



**CHEMTrust**  
Protecting humans and wildlife  
from harmful chemicals

# Consultation Response

## European Commission Stakeholder Consultation: “Chemical, Product, Waste interface” Response from CHEM Trust, 7<sup>th</sup> July 2017

### Contents

<b>1</b>	<b>Introduction and overarching comments .....</b>	<b>2</b>
1.1	<i>A lack of adequate implementation and enforcement.....</i>	2
1.2	<i>A failure to follow EU Treaty principles for Environmental regulation.....</i>	2
1.3	<i>See no evil, hear no evil.....</i>	3
1.4	<i>Action is needed on this issue, and on the Non-Toxic Environment Strategy</i>	3
1.5	<i>Don't forget PCBs.....</i>	3
<b>2</b>	<b>Response to specific sections of the consultation document .....</b>	<b>4</b>
2.1	<i>#1: Insufficient information about substances of concern in products and waste.....</i>	4
2.2	<i>#2: Presence of substances of concern in recycled materials (and in articles made thereof, including imported articles).....</i>	4
2.2.1	a) Substances subject to REACH restrictions that are present in recovered materials (substances, mixtures and articles) .....	5
2.2.2	b) Authorisation obligations for recovered substances or mixtures .....	6
2.2.3	c) Application of authorisation requirements to the presence of substances of concern in EU-produced articles but not to their presence in imported articles ....	6
2.3	<i>#3: Uncertainties about how materials can cease to be waste.....</i>	6
2.4	<i>#4: Difficulties in the application of EU waste classification methodologies and impacts on the recyclability of materials.....</i>	7
2.4.1	Implementation and enforcement .....	7
2.4.2	Producer responsibility.....	8
2.4.3	Scope of the definition of hazardous waste.....	8
2.4.4	The problem of furniture .....	8
2.4.5	A need for a general review of hazardous waste provisions .....	8
2.4.6	PCBs in open applications – a source of pollution and hazardous waste that is currently being largely ignored.....	8
<b>3</b>	<b>For more information on CHEM Trust's work:.....</b>	<b>10</b>

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## 1 Introduction and overarching comments

CHEM Trust welcomes the opportunity to respond to the Commission's consultation document on the Chemical, Product, Waste interface. We have been interested in this area for some years, producing a position paper in 2015<sup>1</sup> & responding to the Road Map earlier this year<sup>2</sup>.

As we have said before, chemical problems are a significant challenge to the circular economy:

*“The circular economy will only be successful in the long term if customers – including the public – are confident in the quality of recycled material.*

*If this confidence is removed, then the market will demand virgin materials, and the attempt to create a circular economy will fail.”*

### 1.1 A lack of adequate implementation and enforcement

It is clear from this consultation document<sup>3</sup> that many aspects of the current approach to chemicals and the circular economy are not being properly implemented or enforced. This is not acceptable – these regulations are in place to protect human health and the environment, and should be fully implemented and enforced.

The final sentence of the consultation document gives an example of this (when talking about hazardous waste):

*In the absence of enforcement, the consequences for operators are small and business would continue as usual (although with the uncertainties described above), but the impact on the environment and on health could be high.*

### 1.2 A failure to follow EU Treaty principles for Environmental regulation

We would argue that the above this is part of a wider problem with regulations in this area, in that they are not following the principles laid down in the EU Treaty, which states that:

*Union policy on the environment “shall be based on the precautionary principle and on the principles that **preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay**” [our emphasis]*

The biggest regulatory gap is that **the polluter is not paying**. The producers of the substances that are causing these problems do not seem to be liable for any of the costs that their substances are creating. Chemical producers frequently delay regulatory action on their chemicals, by not producing adequate safety data, lobbying against controls, pushing for exemptions or through legal actions. These delays mean that their product - for example Deca BDE - ends up in more and more articles (e.g. furniture) and hence in waste streams. However, in spite of the extra contaminated

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<sup>1</sup> <http://www.chemtrust.org.uk/circulareconomy>

<sup>2</sup> <http://www.chemtrust.org.uk/wp-content/uploads/chemtrust-circeconchemsroadmap-mar17.pdf>

<sup>3</sup> We have not managed to find the consultation document on the Commission's web site, though it is here: <http://ceoe-tenerife.com/wp-content/uploads/2017/05/2017-04-12-Instructions-stakeholder-consultation-Chemicals-products-wa....pdf>

waste that the chemical producers have caused to be produced, they currently have no producer responsibility obligation to deal with this pollution.

The lack of any producer responsibility means that producers have an incentive to keep manufacturing, importing and selling harmful chemicals: the longer they are sold, the more profit is generated. If there is some form of obligation to pay to clean up particularly problematic chemicals, this will instead create an incentive to stop producing them

The evidence in the consultation paper also shows that other over-arching principles of EU environmental policy are also not being applied, for example:

- ***Preventive action is not being taken*** – e.g. measures are not being put in place to ensure problematic chemicals are not in recovered materials
- ***Environmental damage is not being rectified at source*** – contaminated products are instead being allowed on the market, with problems identified by chance

### 1.3 See no evil, hear no evil

It is also clear from the consultation paper, and from other case studies<sup>4</sup> that we are aware of, that this policy area is following the cardinal rule of bad chemicals policy - **if you don't look, you won't find anything.**

### 1.4 Action is needed on this issue, and on the Non-Toxic Environment Strategy

It is very clear that action is needed to ensure that Europe achieves a clean circular economy, as the legislation – and its implementation and enforcement – is not currently fit for purpose.

However it is important that such action is carried out in parallel with the development of the EU strategy for a non-toxic environment. The 7<sup>th</sup> Environmental Action Programme includes both a circularity objective and a non-toxic environment objective. 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

### 1.5 Don't forget PCBs

As we point out on page 8, the release of PCBs from open applications such as sealant is an important source of PCB pollution. Despite controls on closed PCB sources, levels of PCBs in whales and dolphins around Europe are not going down, and the contamination is high enough to be damaging their populations.

New controls on PCB-containing materials are needed, including a larger focus on sealants and other open sources, both in situ and ensuring that they are dealt with as hazardous waste.

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<sup>4</sup> e.g. recycled PVC roof tiles in Czech Republic, see:

<http://www.chemtrust.org.uk/wp-content/uploads/chemtrust-circeconchemicals-mar17.pdf>

<http://www.chemtrust.org.uk>

## 2 Response to specific sections of the consultation document

### 2.1 #1: Insufficient information about substances of concern in products and waste

We strongly agree that this is an important issue, as we stated in the recommendations in our briefing:

- The supply chain, including consumers and recyclers, should have easy access to information on identity and properties of hazardous chemicals in products.
- Imports should be subject to the same restrictions and information requirements.

The right to information on SVHC content of articles through REACH Article 33 is an important tool in this process, but needs further development and improvement. For example all chemicals that meet the criteria for SVHCs must be added to the candidate list, and recyclers must have the right to obtain this information. Article 33 needs to be fully implemented, with proper enforcement where necessary.

It is also clear that work needs to be done to improve information flow in article supply chains, through bar codes or other tools. This should also cover substances with harmful properties which do not meet the SVHC criteria, such as persistent and toxic chemicals or chemicals that are hazardous to the aquatic environment (CLP cat 1 and 2).

As regards recovered substances and registration, the consultation states:

*Recovered substances not meeting the sameness requirements or not meeting the safety information requirements in Article 2(7)(d) would be illegally on the market without a REACH registration.*

We would suggest that more enforcement activity is required to ensure that REACH regulations are being followed properly.

### 2.2 #2: Presence of substances of concern in recycled materials (and in articles made thereof, including imported articles)

We also view this as a priority area for the Commission's work. Many of the elements below should go hand in hand with the development of the future EU strategy for a non-toxic environment.

Regulations, regulators and industry must ensure that all chemicals of high concern are phased out of products as soon as possible.

In our view this issue is made up of a number of different elements, and there is need for:

- More rapid removal of problematic chemicals at the start of the lifecycle:
  - Better quality safety data on chemicals
  - More rapid and precautionary restrictions on the use of chemicals
  - Effective action on groups of related chemicals, rather than the current approach which encourages substitution of one substance with another of similar properties.

- More chemicals identified as substances of very high concern and subject to the REACH Authorisation process
- Safety assessments carried out by companies and regulators should assume that a circular economy is going to be in place, e.g. that 100% of sewage sludge will be used as fertiliser for food crops. This may require a more careful scrutiny of the use descriptors and the subsequent exposure assessment in REACH registration dossiers.
- In contrast, currently there is a lack of proper regulation and enforcement of recycling processes, including
  - The use of contaminated recycled materials in toys is frequently identified by NGOs not regulators<sup>5</sup>
  - The use of recycled materials such as paper in food contact materials is largely unregulated, while there is regulation of recycled plastic food contact materials.
  - A lack of regulatory and enforcement oversight in the production of furnishings and building materials from recycled materials, for example PVC roof tiles and polyurethane carpet underlay<sup>6</sup>.
- There needs to be acceptance that some materials should not be recycled, unless it is possible to remove problematic substances.
  - Assessments should balance the value of the resource and the hazard of the chemical, with a default of no recirculation of hazardous substances.
  - Much of the political pressure for recycling of materials containing hazardous chemicals seems to come from one sector, PVC, where recycling levels are low but a number of hazardous additives are in use.

Overall, there needs to be a move to non-toxic products, anticipating increases in understanding of chemical toxicity as far as possible. Companies should take a forward-looking approach when producing products, avoiding chemicals likely to be restricted in the future, e.g. the ChemSec SIN list.

### **2.2.1 a) Substances subject to REACH restrictions that are present in recovered materials (substances, mixtures and articles)**

In our view the standards for recovered materials should be the same as those for virgin materials, otherwise we cannot create a clean circular economy.

We are well aware that this requirement is a problem for some materials, for example PVC<sup>7</sup>, but environmental groups have been pointing for decades to the clear evidence that PVC is a problematic material. Moreover, many companies have meanwhile developed alternatives. Establishing recycling loops for problematic material can also hamper innovation and new technologies. A circular economy needs to set the right incentives as a prerequisite for a non-toxic environment.

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<sup>5</sup> see <http://ipen.org/news/press-release-recycling-contaminates-plastic-children's-toys-toxic-chemicals-electronic-waste>

<sup>6</sup> "Presence of substances of concern in products made from recycled materials", presentation by CHEM Trust,

<http://www.chemtrust.org.uk/wp-content/uploads/chemtrust-circeconchemicals-mar17.pdf>

<sup>7</sup> <http://www.chemtrust.org.uk/replacing-chemicals-with-safer-alternatives-or-protecting-dirty-industry/>

We also consider that it is vital that the EU takes a leading position in ensuring that Stockholm Convention POPs are not recycled.

In addition, the EEB have recently produced a detailed analysis of problems with restrictions process, and we support the recommendations made in that report<sup>8</sup>.

### **2.2.2 b) Authorisation obligations for recovered substances or mixtures**

As with restrictions, we do not support any special treatment of SVHCs in recovered substances within authorisation.

The point of the authorisation system is to incentivise a switch to alternative substances, not to promote continued use through recycling.

Authorisation should not be deregulated; the EU should not be creating a dirty circular economy.

### **2.2.3 c) Application of authorisation requirements to the presence of substances of concern in EU-produced articles but not to their presence in imported articles**

CHEM Trust supports a more systematic and quicker use of restrictions to complement the Authorisation process when it comes to imported articles.

We would also encourage the Commission to investigate the extension of Authorisation to cover imported articles, as researchers have argued this can be done in line with WTO requirements<sup>9</sup>.

The consultation paper suggests that concerns have been expressed regarding potential delocalisation, yet admits that there is no evidence of such delocalisation and overall the assessment of the EU chemical industry regarding the 10 year anniversary of REACH has been very positive.<sup>10</sup>

The focus of EU policy in this area should be on ensuring that REACH provisions are being followed, including monitoring and enforcing any breaches in rules on chemicals in imported articles. We don't think a 'race to the bottom' will help human health, the environment, or EU industry.

## **2.3 #3: Uncertainties about how materials can cease to be waste**

In CHEM Trust's view the focus should be on removing hazardous substances from materials and waste, rather than arguing about acceptable levels of contamination.

It is clear that it is quite easy to establish End of Waste status when the recyclate is basically of the same quality as virgin material – for example for glass and metals.

Other materials are more problematic, for example plastics, due to continued contamination of recyclate. We firmly believe that the circular economy must be clean to be sustainable, and encouraging recycling of contaminated materials goes against this.

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<sup>8</sup> <http://eeb.org/attempts-to-limit-the-use-of-hazardous-substances-in-europe-are-being-hindered-by-poor-implementation-of-europes-chemical-laws/>

<sup>9</sup> Schenten, J., & Führ, M. (2016). SVHC in imported articles: REACH authorisation requirement justified under WTO rules. *Environ Sci Eur*, 28(1), 21

<sup>10</sup> <http://www.cefic.org/newsroom/top-story/Cefic-looks-forward-to-building-the-next-20-years-of-REACH/>

We fully support the consultation paper's assertion that there should be an administrative decision on end of waste, and we are very concerned to read that this is currently apparently not taking place. This raises questions about whether national authorities are taking responsibility for ensuring a preventative approach. The 'implicit' end of waste approach is not protective, nor does it create a level playing field across the EU. We suspect this approach is what led to scandal of recycled PVC roof tiles being sold in the Czech Republic despite huge emissions of VOCs<sup>4</sup>.

The Consultation paper states that:

*“There is a lack of clarity about the extent to which Member States are allowing recyclers to place on the market recovered substances and mixtures as 'non-waste', without any administrative decision (whether an EU or a national decision) confirming their non-waste status”*

This is not an acceptable situation, and the Commission should ask Member States to report on how they are dealing with such decisions. Given the lack of confidence in the way Member States are dealing with end of waste we wonder whether the Commission should be taking out more infringement actions against Member States in this policy area?

## **2.4 #4: Difficulties in the application of EU waste classification methodologies and impacts on the recyclability of materials**

### **2.4.1 Implementation and enforcement**

The consultation paper makes clear that the legislation in this area is not being properly implemented and enforced, for example:

*Some important waste streams, which ought to be classified as hazardous waste based on the application of the substance-specific concentration thresholds defined in Annex III of the WFD, are in practice sometimes misclassified and managed as non-hazardous waste by the relevant actors involved ...*

*To date it has not been possible to verify whether the assumptions by operators are based on adequate, reliable and conclusive scientific experimental data as required by Article 12(b) of the CLP Regulation... Authorities in the Member States might not have sufficiently acted upon this lack of compliance until now, even though the legislation determining hazard classification has not been changed very substantially since 1991. The Commission has not taken action either. ..*

*Lack of action will result in continued deficiencies in the implementation and enforcement of existing waste legislation and in uncertainty about the legality of waste management practices and recyclability of certain important waste streams containing hazardous substances (such as flexible and rigid PVC waste). This does not generate public confidence in the safety of the related waste management operations, nor in that of the recovered products that are reintroduced in the market, nor does it provide confidence to investors to engage in such recycling/recovery operations.*

*In the absence of enforcement, the consequences for operators are small and business would continue as usual (although with the uncertainties described above), but the impact on the environment and on health could be high.*

This lack of action is shocking, given that these regulations were put in place to protect human health and the environment. Clearly these deficiencies in implementation and enforcement – and follow-up from the Commission – indicate clear areas where urgent action is needed in order to create a clean circular economy.

CHEM Trust therefore supports the view that the implementation and enforcement problems identified under Point 4 of the consultation paper need to be resolved and methodologies need to be developed and applied. Otherwise there is the danger that the public confidence in recycling will drop and the circular economy will not deliver on the business advantages it tries to establish.

#### **2.4.2 Producer responsibility**

As mentioned in the Introduction above, we consider that the current situation where there is no producer responsibility for the original producer of the substance of concern is out of line with the principles of EU environmental policy. Some form of polluter pays/producer responsibility approach could pay for some of the costs of dealing with contaminated wastes, and also act as a disincentive for continued sale of problematic chemicals.

#### **2.4.3 Scope of the definition of hazardous waste**

CHEM Trust also has concerns regarding which properties are viewed as hazardous in waste, for example the status of SVHCs such as vPvBs, PBTs and EDCs, which are not in the list for definition of hazardous waste. The hazardous waste definitions are dominated by ‘acute’ hazards rather than persistent ones, whilst persistent ones are very important for the wider environment and human health.

#### **2.4.4 The problem of furniture**

One particular example of SVHC and POP contaminated waste is furniture, which is already a challenging waste stream to deal with. For example, a range of brominated flame retardants have been used in furniture, with suppliers moving from one chemical to another as substances are restricted. This is a case where the polluter pays principle could be considered to be a very useful way of ensuring that the relevant chemical producers pay a portion of the costs of dealing with their products.

#### **2.4.5 A need for a general review of hazardous waste provisions**

We would suggest that there is a case for a general review of hazardous waste classification, implementation and enforcement, including how to better deal with materials containing SVHCs and POPs.

#### **2.4.6 PCBs in open applications – a source of pollution and hazardous waste that is currently being largely ignored**

This consultation paper does not specifically mention PCBs, possibly because many believe that the EU already has effective rules in place to ensure that PCB releases are minimised and wildlife and people are adequately protected.

Unfortunately this is not the case, with recent research revealing worrying levels of contamination of cetaceans in European seas<sup>11</sup>: [our emphasis]

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<sup>11</sup> Jepson, P. D., Deaville, R., Barber, J. L., Aguilar, À., Borrell, A., Murphy, S. et al. (2016). PCB pollution continues to impact populations of orcas and other dolphins in European waters. *Sci Rep*, 6, 18573.

*“In a large pan-European meta-analysis of stranded (n = 929) or biopsied (n = 152) cetaceans, three out of four species:- striped dolphins (SDs), bottlenose dolphins (BNDs) and killer whales (KWs) had **mean PCB levels that markedly exceeded all known marine mammal PCB toxicity thresholds.**”*

*“Blubber PCB concentrations initially declined following a mid-1980s EU ban, **but have since stabilised** in UK harbour porpoises and SDs in the western Mediterranean Sea*

*“**EU regulations to mitigate PCB pollution currently appear insufficient to protect cetacean top predators in the NE Atlantic and Mediterranean Sea.**”*

*“Further steps to reduce PCB inputs into the European marine environment should include stricter controls on disposal of PCBs, e.g. in buildings with sealants containing PCBs”*

*“A lack of recruitment in monitored KW and BND populations is also consistent with PCB toxicity as the likeliest cause of their declines*

The EU does have specific regulations regarding closed PCB applications such as transformers, though there are questions as to how effectively these are being implemented and enforced. However, there is a lack of regulation of open uses such as building sealants.

A Swiss case study on “Management of PCBs from Open and Closed Applications” points out the importance of open applications such as sealants and paints:<sup>12</sup>.

*“The remediation and management of PCBs in open applications is important because of the relatively high levels of human exposure and environmental releases compared to closed systems and their associated health effects. Although open uses accounted for only approx 21% of the total production it is estimated that approximately 50% of the total PCB emissions have come from these ‘open system’ uses”*

Another study of PCBs in the open air in Zurich has found that the highest levels occur next to buildings with PCB-containing sealants<sup>13</sup>; this study also estimated emissions of 110-190 g iPCB per year from a single housing complex.

Switzerland has put in place regulations to remove and destroy PCBs in building sealants. The EU does not currently require management of open uses of PCBs, though Sweden and Finland do have measures in place for identifying and destroying such materials. In most countries sealants containing PCBs are unlikely to be identified as hazardous waste, so the PCBs will not be destroyed, adding to pollution of the environment.

There is an urgent need for the EU to review its regulations on PCBs and create new requirements to address open sources of PCBs. As the authors of the above study on Cetaceans conclude:

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<sup>12</sup> [http://www.global-chemicals-waste-platform.net/fileadmin/files/doc/Management\\_of\\_PCBs\\_Case\\_Study\\_Switzerland.pdf](http://www.global-chemicals-waste-platform.net/fileadmin/files/doc/Management_of_PCBs_Case_Study_Switzerland.pdf)

<sup>13</sup> Diefenbacher, P. S., Gerecke, A. C., Bogdal, C., & Hungerbühler, K. (2016). Spatial Distribution of Atmospheric PCBs in Zurich, Switzerland: Do Joint Sealants Still Matter. *Environ Sci Technol*, 50(1), 232-239.

***Without significant mitigation, PCBs will continue to drive population declines or suppress population recovery in Europe for many decades to come. Measures to significantly reduce inputs of PCBs into the marine environment from terrestrial and other sources are urgently needed.***

*Further studies are also needed to better assess PCB exposure and quantify toxic effects in marine apex predator populations in Europe.*

*Finally, the potential impact of PCB bioaccumulation in marine ecosystems may extend beyond European waters, particularly in globally distributed marine apex predators such as KWs, false killer whales (*Pseudorca crassidens*) and great white sharks (*Carcharodon carcharias*).*

### **3 For more information on CHEM Trust's work:**

CHEM Trust is a charity that works at UK, European and International level in order to prevent man-made chemicals from causing long term damage to wildlife and humans, by ensuring that harmful chemicals are substituted with safer alternatives.

Our website, <http://www.chemtrust.org.uk/> includes our regularly-updated blog, and our talks and policy submissions.

We are also on twitter, [@CHEMTrust](https://twitter.com/CHEMTrust).