



To: Members of the REACH Committee

Brussels, 13 September 2019

Dear members of the REACH Committee,

We are writing to you regarding the **REACH Committee Meeting that will take place on September 17-18, 2019.**

Crucial discussions (and potentially votes) are planned during this meeting, on a large number of authorisation proposals for Cr VI substances. These authorisations disregard both the Judgment [T-837-16](#) (the General Court in Sweden vs Commission) and the European [Parliament's objection](#) to another authorisation granted on certain uses of chromium trioxide (Lanxess Deutschland GmbH and others) - as they ignore available alternatives and/or leave to companies the final decision on whether the conditions set by REACH to obtain an authorisation are met for each specific use.

Other important discussions/votes will take place regarding several restriction processes as well as the amendment of REACH article 41(5):

For discussion and tentative vote:

- 1) authorisation to certain uses of several Cr VI substances** (Henkel AG & Co and Henkel Global Supply Chain BV), PPG Industries UK Ltd and others, Brenntag UK Ltd, Gentrochema BV, Brenntag UK Ltd and others, Cromomed S.A. and others)
- 2) restriction of lead and its compounds**
- 3) amendment of Draft REACH Article 41(5) as regards the percentage of registration dossiers to be selected for compliance checking**

For discussion:

- 4) Restriction of substances in tattoos and permanent make-up inks**

Any other business:

- 5) Update on the PFOA derogation (Annex XVII, entry 68) and on decaBDE-inclusion of the amendment in the POPs Regulation**

Firstly, the draft decisions to grant the authorisation for use of some Chromium VI Compounds for Surface Treatment are in manifest violation of REACH and of the General Court judgement T-837-16 (the General Court in Sweden vs Commission). They also run contrary to several European Parliament objections to other Commission authorisation decisions (in particular against the authorisation of Lanxess Deutschland GmbH).

Secondly, while we strongly support the restriction proposals of lead and tattoo inks, which will reduce emissions of and exposure to highly toxic chemicals, we vehemently object to the proposed derogations that would allow high exposure to toxic chemicals of EU citizens and the environment.

The signatories welcome the Commission's and Member States' initiative to improve compliance of the registration dossiers by amending REACH article 41(5). However, the latest version of the text (that we had access to) does not define the clear timeframe for updates, when the lack of timeframe has been identified as a main barrier to compliance with the obligation to update the registration dossiers.

Finally, the NGOs endorsing this letter firmly reject the idea of amending any POPs regulation for the purpose of weakening its provisions.

We therefore ask you to:

- **Reject all of the Cr VI applications for authorisation as they stand, because the Commission has illegally transferred to the companies covered its power to determine on a case-by-case basis the uses for which an alternative is suitable and feasible, even though taking this final decision its own responsibility under REACH**
- **Support the restriction of lead and its compounds (in PVC), while rejecting the proposed higher concentrations of lead in recycled materials**
- **Raise the % of minimum compliance checks to be performed by ECHA and ask the Commission to establish a clear definition of the term “periodically” to be added to the legal text. In our view registration dossiers should be reviewed on a yearly basis a minima, in addition to the reviews triggered by changes in law (CMR classification for example), knowledge (previously unknown risk identified) or production (e.g. change of quantity range)**
- **Support the restriction proposals of tattoo inks, while rejecting the proposed derogations**
- **Align with the Stockholm Convention's objectives and set much stricter exemptions and concentration limits in the EU POPs Regulation.**

For more information, please see the Annexes below.

Yours faithfully,



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On behalf of:

Arnika - Toxics and Waste Programme (Czech Republic)

BUND - Friends of the Earth (Germany)

CIEL - Center for International Environmental Law (International)

ClientEarth (Europe)

ChemSec (International)

ECOCITY (Greece)

Ecologistas en Acción (Spain)

European Environmental Bureau (EEB) Europe

GLOBAL 2000 (Austria)

Health Care Without Harm (HCWH) Europe

HEJSupport (Germany)

Hogar sin Tóxicos - Fundación Vivo Sano (Spain)

TNZ - Society for Earth (Poland)

Women Engaged for a Common Future (WECF) International

ZERO - Association for the Sustainability of the Earth System (Portugal)

Annexes:

1) Authorisation to certain uses of several Cr VI substances (Henkel AG & Co and Henkel Global Supply Chain BV), PPG Industries UK Ltd and others, Brenntag UK Ltd, Gentrochema BV, Brenntag UK Ltd and others, Cromomed S.A. and others).

As stated above, the draft decisions to authorise several applications of authorisation carried out for some Chromium VI Compounds for Surface Treatment clearly are in conflict with REACH, and the General Court judgement T-837-16 (the General Court in Sweden vs Commission) as well as several European Parliament objections to the Commission's authorisation decisions, in particular against the authorisation of Lanxess Deutschland GmbH. **These draft authorisation decisions or certain Cr VI uses violate both REACH and the rule of law** for the following reasons:

- **The Commission's proposals disregard the General Court's judgment conclusions** on two primary points.
 - **First, the burden of proof lies on the applicant**, who bears the risk of any impossibility to prove that alternatives are unavailable.
 - **Second, it is the sole responsibility of the Commission to take the final decision on whether an alternative is available** (for each use and sub-use applied for), in order to determine if the conditions set by Article 60.4 of REACH are met. **It non- negligible uncertainties remain** such as the ones weakening the Cr VI applications, **the Commission has the obligation to reject the application.**
- SEAC itself recognised, for example in its Cromomed opinion, that **technically feasible alternatives to chrome plating are available in general for many surface treatment applications**. Some of the applicants for the chrome plating authorisations even advertise their Cr(VI)-free alternatives, e.g. as "meeting all automotive requirements", while requesting authorisation for automotive uses on the basis of the lack of technically viable alternatives. In fact, in the case of the Cromomed application, the analysis of alternatives is based on the one provided by the CTAC consortium (the Lanxess AfA) that has already been objected to by the European Parliament. SEAC in its opinion expressly affirmed that 'the applicants fail to convincingly supply the claim that no alternatives for chrome-coating applications (in the applicants' business sectors) would be available or would become available over the normal review period. SEAC is aware of alternative coating technologies that could already be or become technically feasible for specific parts coated by two of the five applicants'¹.

¹ Committee for Risk Assessment (RAC) Committee for Socio-economic Analysis (SEAC) Opinion on an Application for Authorisation for Chromium trioxide use: Functional Chrome Plating ECHA/RAC/SEAC: Opinion N° AFA-O-000006522-78-02/F Consolidated version , P. 50 <https://echa.europa.eu/documents/10162/50002b75-2f4c-5010-81de-bcc01a8174fc>

The Commission also recognised that alternatives exist for some sub-uses of the Chromium applications as in all the drafts it gave to companies the responsibility to perform a post-authorisation analysis of alternative. This practice is however in manifest violation of REACH as the Commission is the sole responsible of the final sorting out of uses with alternatives and those without. In the words of the Court, *'in spite of the submission of evidence by the various stakeholders involved in the authorisation procedure, including evidence which the Commission has collected by its own efforts, there remain uncertainties as regards the condition relating to the lack of availability of alternatives, it must be concluded that the applicant for authorisation has not discharged the burden of proof and, therefore, that he cannot be granted authorisation'*². If the Commission does not have sufficient information to conclude, it must reject the application as the applicant bears the burden of proof.

The Commission *'is not bound'* by ECHA's committees' opinion. It may endorse their opinion to justify an authorisation decision, but must not do so if the reasoning is not *'full, consistent and relevant'*³ and it has the obligation to check if it is the case.

Therefore, **the draft authorisations for certain Cr VI uses violate both REACH and the rule of law.**

2) Restriction of lead and its compounds (in PVC)

We strongly support this restriction proposal which will reduce emissions of this highly toxic chemical to the environment. However, we vehemently reject the proposed higher concentrations of lead in recycled materials (2% and 1% for rigid and flexible PVC recycle, respectively) compared to virgin material (0,1%).

The EU has embarked on a move towards a circular economy. It is therefore critical to prevent hazardous substances like lead from entering the supply chain in the first place. The proposed derogation will allow for continued contamination of the supply chain and consumer products far into the future, greatly weakening the effect of the restriction and undermining public trust and support to recycling.

We recall that the [Council Conclusions](#) of 25 June 2018 on the options to address the interface between chemicals, products and waste legislations **'strongly highlight the importance for establishing non-toxic material cycles'**. This should also concern eco-innovation achieving the detoxification of waste containing legacy substances, which is already possible for lead contained in recycled materials like PVC. In addition, the related [Parliament resolution](#) **'[r]eiterate[d] that in accordance with the waste hierarchy, prevention takes priority over recycling** and that,

² Judgment of the General Court (Fifth Chamber) of 7 March 2019 Kingdom of Sweden v European Commission Case T-837/16, Paragraph 79

³ Paragraph 68

accordingly, **recycling should not justify the perpetuation of the use of hazardous legacy substances**'.

3) Amendment of Draft REACH Article 41(5)

The signatories of this letter welcome the Commission's and Member States initiatives to improve compliance of the registration dossiers.

In our view, raising the percentage of dossiers for compliance checking by ECHA is urgently needed to ensure that registration dossiers comply with REACH. This, together with ECHA's Evaluation action plan, set ambitious scene for screening and evaluating *all* registered substances by defined deadlines.

However, we are concerned with the statement '*the registrant shall be obliged to periodically review relevant information sources*'. The regulation should avoid ambiguous terminology such as 'periodically', and the legal services of the Commission should establish a clear definition of the timeframe for this legal requirement, to be added to the legal text. If the Commission keeps on claiming that doing so is not legally possible, a legal analysis should be issued on why this is the case.

Finally, in order to contribute to the compliance of the registration dossiers and incentivise the review of relevant information sources by the registrants, the Commission should establish a mechanism to allow third parties, in particular civil society organisations and academia, to electronically submit to the Agency any available information they hold on substances registered, especially those whose dossiers do not contain the full information requested by the law, in line with REACH articles 41(6) and 124. The Agency would be under the obligation to then consider this information.

4) Restriction of substances in tattoos and permanent make-up inks

While we strongly support the restriction proposal of tattoo inks, which will reduce emissions of and exposure to highly toxic chemicals, we vehemently object to the proposed derogations that would allow much higher exposure to other toxic chemicals of EU citizens and the environment.

The two proposed derogations are only based on industry claims that are non properly substantiated. Since it implies the injection of a substance of high concern to health under the skin, any derogation under this restriction procedure should be as well justified as an application for authorisation of a substance of very high concern. These derogations should therefore not be accepted.

5) Update on the PFOA derogation (Annex XVII, entry 68) and on decaBDE-inclusion of the amendment in the POPs Regulation

Despite the lack of transparency of this proposal, which has not been uploaded to the public domain, the undersigned organisations regret the potential Commission's proposal to include the derogation of PFOA and to raise the concentration limits of decaBDE in the amendment of the POPs Regulation. If this is the case, the Commission's proposals would weaken the POPs Regulation, which is supposed to protect the health and environment.

The **derogation to the restriction of PFOA** in order to allow the pharma company AstraZeneca to continue its use of a likely persistent bioaccumulative substance (PFOB), contaminated with a PFOA-related substance (PFOI) which is predicted to become an Arctic contaminant and appears to be an endocrine disruptor, is not acceptable. Although alternatives are widely available, AstraZeneca's primary argument for a REACH derogation is that a search for alternative processing substances would entail extra time and cost.

The EU's limit value for the sum of all listed polybrominated diphenyl ethers (PBDEs) in waste is extraordinarily high compared with other countries' proposals. The EU has adopted a 1,000 mg/kg limit value for the sum of all listed PBDEs, including **decaBDE**. By comparison, at the latest Stockholm Convention Conferences of the Parties, the African Region proposed a more protective value of 50 mg/kg. Other countries such as Norway and Switzerland also put forward a proposal for a sum of PBDEs of 500 mg/kg - half that of the EU's adopted limit.

Over time, PBDE limit values should be reduced as much as possible. However, as a first step in line with the review clause contained in the latest recast of the POPs Regulation, we urge the Commission to adopt a legislative proposal to lower this value to no more than 500 mg/kg as soon as possible.