

ESWET's contribution to the Public consultation launched by the European Commission addressing the interface between chemical, product and waste legislation.

The document includes:

- 1) Public consultation's background (EC introduction)
- 2) ESWET's statement on the interface between chemicals products and waste legislation
- 3) ESWET's response to the Public consultation

Brussels, 29 October 2018

1. Public consultation's background (EC introduction)

In the [Circular Economy Action Plan](#) adopted by the Commission in 2015, the Commission announced its intention to analyse and prepare policy options to address the interface between chemical, product and waste legislation. As part of the [Circular Economy Package](#) adopted on 16 January this year, the Commission published the results of its work in this area in the form of a Communication and accompanying Staff Working Document on the Interface.

The Communication addresses four obstacles that impede the safe uptake of secondary raw materials: insufficient information about substances of concern in products and waste; presence of substances of concern in recycled materials and in articles made thereof; difficulties in applying End of Waste criteria and no clear application of EU waste classification methodologies.

In addition to the objectives and actions that are set out in the Communication, the Staff Working Document describes the main challenges pertaining to the four issues and proposes options to tackle them. It is highly recommended that this questionnaire is read in conjunction with the [Commission's Communication](#) and [Staff Working Document](#) since the main content of the questionnaire relates directly to the Commission's assessment of the Interface as described in those documents.

The broad policy questions in the communication and the specific options to address the different challenges outlined in the Staff Working Document are the result of the analysis of all the input received from stakeholders to date¹. This questionnaire builds upon the Commission's analysis and is directed to both specialists and non-specialists alike with the objective of assessing the reaction to the different options and questions posed in those documents.

A twelve week consultation period is foreseen. A synopsis report, with a summary of all consultation activities' results, will be published on the consultation page.

¹ Stakeholders provided input in response to the Commission's Roadmap on the Interface, published in January 2017, and a targeted stakeholder consultation that was conducted between April and July 2017

2. ESWET's statement on the interface between chemicals products and waste legislation

The current review of the EU products, chemicals and waste legislation occurs in a context of more and more unsustainable use of primary raw materials. Among other alarming signals, the recent OECD's *Global Material Resource Outlook to 2060* foresees the world's consumption of primary raw materials to nearly double by 2060. Should these trends be confirmed, air, water and soils pollution but also climate change will get out of control.

Approximately 20 million tonnes of ashes from waste incineration are produced in the EU annually. Due to a lack of incentives and/or harmonisation at the EU level, only a few applications are considered in a limited number of Member States while the opportunities to manufacture new products from these residues could be much higher. Their use could offset the excess use of primary raw materials such as sand and gravel, which greatly exceeds natural renewal rates². This observation is not only valid for residues from incineration, but for many other waste streams containing substances of concern.

As far as these substances are concerned, the Commission needs to adopt a more subtle approach, taking particular account of the end-use of the material in addition to its intrinsic hazardous property. Such approach would allow much more materials to re-enter into the "loop" while protecting public health and the environment.

In the context of this consultation, ESWET would like to insist on these four key messages:

1) Substances of concern

A broad scope for substances of concern is preferable, provided that an information system for products manufactured inside and outside of the EU takes into account the constraints of waste management. It should therefore be the responsibility of the waste producer to provide the information regarding the presence of substances of concern. Such information should moreover be handy in order to facilitate the adequate treatment of the waste.

2) Substances of concern in recycled materials

An adequate level of degradation has to be expected from secondary raw materials. Eco-design, Enhanced Producer Responsibility or other voluntary methods of environmental performance certification should allow, on the basis of a risk assessment, for the use of secondary raw materials in new products even if they contain chemicals no longer permitted in primary raw materials.

3) End-of-waste

² Pascal Peduzzi, *Sand, rarer than one thinks*, Environmental Development. 2014, vol. 11, p. 208-218

Harmonization of end-of-waste rules should be sought for additional waste streams. In this respect, the principle that REACH applies for any substance, mixture or article that ceases to be waste should be softened in order to foster the recycling of waste that does not pose unacceptable risks. Should no end-of-waste rules be elaborated for ashes and slag, product legislation should serve as a basis for determining whether or not a substance, mixture or article ceases to be waste.

4) Classification of waste

In view of protecting public health and the environment, current rules on the classification of waste, based on the List of Waste (LoW) as well as on their intrinsic properties, should be maintained. However, these rules should be supplemented by a second step based on a risk assessment, taking into account on one hand the intrinsic properties of the waste but also exposure (risk = danger x exposure). Such rules should be enacted at the EU-level in order to ensure a level playing field in the evaluation.

Bioavailability/bioaccessibility of substances contained in the waste could be used to assess exposure, and, hence, risk. However, to date, these concepts are neither defined nor standardised and do not cover all exposure pathways in all cases. Therefore, risk should be assessed for each category of waste based on the intended use.

3. ESWET's response to the Public consultation

Questionnaire on the policy options described in the Commission's Staff Working Document

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

Limited information is available about the presence of substances of concern in articles, waste streams and recycled materials which affects the ability to monitor compliance of recovered materials (and articles produced therefrom) with relevant legislative requirements (including [REACH Regulation \(EC\) No 1907/2006](#) and [CLP Regulation \(EC\) No 1272/2008](#), but also product legislation such as [RoHS Directive 2011/65/EU](#), etc). This lack of information hinders the assessment of whether these materials are safe and fit for purpose in relation to their envisaged uses which also increases business risks for recyclers.

Challenge 1: Defining substances of concern

The concept of "substances of concern" is of utmost importance for the scope and implementation of the different options set out in this consultation.

To what extent do you agree with the definitions of the concept of 'substances of concern' proposed in the options below?

Option 1A: substances of concern are all substances identified under REACH as substances of very high concern ('candidate list substances') or listed in Annex VI to the CLP Regulation for classification of a chronic effect.

Option 1B: substances of concern are those identified under REACH as substances of very high concern, substances prohibited under the Stockholm Convention (POPs), specific substances restricted in articles listed in Annex XVII to REACH as well as specific substances regulated under specific sectorial/product legislation³.

ESWET's reply

Option 1A: disagree

Option 1B: fully agree

Challenge 2: Tracking substances of concern

The options to be considered depend on the speed and means by which tracking of substances of concern should be introduced.

³ Substances which pose technical problems for recovery operations, even if not specifically flagged from the toxicological point of view, could also be considered

To what extent do you agree with the following statements on options for tracking such substances?

Option 2A: all substances of concern should be tracked by a set date

Option 2B: sector-specific tracking solutions: information on relevant substances of concern should be available to recyclers in a form commensurate to what is required.

Option 2C: tracking of substances of concern should remain voluntary.

Option 2D: tracking of substances of concern is not necessary or suitable because information on chemicals should be obtained directly by analytical means (incoming waste batches, including imported waste, and outgoing recycled or recovered materials).

ESWET's reply

Option 2A: mostly disagree

Option 2B: mostly agree

Option 2C: mostly disagree

Option 2D: disagree

Questions that arise in relation to Issue #1

In the framework of the on-going ordinary legislative procedure amending Directive 2008/98/EC on waste, it is envisaged that the European Chemicals Agency (ECHA) will establish and maintain a database on substances of very high concern⁴ in articles. The questions below refer to other, complementary systems that may be established in addition to the database to be maintained by ECHA as mentioned above.

What would be the added value of introducing a compulsory information system in the Union that informs waste management and recover operators of the presence of substances of concern?

ESWET's reply

A compulsory information system for products in the Union that informs waste management and recovery operators of the presence of substance of concern would allow for improved identification of critical input streams, classification of analysed parameters (pollutants) and better availability of the information. In addition, such system could help monitor any variation to the global situation. This information should ensure that waste is handled sustainably.

⁴ 'Substances of very high concern' are a group of substances for which strict criteria are set in Article 57 of 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) (OJ L 396, 30.12.2006, p. 1–849).

However, the design of such system should take into account the constraints of waste management. For example, it may become impossible to retrieve information after incineration, e.g. information displayed on packaging. Therefore, it should be the responsibility of the waste producer to provide the information regarding the presence of substances of concern.

The information provided to waste management operators should be given in such a manner that they can easily process the waste according to its composition and recycling potential. One way to do this would be to sort products into categories, with a label attached, which could be easily read by non-experts.

How should we manage goods imported to the Union?

ESWET's reply

Information available on the goods imported or manufactured in the EU should be the same.

- Issue #2: Substances of concern in recycled materials

Currently there is no specific framework to deal with the presence of substances of concern in recycled materials and in articles made thereof. Neither is there an agreed methodology to determine the overall costs and benefits for society of the use of recycled materials containing such substances compared to disposal of, or energy recovery from, the waste. The impacts of production of virgin materials in case recycling is prevented must also be considered.

Challenge 3: Level playing field between secondary and primary material

Uptake of secondary raw materials is governed, not only by price considerations but largely by the credibility of the material itself, which may be able to perform similarly to the equivalent comparable grade of the primary material and may ensure safe use. The current technical and economic feasibility of removing substances of concern is very case-dependent. In such cases where the recovered substance cannot fully match the quality of the primary substance, several options on how to proceed are possible.

To what extent do you agree with the statements made in the following options?

Option 3A: all primary and secondary raw materials should be subject to the same rules. For example, under REACH, restrictions and authorisation conditions imposed on primary substances should apply equally to recovered materials. Materials not meeting such requirements cannot be recycled and can only be destined to energy recovery, final disposal or to destructive chemical recycling (feedstock recycling).

Option 3B: derogations from rules on primary materials could be made for secondary materials, subject to conditions and to review within a defined time period. Such decisions should be substance-specific and based on overall costs and benefits to society according to an agreed methodology. The methodology should include considerations of risk, socioeconomic factors and overall environmental outcome based on the whole life cycle of the material. In some cases, a careful analysis will have to be made, for example, on the trade-off between allowing the repair of equipment with spare parts containing substances of concern versus early decommissioning or obsolescence of that equipment.

ESWET's reply

Option 3A: disagree

Option 3B: mostly agree

Challenge 4: Level playing field between EU-produced and imported articles

A very significant proportion of the products that become waste in the EU are imported from outside the EU, where often less restrictive chemical-related requirements apply. The difficulties in ensuring even minimal supply chain communication with non-EU suppliers and the legal impossibility to apply the REACH authorisation obligation to articles containing substances of very high concern manufactured outside of the EU clearly represents a barrier to achieving waste streams without substances of concern.

To what extent do you agree with the statements defining the following options?

Option 4A: In the case of REACH, the restriction procedure is the only means to address differences in treatment between imported articles and EU-produced articles⁵. Therefore, we propose to promote the timely use of the restriction procedure under REACH and other product legislation so that EU-produced and imported products are subject to the same rules.

Option 4B: The enhanced enforcement of existing legislation to prevent the entry of non-compliant products into the EU is necessary, not only to protect human health and the environment, but also to contribute to the availability of high quality material for recycling. Therefore, we propose to promote the enhanced enforcement of chemicals and product legislation at EU borders.

ESWET's reply

Option 4A: no opinion

Option 4B: no opinion

⁵ *The incorporation of substances of very high concern in imported articles is not subject to the REACH authorisation procedure whereas the use of such substances in EU-produced articles is subject to authorisation.*

Challenge 5: Design for circularity

To what extent do you agree with the statements defining the following options?

Option 5A: use of the [Ecodesign Directive](#), or of other dedicated product specific legislation as appropriate (for example, WEEE or ROHS), to introduce requirements for substances of concern with the purpose of enabling recovery.

Option 5B: make use of the extended producer responsibility requirements under the [Waste Framework Directive](#) to promote the circular design of products.

Option 5C: make use of voluntary methods of environmental performance certification (e.g. national or EU Ecolabel of green public procurement) to introduce rules for substances of concern.

Option 5D: make use of voluntary approaches such as value chain platforms for exchange of good practice in the substitution of materials in the design phase.

ESWET's reply

Option 5A: mostly agree

Option 5B: mostly agree

Option 5C: mostly agree

Option 5D: mostly disagree

Questions that arise in relation to Issue #2

How can one reconcile the idea that waste is a resource that should be recycled and, at the same time, ensure that waste that contains substances of concern is only recovered into materials which can be safely used? How do we strike the balance?

ESWET's reply

An adequate level of degradation has to be expected from secondary raw materials. Further to identification of substances of concern, it is necessary to adopt a risk-based approach in order to determine whether or not new materials or products made of such materials can be safely used.

The risk-based approach should rely on a two-step test:

As a first step, does the waste stream comply with limits set for substances of concern? If yes, it should be inferred that the waste stream does not pose unacceptable risks. If no, the second step should be followed.

As a second step, the three following assessments should be made:

- a. Are substances of high concern unavailable (i.e. bound in the material mix)?
- b. Is the risk of exposure from the substances of high concern acceptable in regards of the intended use of the secondary raw material?
- c. Is it possible to dispose or destroy the substance of high concern at a later stage?

Should these three assessment result in positive answers, then it should be inferred that the waste stream does not pose unacceptable risks.

Should recycled materials be allowed to contain chemicals that are no longer permitted in primary materials? If so, under what conditions?

ESWET's reply

An adequate level of degradation has to be expected from secondary raw materials. Further to identification of substances of concern, it is necessary to adopt a risk-based approach in order to determine whether or not new materials or products made of such materials can be safely used.

Should the risk-based approach defined above show that the waste stream does not pose unacceptable risks, chemicals no longer permitted in primary materials should be allowed in recycled applications.

- Issue #3: Uncertainties about how materials can cease to be waste

The current differences among the Member States on how and under what criteria waste can cease to be waste generates legal uncertainty for operators and authorities and creates difficulties in the application and enforcement of chemical and product legislation, which requires, as a starting point, to know whether a given material is still subject to waste legislation (either as hazardous or non-hazardous waste) or has ceased to be waste.

Challenge 6: Improving certainty in the implementation of end-of-waste provisions

Option 6A: take measures at EU level to bring about more harmonisation in the interpretation and implementation by Member States of end-of-waste provisions laid down in the Waste Framework Directive.

To what extent do you agree with the following possible actions relating to these options?

i. stepping up work⁶ on the development of EU end-of-waste criteria⁷. This would ensure that more waste streams are covered by clear EU-wide rules specifying which conditions need to be met to exit the waste regime and introducing support measures that would enable Member States to check compliance by recyclers with the exemption from REACH registration.

ii. removing the registration exemption for recovered substances provided in REACH⁸ thus requiring that all recovered substances should be registered under REACH and thereby achieve end-of-waste status;

iii. where other specific product legislation provide conditions that ensure the safe placing on the market of a substance or mixture, it is proposed to recognise these conditions to be end-of-waste criteria⁹ and, where justified¹⁰, introduce a specific exemption from REACH registration.

ESWET's reply

Option 6A(i): mostly agree

Option 6A(ii): disagree

Option 6A(iii): mostly agree

Option 6B: take measures to ensure more consistency of practices at Member State level. Indicate which of the following approaches would best achieve this purpose:

i. End-of-waste status can only be achieved as a result of an ex-ante decision by a Member State competent authority (i.e. permit);

ii. A recovery operator can make his own assessment of whether end-of-waste status is achieved. This assessment is subject to an ex-post verification regime by competent authorities; or

iii. A combination of these approaches, e.g. distinguishing on the basis of the nature of specific waste streams.

⁶ When considering this option, as highlighted in the staff working document, resource implications (e.g. in terms of additional staff needed) and challenges related to setting end-of-waste criteria for specific uses of a recovered material need to be borne in mind.

⁷ In the framework of the on-going ordinary legislative procedure amending Directive 2008/98/EC on waste it is envisaged that the Commission shall monitor the development of national criteria in Member States and assess the need to develop Union wide criteria on this basis.

⁸ Article 2(7)(d) of REACH exempts from registration substances which are recovered from waste in the EU, subject to certain conditions being satisfied. However, since this Article does not set any specific provisions on how the use of this exemption is to be monitored by ECHA or by Member States, the practical ability of Member States to assess the effectiveness of, or compliance with, the complex conditions of the exemption is currently quite limited.

⁹ Example of this could be the approach defined in Article 18 of the Commission proposal for a Regulation on Fertilisers, whereby end-of-waste status is recognised via compliance with the recovery rules and product criteria set out for the different constituent material categories in the annex of this draft regulation.

¹⁰ Substances may be exempted from REACH registration requirements if the conditions in Article 2(7)(b) of REACH are satisfied.

ESWET's reply

Option 6B(i): mostly disagree

Option 6B(ii): disagree

Option 6B(iii): mostly agree

Questions that arise in relation to Issue #3

How and for which waste streams (and related to which uses of the recovered material) should the Commission facilitate more harmonisation of end-of-waste rules to improve legal certainty?

ESWET's reply

More harmonization of end-of-waste rules should be sought for ashes and slag.*

In this respect, the principle that REACH applies for any substance, mixture or article that ceases to be waste should be softened in order to foster the recycling of waste that does not pose unacceptable risks.

Should no end-of-waste rules be elaborated for ashes and slag, product legislation should serve as a basis for determining whether or not a substance, mixture or article ceases to be waste.

*Waste stream identified in JRC Study on the selection of waste streams for end-of-waste assessment (2010)

- Issue #4: Difficulties in the application of EU waste classification methodologies and impacts on the recyclability of materials (secondary raw materials)

Inconsistent application and enforcement of waste classification methodologies, leading to waste being misclassified, or classified differently in different Member States or in different regions of the same Member State, may lead to uncertainty about the legality of waste management practices of certain important waste streams containing substances of concern.

The situation described has also been reported to lead to uncertainty for operators and authorities in cross-border movement of waste, resulting in delays or even refusal of entry and thereby resulting in an inefficient internal market for waste materials in the EU. Furthermore, in some cases, misclassification of waste could lead to poor management of risks during waste management and to potential risks to human health and to the environment.

Challenge 7: Approximating the rules for classification of chemicals and waste

To what extent do you agree with the following options?

Option 7A: the rules for classifying waste as hazardous or non-hazardous in Annex III of the Waste Framework Directive should be fully aligned with those for the classification of substances and mixtures under CLP. This should enable a smooth transition and placing on the market of secondary raw materials in full knowledge of their intrinsic properties.

Option 7B: hazardousness of waste should be inspired by the classification of substances and mixtures under CLP, but not fully aligned with it. Specific considerations of each waste stream and its management may allow wastes to be considered as non-hazardous even if the recovered material will be hazardous when placed on the market as secondary raw material.

ESWET's reply

Option 7A: disagree

Option 7B: mostly agree

Challenge 8: Classifying waste taking into account the form in which it is generated

Like some primary materials, the constituent substances of some types of waste may be retained, to a greater or lesser extent, in a matrix¹¹. The issue of the bioavailability/bioaccessibility of such constituent substances and their bearing on the hazard properties of the material is currently being assessed by the Commission. Under product legislation, there is potential for the CLP Regulation to introduce such bioavailability considerations in hazard classification of substances and mixtures, although methodologies to assess this are still being developed.

The waste legislation only recently provides this option for classifying waste for their ecotoxicity. Given the relevance that proper classification of waste as hazardous or non-hazardous has in its subsequent management and potential for recovery, several options exist to address this issue.

To what extent do you agree with the following options?

Option 8A: once the rules have been established under CLP, waste classification should also consider the form in which it is produced, taking account of the bioavailability/bioaccessibility of the substances contained in the waste, subject to reliable scientific information to support claims for reduced hazard classification.

Option 8B: Under Annex III of the Waste Framework Directive, waste should be classified exclusively based on the concentration of hazardous substances it contains, without further consideration of bioavailability or bioaccessibility.

¹¹ For example, in relative terms, certain plastic matrices could release a given substance more than a glass matrix; this means that the same hazardous substance (e.g. lead in plastics, lead in glass) would be less bioavailable from certain matrices than from others.

ESWET's reply

Option 8A: mostly agree

Option 8B: disagree

Questions that arise in relation to Issue #4

Are there any other points that you wish to make regarding the application of waste classification rules in the context of the interface between chemicals, products and waste legislation?

ESWET's reply

In view of protecting public health and the environment, current rules on the classification of waste, based on the List of Waste (LoW) as well as on their intrinsic properties, should be maintained. However, these rules should be supplemented by a second step based on a risk assessment, taking into account on one hand the intrinsic properties of the waste but also exposure (risk = danger x exposure). Such rules should be enacted at the EU-level in order to ensure a level playing field in the evaluation.

Bioavailability/bioaccessibility of substances contained in the waste could be used to assess exposure, and, hence, risk. However, to date, these concepts are neither defined nor standardised and do not cover all exposure pathways in all cases. Therefore, risk should be assessed for each category of waste based on the intended use.

This is already being done for bottom ashes in several countries, such as France, where, according to their characteristics, they can be used for example in non recovered structures (high grade), in covered structures (intermediate grade) or landfilled otherwise. Furthermore, bottom ashes cannot be used nearby watercourses or water tables.

Finally, updated rules should unequivocally clarify that:

- Waste containing hazardous properties can be reused or recycled provided that the associated risk (which is the real test), is acceptable (indeed, zero risk does not exist);
- The risk has to be assessed in the context of the future use of the waste and not in the context of its preparation for reuse/recycling.