part of going shooting, the shooting concerned is presumed to be wetland shooting. This legal presumption is rebuttable however: the person concerned can prove by any means acceptable to the enforcement authorities that it is another type of shooting.

It is not uncommon for the law, including criminal law, to create legal presumptions as to factual or intentional elements. This is not against fundamental law principles of either the European Union or of Member States and does not reverse any presumption of innocence. Various examples of such criminal law presumptions can be given, as follows:

- Under the **Maltese dangerous drugs ordinance**, if a person is found cultivating certain drugs, he is presumed to do so for trafficking purposes; however, this presumption is rebuttable by showing to the court's satisfaction that the cultivation was for the exclusive personal use of the offender.
- Under **Belgian law**, managers of companies can be held criminally liable for failure of their companies to respect e.g. environmental law, legislation on company accounts or employment law, even if not they themselves, but company employees committed the acts at stake, as managers are presumed to be responsible for the company's actions. They can rebut this liability by showing that they delegated the relevant part of their management authority to someone else in the company.
- Under **French traffic law (code de la route)**, the holder of the registration certificate for a car is held liable to pay the fine resulting from certain listed breaches, unless he rebuts the presumption by proving that there was theft or another case of force majeure, or proves that he

is not really the one who committed the breach. If the holder of the registration certificate is a company, the company's legal representative is held liable to pay the penalty.

The principle of creating legal presumptions seems to be recognised also outside the EU, e.g. in Australia⁷: “Some laws, commonly called “reverse onus provisions”, shift the burden of proof to the accused or apply a presumption of fact or law operating against the accused. Under international human rights law, a reverse onus provision will not necessarily violate the presumption of innocence provided that the law is not unreasonable in the circumstances and maintains the rights of the accused. The purpose of the reverse onus provision would be important in determining its justification. Such a provision may be justified if the nature of the offence makes it very difficult for the prosecution to prove each element, or if it is clearly more practical for the accused to prove a fact than for the prosecution to disprove it.”

In a similar manner, the draft Regulation does not reverse or violate any presumption of innocence. It merely creates a legal presumption with regard to an evidentiary element: the authorities enforcing the REACH restriction on the use of lead in gunshot in wetlands are not required to prove the subjective intention of the hunter or shooter to discharge the lead-containing gunshot in or around wetlands – a proof they could not bring, as authorities have no access to people's subjective intentions. Instead, hunters or shooters are presumed to intend to discharge their lead-containing gunshot in or around wetlands, but can rebut this presumption through any evidence acceptable to the enforcement authorities – for example by showing their hunting licence or a hunting plan limited to non-wetland areas. Nevertheless, the carrying of lead gunshot in or around wetlands will still have to be proven and the shooter will still be innocent until found guilty and convicted by the appropriate jurisdiction.

Recital (22) of Directive (EU) 2016/343 actually recognises the legality of such legal presumptions by providing that the presumption of innocence is “without prejudice to (...) the use of presumptions of fact or law concerning the criminal liability of a suspect or accused person” and that “such presumptions should be rebuttable”. Both the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms provide for the proof of guilt to be “according to the law”.

Accordingly, the fact that some Member States appear to impose criminal penalties in case of breaches of REACH obligations does not imply any reversal or violation of the presumption of innocence by the legal presumption incorporated into the draft Regulation. In any event, REACH does not require Member States to enforce REACH obligations through criminal penalties – REACH merely requires that penalties are “effective, proportionate and dissuasive”. REACH is not within the scope of Directive 2008/99/EC on the protection of the environment through criminal law, which requires MS to provide for criminal sanctions for several categories of environmental offences. The draft Regulation on the use of lead in gunshot in and around wetlands does not provide otherwise.

*Moreover, REACH itself is not a measure of criminal law. Multiple other examples of well-established rebuttable presumptions with regard to evidentiary elements can be given, especially in the areas of liability, and are not contested as being contrary to fundamental principles of EU law. For example, the **EU's Product Liability Directive** makes producers*

⁷ <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/presumption-innocence#what-is-the-scope-of-the-right-to-the-presumption-of-innocence>

*liable for defects in goods they produced and this is a strict liability; in other words, the Product Liability Directive creates a legal presumption in respect of an evidentiary element: the one suffering damage does not need to prove the fault of the producer of the good. Nevertheless, the presumption can be rebutted by the producer through one of the means provided in Article 7 of the Directive. Similarly, the **Belgian Civil Code** creates a legal presumption that parents are liable for the damage caused by their children, without need for the one suffering damage to prove a fault of the parents. The parents can rebut that presumption by proving that they raised their children well and that they did not make mistakes in the supervision of their children. Similarly, employers are liable for damage caused by their employees, and also this presumption can be rebutted.*