

July 2017

**Comments on Stakeholder Consultation Paper - interface of
chemical, product and waste legislation**

ClientEarth welcomes the initiative of the Commission to undertake an analysis of the interface between chemicals, product and waste legislation, and for the opportunity to provide input into the Stakeholder Consultation Paper.

Overall, ClientEarth agrees with the four main problems identified in the Consultation Paper, which create obstacles to the circular economy. However, we invite the Commission to take into account the comments detailed below when preparing the future Communication.

1 Context and objectives

When setting the context and objectives of the analysis, the Consultation Paper seems to focus on removing “legislative barriers”¹, “legal, technical and practical problems [...] that may be unnecessarily hindering the transition of recycled materials into fit-for-purpose products”² and ensuring the “smooth transition of recycled materials from waste to new products”.³ By contrast, the Consultation Paper presents the non-toxic environment strategy as a separate and ancillary piece of work that will be adopted in the “future” while they should be logically dealt with in parallel.⁴

The circularity objective and the non-toxic environment objective are both included in the Seventh Environmental Action Programme.⁵ This decision states clearly that the Thematic Objectives, i.e. “turning the Union into a resource-efficient, green and competitive low-carbon economy” and “safeguarding the Union’s citizens from environment-related pressures and risks to health and well-being” are to be pursued in parallel.⁶

The European Environmental Agency’s 2016 report on the circular economy,⁷ explains well the place that the circular economy is supposed to take in the overall EU environmental policy:

“While a circular economy aims to increase resource efficiency, and is thus instrumental in realising the second key objective of the 7th Environment Action Programme, it does not fully address preservation of natural capital and prevention of environmental risks to human health and well-being. In fact, the circular economy can be represented as the core of a green economy perspective that widens the focus from waste and material use to ecosystem resilience and human health and well-being (Figure 4.1).”

¹ European Commission, ‘Stakeholder Consultation Paper - Chemical, Product, Waste Interface’, p. 2 (**“Consultation Paper”**).

² Consultation Paper, p. 2-3.

³ Consultation Paper, p. 3.

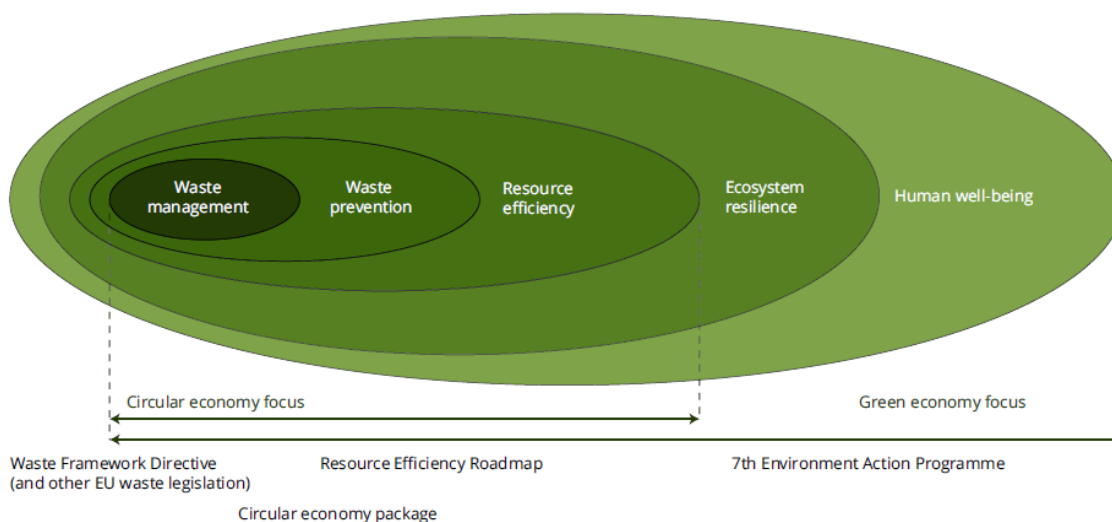
⁴ Consultation Paper, p.2.

⁵ Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 ‘Living well, within the limits of our planet’, Annex, The 7th Environment Action Programme to 2020 (**“7th EAP”**).

⁶ 7th EAP, §16.

⁷ European Environment Agency Report No 2/2016, ‘Circular Economy in Europe’, (<https://www.eea.europa.eu/publications/circular-economy-in-europe>), p. 36.

Figure 4.1 Circular economy and green economy



Source: EEA.

If the Commission focuses on the circular economy without considering, at the same time, the protection of human health and the environment against hazardous chemicals, ClientEarth is concerned that this will lower the current level of protection in EU law against hazardous chemicals and pre-empt the effectiveness and efficiency of any non-toxic environment strategy. Ultimately, this will also impair the success of the circular economy which requires trust from consumers and market players.

We therefore invite the Commission to clarify in the future Communication how the non-toxic environment strategy and the circular economy are pursued in parallel, as required by the 7th EAP.

2 Insufficient information about the substances of concern in products and waste

The Consultation Paper rightly highlights the need to improve information regarding chemicals in material cycles. The EEB/ClientEarth Report 'Keeping it clean', advocates, more precisely, for a two-staged strategy:⁸

In the long term, there is a need for a new information system, tailored to the objective to transition towards a non-toxic circular economy. This system must ensure relevant information (including the full chemical composition of the material) is made available to the relevant economic operators, including, recyclers and manufactures of products with recycled materials.

⁸ EEB/ClientEarth Report, 'Keeping it clean', February 2017, (<https://www.documents.clientearth.org/wp-content/uploads/library/2017-02-22-keeping-it-clean-how-to-protect-the-circular-economy-from-hazardous-substances-web-coll-en.pdf>) p. 36-37.

This may require new technologies to be developed, and thus constitutes a potential for innovation and enhanced competitiveness for EU companies.

In the short and middle-term, pending the development of the necessary innovations, ClientEarth advocates for an improvement of the information flow all along the material cycle, for all actors, including consumers and recyclers. This means:

- setting as a priority the enforcement of existing rules (e.g. compliance of registration dossiers, and enforcement of Article 33 of REACH);
- extending existing rules (e.g. extending under REACH the obligations of providing information, currently applicable to SHVCs, to all substances classified as hazardous as foreseen by Article 138(8) of REACH);
- adopting new waste or product specific rules inspired by existing ones (e.g. adopting material or sector specific rules similar to the WEEE Directive imposing an obligation on manufacturers and importers of products to make available to recyclers and treatment facilities relevant information).

ClientEarth welcomes in particular the acknowledgement in the Consultation Paper that consumers need more information on the presence of hazardous chemicals in products, so that they can make informed choices.⁹ There is another important issue regarding information to consumers though, not mentioned in the Consultation Paper: the lack of enforcement of Article 33 of REACH. For an example, see Annex I, which shows the refusal of a key retailer in the EU (Amazon) to provide any information. The case is now pending before the UK competent authority. However, so far, we have not been informed of any potential 'effective, proportionate and dissuasive' penalties.¹⁰

After consulting with some EU retailers, ClientEarth understands that the retailers tend to blame the manufacturers of products (whether those are based outside the EU or not), for not providing the SVHC information. They tend to deny that they have sufficient bargaining power to impose information clauses in their supply contracts. In any case, they are unwilling to complain to authorities about their suppliers' failures to comply, in order to preserve their business relationships. ClientEarth understands that this leads to a situation where retailers tend to assume that manufacturers of products are complying with Article 33. This means that they assume that the products supplied do not contain SVHCs in proportion exceeding 0.1% weight by weight, unless specified otherwise. ClientEarth is not aware of any enforcement plans from national authorities or of any case where a company has been sanctioned for non-compliance.

3 Presence of substances of concern in recycled materials

ClientEarth agrees that the presence of substances of concern in material cycles is a key barrier for the transition to the circular economy. However, the Consultation Paper seems to open the door for policy options that prioritise circularity - and the potential economic benefits this model

⁹ Consultation Paper, p. 3.

¹⁰ REACH, Article 126.

could bring - over a high level of protection for human health and the environment against hazardous chemicals.

First, the Consultation Paper seems to call for more **socioeconomic** assessments in the context of the circular economy rather than having a clear commitment to decrease health and environmental exposure to hazardous chemicals. ClientEarth is concerned that the Consultation Paper focuses on economic factors, to the detriment of the environmental and health factors. The development of models for predicting socio-economic benefits are flawed when there is unreliable information about the actual use and exposure scenarios of chemicals, particularly in products. While recycling may appear like a “greener” option than disposal, recycling may lead to longer and unexpected exposure to hazardous chemicals, and thus higher risks for human health and the environment than a proper disposal.

Second, the Consultation Paper opens the door to a general “**differential treatment**” **in restrictions** under REACH (i.e. allowing for more lenient restrictions when materials are recovered from waste). However, when a restriction is adopted, the risk assessment committee agrees that above a given concentration limit, the risk is not adequately controlled for the uses/articles covered in the restriction. Setting a different threshold for materials because they are recycled, amounts to – knowingly – exposing people and the environment to hazardous chemicals at a level that is not considered adequate to ensure their protection.

Third, the Consultation Paper focuses on the burden of the **authorisation** process under REACH,¹¹ without raising the question whether this burden is “necessary”. The Authorisation process is meant to ensure i) that the risk from substances of very high concern is adequately controlled, and ii) substances of very high concern are replaced with safer alternatives.¹² It is a key mechanism to promote the substitution of SVHC and protect health and environment to the standard set in the Treaty. . The authorisation process requires a burden to the extent that it ensures that the company applying for an authorisation does control the risk adequately and proves that no substitutes are readily available. As explained in the *Travaux Préparatoire* for REACH:

“This is justified because the effects of CMRs category 1 and 2 on humans are generally so serious and cannot normally be reversed so that such effects have to be prevented rather than remedied, and because PBTs/vPvBs accumulate in living organisms, so that accumulation would already have taken place and could not be reversed if regulatory action were only taken a posteriori. The same applies to the other substances of equivalent concern that may be made subject to authorisation on a case-by-case basis”¹³.

Finally, ClientEarth welcomes the Consultation Paper’s statement regarding authorisation and innovation that “*it may yield longer term benefits in terms of increased competitiveness and innovation by encouraging the introduction of innovative products and technologies in the EU*”.¹⁴ The Consultation Paper however considers that there is no evidence of such long term benefits.

¹¹ Consultation Paper, p. 5.

¹² Article 55 REACH

¹³ Proposal for a Regulation of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (Reach), establishing a European Chemicals Agency and amending Directive 1999/45/EC and Regulation (EC) {on Persistent Organic Pollutants} (SEC(2003 1171) COM/2003/0644 final - COD 2003/0256).

¹⁴ Consultation Paper, p. 5.

Experience from the past shows that when a country bans a chemical, the world follows in the long term and the first companies which had to invest in alternatives have, a competitive advantage.¹⁵ Regarding authorisation more specifically, the future Communication could mention the rise of new chemical laws outside the EU, that are following the main principles of REACH, including the authorisation process (e.g. Turkish law).

4 Gaps in the classification of waste as hazardous

The Consultation Paper highlights many relevant issues in the application of the EU waste classification methodology in the context of the circular economy. Two issues do not seem to be covered however:

- The classification of the waste is not done based on the chemical composition of the waste but based mainly on the origin of the waste as defined in the list of waste. As a result some waste categories are listed as "absolute non-hazardous" in the list of waste, even though they may contain a SVHC under REACH;
- The properties of chemicals that render waste "hazardous" under the Waste Framework Directive only include hazards that are listed in the CLP Regulation, thereby excluding hazards identified under REACH (e.g. PBT, vPvB or endocrine disruptors).¹⁶

We therefore invite the Commission, in its future Communication, to mention these issues.

5 The hazardous chemicals entering the economy today

To ensure the recyclability of materials in the future, there is a need to limit hazardous chemicals from entering the economic cycle in the first place. This was restated by the European Environment Agency in their recent report 'Circular by design – Products in the circular economy':

"Clean materials are crucial for maintaining material performance and quality in recycling processes. Material performance and trust in the safety of the materials — in addition to the price — will largely determine whether or not consumers will buy recycled materials and derived products. Keeping material cycles clean is therefore essential for the circular economy, from both a safety and an economic point of view. This is a main area of potential synergy with EU chemicals legislation (for example REACH, EU, 2006) and the strategy for a non-toxic environment stipulated in the 7th EAP"¹⁷.

Virgin materials placed on the market today, are the recycled materials of tomorrow. Limiting hazardous chemicals from entering these materials, today, is therefore fundamental for the

¹⁵ See for examples of innovation brought by regulation of hazardous chemicals "Driving Innovation: How stronger laws help bring safer chemicals to market" available at <http://www.ciel.org/Publications/Innovation_Chemical_Feb2013.pdf>

¹⁶ See 'Keeping it clean' Report *infra*, p. 16 and Case Study 1 (Flame retardants in textile of a mattress).

¹⁷ European Environment Agency Report No 06/2017, 'Circular by design – Products in the circular economy', July 2017, p. 9-10 (<https://www.eea.europa.eu/publications/circular-by-design>)

future of the circular economy. The legal tools already exist. Our recommendation would therefore be to prioritise their implementation. This would include:¹⁸

- Accelerate of the identification of SHVCs and inclusion of substances in the Restriction or Authorisation Lists. REACH needs to be implemented fully and its mechanisms need to keep up with the evolving scientific knowledge regarding hazardous properties of chemicals;
- Clarify and harmonise the interpretation of the notion of “suitable alternative” under REACH, the POPs Regulation, the RoHS Directive, and any other relevant piece of legislation restricting the manufacturing, marketing and use of hazardous substances. Public consultations regarding availability of safer alternatives should also be made more visible so that more actors with relevant expertise (such as product designers) can contribute. We suggest, for example, the creation of a common online platform promoting innovation where stakeholders could share their knowledge on alternatives substances and technologies and contribute to the decision-making process, whether under REACH, the POPs Regulation, RoHS Directive or any other piece of relevant legislation; and,
- As explained above, set as a priority the enforcement of the obligation to inform consumers of the presence of SVHCs in products, requiring that the location of the substance in the product must be identified.

ClientEarth therefore invites the Commission to make the implementation of these rules - and any other EU actions incentivising innovation towards safer alternatives (whether based on chemicals or alternative technologies) - a central piece of its circular economy policy.

¹⁸ ‘Keeping it clean’ report, p. 35

Vito Buonsante
Law & Policy Advisor, Chemicals & Biodiversity
+32 (0) 2 808 3472
vbuonsante@clientearth.org

Alice Bernard
Lawyer/Juriste, Chemicals & Biodiversity
+32 (0) 28 08 80 15
abernard@clientearth.org

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

ClientEarth is funded by the generous support of philanthropic foundations, institutional donors and engaged individuals.

Brussels
Rue du Trône 60
5ème étage
1050 Bruxelles
Belgique

London
274 Richmond Road
London
E8 3QW
UK

Warsaw
ul. Żurawia 45
00-680 Warszawa
Polska

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