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Consultation response

AmCham EU Response to the European Commission's Targeted Consultation

Analysis of the interface between chemicals, products and waste legislation and identification of policy options

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2016, directly supports more than 4.5 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Executive summary

The concerns about the information on substances of very high concern (SVHC) and their presence in products and materials do not necessarily apply across all waste streams, but primarily to certain examples. To examine the situation related to SVHCs in recyclates, **we recommend the EU starts assessing high volume/high value recyclates, with well-characterised compositions, which are a priority for recycling within the EU**. The experience and best practices learned from these examples should also help improve the situation in less-advanced waste streams.

Although information sharing requirements currently exist in in EU legislation, in practice there is room for improvement in sharing information between manufacturers, appropriate players within the value chain and recyclers. **The development of sectoral collaborative industry platforms could help improve communication about the presence of SVHCs** in the individual market segments.

In alignment with the resource efficiency goals of the circular economy, policy should focus on permitting and increasing the reuse and recycling of materials, while maintaining high levels of safety and protection of the environment. Regulation should concentrate on ensuring a pragmatic, case-by-case and application-oriented approach to chemicals safety in the circular economy, based on safe for intended use and risk-management. **AmCham EU recommends that the Commission's approach should not focus on the simple presence of 'chemicals of concern', but rather the safe for-use management of recycled materials containing such substances**.

A level playing field between primary materials and those derived from recovered material should be ensured. Both should safeguard equally high levels of safety for their intended use through full compliance with REACH and other relevant existing legislation.

Current chemicals legislation does not require major revision – existing EU chemicals safety legislation (including for example REACH) remains broadly appropriate and should be maintained as the underpinning legislative framework when materials are placed on the market. However, additional guidance and clarification on the application of REACH and other relevant legislation could help to inform decision making around recycling. Overlapping and misaligned waste, product and chemicals legislation should be avoided. A cohesive and pragmatic approach, focused on removing legislative barriers, should be adopted to fully realise circular economy objectives. Legal certainty is needed in relation to the interfaces between legislation, and certain definitions and procedures falling under its scope. All of the above will ensure circular economy goals are maximised.

AmCham EU believes that the Commission's efforts to analyse and clarify the interface between chemicals, waste and product legislation can help to streamline and improve the operation of the current framework. **The successful implementation of the circular economy – with all the benefits that it can bring to the environment, society and businesses – will rely on pragmatic and fit-for-purpose regulation in this area.**

Introduction

The American Chamber of Commerce to the European Union (AmCham EU) represents US companies operating and investing in Europe and is committed to making Europe more competitive in the global marketplace. The membership of AmCham EU encompasses wide-ranging industrial sectors and many member companies have, or are implementing, dynamic business models and practices in line with the goals of the circular economy.

AmCham EU fully supports the circular economy objectives to increase reuse, recycling, and resource efficiency on the basis of life-cycle thinking, bearing in mind that recycling and reuse itself should not be an environmental target per se, but rather a tool to improve the resource efficiency of certain raw materials. For industry and policymakers alike, fully safeguarding the safety of consumers and workers, while protecting the environment is an essential precondition to a successful circular economy.

An effective, clear and consistent EU legislative framework covering chemical, product and waste legislation will be the cornerstone of a successful transition to the circular economy in Europe. AmCham EU welcomes the Commission's analysis of the interface between these three pieces of legislation, as a means to help improve the suitability, coherence and alignment across the existing legislative frameworks.

AmCham EU would like to share its feedback on the four issues identified by the Commission, as well as on other relevant considerations. As a preamble, we noted the references made in the Commission's consultation document to 'substances of concern'. However, we believe the use of this vague and undefined terminology lacks clarity and could create confusion. Therefore, AmCham EU recommends to only make reference to 'substances of very high concern' (SVHCs) which has a clearly defined meaning and scope within the existing EU legislative framework.

Insufficient information about substances of very high concern in products and waste

For an efficient and safe circular economy, as provided for under existing legislation, it is important that information about the presence of SVHCs be communicated from manufacturers to the appropriate players in the supply chain, such as waste treatment operators and recyclers.

Materials producers in the EU are required to communicate the presence of hazardous substances, including SVHCs, above a certain threshold to downstream users via safety data sheets. Final product producers and importers in the EU are required to communicate the presence of SVHCs under Article 33 of the REACH regulation. Sector specific product waste legislation (e.g. WEEE) also provides information about preparation for re-use and treatment for the products placed on the market to recyclers and re-use organisations, to enable these products to be recycled at their end-of-life.

Nevertheless, it is acknowledged that in practice, and despite these provisions in EU legislation, possible gaps may exist, particularly for waste streams which end up in bulk and where the presence of SVHCs may vary for each recyclate batch. It is not necessarily the case that comprehensive information will be easily and readily available to all waste holders including recyclers.

However, **for a large number of recycled waste streams, where the origin and composition of the materials are well known, the potential presence of SVHCs is not an issue**. The issue primarily concerns waste streams where:

- the origin and composition is ill-defined, or
- the material has been used in long duration applications and contains substances which were not regulated when first introduced to the market, but subsequently for which regulatory measures or restrictions have been put in place – i.e. legacy substances.

In addition, any lack of compliance with EU legislation for products made outside of the Union, but which are imported and become waste within Europe, could lead to the unidentified presence of SVHCs in products and their waste streams. Addressing this problem effectively will require the EU and its Member States to step up enforcement efforts, which will also be critical when it comes to eventual REACH restrictions for finished articles, including Annex XIV substances after their sunset dates.

These factors imply that **tackling the issues of insufficient information on SVHCs in products and waste should start by focusing on specific waste streams,** where the issue is of most relevance.

One way to help close gaps in information flow could be **for recyclers to better identify and assess the products they wish to place on the market, as well as their intended applications**. This would allow recyclers to place products on the market for specific uses, in full compliance with REACH and other EU chemicals safety legislation. REACH is clear in stating that the obligation for compliance falls upon the actor who places or uses substances, or articles containing specific substances, on the EU market. This obligation therefore does, and should, apply to recyclers putting secondary raw materials on the EU market.

However, the reality behind this legal principle is complex and may lead to implementation problems. Most of the EU recycling sector today is made up of SMEs who will unlikely have the necessary staff, knowledge and resources to meet REACH registration requirements. Recyclers may need help complying with REACH to ensure that information requirements on the content of SVHCs will be met, and to build the trust of European consumers with respect to recycled materials. Transparency will only be achieved if all appropriate actors in the value chain play their part.

In addition, **the development of information sharing platforms between appropriate players in the value chain, including producers and recyclers, could be established**. This is particularly relevant for specific waste streams, particularly well-organised and/or with high volumes. Such mechanisms may allow for the sharing of information on the presence of SVHCs. Several practical examples[1] already exist to install this type of voluntary information sharing, which in some cases can be effectively facilitated by sectoral associations.

[1] E.g. the SDSR (safety data sheet for recyclates) tool; GADSL (Global Automotive Declarable Substance List); EUCertPlast; the electronics sector IEC 62474 database; and the collaborative value chain initiative of VinylPlus.

Presence of SVHCs in recycled materials (and in articles made thereof, including imported articles)

With regards to recycling, chemicals safety, and the presence of SVHCs, AmCham EU believes that several **guiding principles** should guide the Commission's work:

- A **level playing field** between those manufacturing primary materials, and those producing recycled products from recovered material should be maintained. Both should ensure equally high levels of safety for their intended use through full compliance with REACH and other relevant existing legislation;
- **Current EU chemicals safety legislation** (comprising primarily REACH and CLP) remains appropriate and should be maintained as the **underpinning legislative framework** when materials are placed on the market;
- While maintaining the highest level of safety standards, the focus should be on ensuring a **pragmatic, case-by-case and application-oriented approach** to chemicals safety in the circular economy, based on safe for intended use and risk-management.

The presence of SVHCs should not necessarily preclude reuse or recycling. Where the recycling of materials containing SVHCs is possible, shows sustainability benefits based on lifecycle thinking, and can be done in a way which effectively manages any risk to human safety or the environment, this should be permitted in compliance with legislation. Overly conservative, prescriptive and/or hazard-based regulation could, in contradiction to circular economy goals, lead to the prevention of reuse or recycling, hamper innovation, and create higher levels of unnecessary landfill, incineration of materials or their treatment outside of the EU. In addition, one should bear in mind that the presence of hazardous substances is frequently needed to obtain the crucial functional properties of the materials.

The Commission's approach should not focus on the mere presence of 'chemicals of concern', but rather the safe-for-use management of recycled materials containing such substances. As such, a case-by-case socio-economic cost vs. benefit analyses should be utilised. Where recycled materials do not meet the high specifications of primary virgin materials, consideration should be given to the use of these materials in applications where a risk-management approach demonstrates safety in their intended use.

Restrictions in Annex XVII to REACH apply equally to the use of a virgin (new) material and recovered materials (e.g. restrictions for polycyclic aromatic hydrocarbons and for lead in articles for supply to the general public - entries 50 and 63, respectively, of Annex XVII). Certain restrictions, however, foresee a different treatment when the restricted substances are present in recovered materials. An example of this is a higher limit for the content of cadmium in recovered rigid PVC (0.1 %) versus that for virgin PVC (0.01 %). This specific situation is temporary and will be reviewed by December 2017. However, this demonstrates the **issues around alignment of the requirements for virgin materials, and those for secondary raw materials**, and the need for a level playing field between the two types of materials. Recycling with the retention of an SVHC in the polymer matrix, and where lack of migration is demonstrated, can be considered a valid exposure reduction measure in some cases.

Since separating the material can create potential risks during disposal, this is particularly relevant to metals such as cadmium and lead.

Further supporting guidance on the application of REACH and other existing legislation around the presence of, and information sharing on, SVHCs in articles and recycled materials may help to contribute to a greater integration of circular economy principles within the existing legislative framework. Also, it can help to clarify the application of EU regulation and the decision making for recycling in such situations.

Uncertainties about how materials can cease to be waste

End-of-Waste criteria are referred to in the Waste Framework Directive (WFD) but, in practice, policy initiatives and implementation are currently undertaken at national level. National measures applied to recycled materials often vary across member state, creating uncertainty, disparity and potentially distorting the internal market.

This is especially an issue for specialised, high value, B2B waste streams which have few treatment facilities in the EU, let alone in each member state, as the waste volumes they treat are low. Current national administrative burdens around waste shipment and permitting for travel across EU internal borders often do not allow economic actors to take advantage of the economies of scale necessary for a recycling or remanufacturing scheme to be economically viable. Issues around the definitions of waste, by-products and residues, plus barriers in waste and product legislation (e.g. lengthy procedures, various interpretations by local authorities) may also currently deter some by-products or waste streams from being further used or recycled.

The **definition of waste** under the Waste Framework Directive (WFD), under which 'waste' means any substance or object which the holder discards, or intends or is required to discard, relies upon the interpretation of the word 'discard'. The European Court of Justice has ruled that the term 'discard' cannot be interpreted restrictively. This leads to the widest possible interpretation, which in turn can act as a barrier to attaining circular economy objectives.

A possible option within a revised WFD could be to fully define the meaning of 'discard', as it applies to waste and potentially with respect to certain activities (such as in recycling). With appropriate safeguards, this could be constructed in such a way that only materials which exit the circularity loop and are 'disposed of' are considered to be discarded under the legislation. In this manner, the definition of waste would remain unchanged, but the intent of the definition in relation to implementing the circular economy (and recycling in particular) is clarified, potentially leading to a more efficient and unhindered flow of materials, vs. the current situation of a continually repeating cycle of waste/non-waste classification procedure.

Another approach could be one similar to that promoted within the End-of-Life Vehicle (ELV) Directive (2000/53/EC). The ELV Directive has proven highly effective in preventing waste disposal from vehicles, increasing re-use, recycling and recovery, as well as ensuring that ELVs are treated in an environmentally sound way. The current challenge within this legal framework is enforcement, which

is to this day still lacking to a certain extent. The automotive industry has been calling for better enforcement to create a level playing field in the ELV recycling business, as well as a mandatory registration and de-registration system that includes a compulsory certificate of destruction (CoD) to demonstrate proper ELV treatment and support monitoring. A similar de-registration system could be developed for other sectors and waste streams.

To ensure regulatory alignment, remove barriers, and further the development of the circular economy, **the definition and legal status of recycled materials should be clarified and applied in a consistent and coherent manner across all Member States**. We also encourage the European Commission and the Joint Research Centre to start investigating new EU level end-of-waste criteria. AmCham EU believes that even though the Commission has run into problems with very broadly defined end-of-waste criteria for municipal waste in the past, this should not prevent it from investigating more specialised B2B end-of-waste criteria in the near future, which would help recover valuable secondary materials.

Difficulties in the application of EU waste classification methodologies and impact on the recyclability of materials

Currently, waste is classified as hazardous or non-hazardous based on the entries in the European List of Waste (LoW), as defined by the recently amended Decision 2000/53/EC. However, for many waste streams, waste is also classified via the determination of its hazardous properties , according to the classification rules and substance concentration thresholds laid out in Annex III of the WFD, as amended by Commission Regulation (EU) 1357/20146. The rules in this Annex are aligned to a large extent (but not fully) to the rules for the classification of substances and mixtures defined in the Classification Labelling and Packaging (CLP) Regulation. Currently, there is **a lack of consistency in the application and enforcement of the appropriate classification of certain waste streams**.

The classification of waste streams as hazardous has important implications for its management including obligations for collection, recovery, recycling, transportation, final disposal, as well as the need for a special permit to treat hazardous waste. These additional requirements all have consequences for the cost of managing waste which has been classified as hazardous.

Application of waste classification criteria in a stringent or inflexible way under WFD Annex III could, therefore, prove a barrier for the full utilisation of waste streams currently considered in practice as non-hazardous. Clarifying such aspects and ensuring certain and proper classification of waste would assist in improving the function of the regulatory framework in this area.

For example, classification of some materials produced or used in industrial manufacturing process and which then undergo regeneration (including catalysts, solvents, reagents such as acids, and other materials) can negatively impact the reuse and recyclability of these materials within the manufacturing process, even though the material effectively remains in a closed process loop. In this situation, producers are required to bring their operations under the scope of waste regulation, and/or become subject to limitations on the amount of waste material they can accept for processing. Waste classification, in this case, results in additional burdensome regulatory requirements or

limitations. A better approach, and one which would help to promote and facilitate the principles of reuse and regeneration, would be to require the necessary management procedures via the site operating permit which, with appropriate safeguards in place, could safely allow the material to remain subject to product legislation during the entire time it is contained within the closed loop of the manufacturing process.

There are fundamental differences between the challenges which apply to waste classification methodology based on: product legislation (i.e. CLP); waste products and articles; manufacturing process residues; air and water pollution abatement residues; and contaminated soil. The constituents, composition and concentrations of materials in manufactured products and articles are well known, hence waste classification using CLP can be as simple as a look-up exercise. However, this is frequently not the case for non-homogenous wastes which often take the form of complex 'mixtures' having multiple unknown components, constituents and concentrations (which vary, and in some cases have been physically or chemically transformed as part of their normal function - e.g. soil contamination, degradation of manufacturing process materials or lubricating oils). For such mixtures, application of CLP may not be entirely appropriate. Waste legislation should allow for an appropriate balance to be found between the analytical work required to ascertain exact composition and concentrations to enable full application of CLP, against the level of analytical work needed to determine if the mixture has any hazardous properties. This is especially relevant for waste streams where the potential for recycling is limited by virtue of their complex and varying compositions.

Furthermore, the mere presence of certain hazardous properties (and hence classification of a waste stream) does not necessarily imply non-recyclability and should not prevent the material being recycled in a safe and resource efficient manner. It is clear that different recyclates (which may vary in quality, composition and the presence material with hazardous properties) will be appropriate for different end uses. Matching the correct recyclates to safe and suitable end uses will be important in maximising resource efficiency. For example, an irritation hazard of one substance, would not necessarily lead to an irritation hazard for the recycled material (which may have a completely different structure, format and use) even though the recycled material still contains the substance in question.

Overall, to achieve the resource efficiency goals of the circular economy, the classification of waste should be pragmatic – and not simply based on 'hazard'. It should incorporate risk-assessment and risk-management aspects. Amendments to waste classification should include a full impact assessment and a cost-benefit analysis.

Other aspects to be considered by the Commission

Spare parts and replaceability

Spare parts, e.g. for vehicles, must meet the performance demands of the original part and function identically with associated systems and components to make sure that the function and safety of the vehicle are not adversely affected.

The technical performance defined for these spare parts may be linked to their chemical composition. To guarantee the technical performance of the individual parts and interaction with other components, an adverse chemical reaction should be avoided. The geometry of the spare parts needs to be identical to the original part in order for the components to physically fit into the required space. For example, it is not possible to replace the bulbs in high intensity discharge lamps with mercury free bulbs unless the system has been designed to use mercury free bulbs as the size, energy requirements and heat management requirements are incompatible. Interchangeability must be ensured. This issue has been addressed in the End of Life Vehicle Directive (2000/53/EC) in 2005 with the Council Decision 2005/438/EC. Pre-consideration (2) states: 'As product reuse, refurbishment and extension of lifetime are beneficial, spare parts need to be available for the repair of vehicles which were already put on the market on 1 July 2003'. Subsequently, all new material restrictions in the ELV Directive have a 'repair as produced' exemption for spare parts that were not originally designed to be compliant with the new material restrictions.

A similarly balanced approach for vehicle spare parts is also required for substances listed under REACH Annex XIV. To ensure the continued supply of spare parts of the necessary quality and functionality, the relevant industry proposes that spare parts for vehicles that are no longer in current mass production (legacy parts) be exempted from the provisions of REACH, Article 56, when they contain substances which have been listed in REACH Annex XIV.

Furthermore, the supply of spare parts is also regulated at a national level, e.g. in Germany, where a minimum ten year availability obligation must be fulfilled. For this and other reasons, it is not uncommon for original equipment manufacturers (OEMs) and suppliers to provide spare parts for vehicles that have been out of production for more than 20 years.

Link with product legislation

Product legislation defines the minimum requirements for access to the European market. These laws often require certain performance levels be met, among other things, in terms of safety and chemical composition. These laws are essential as they take into account **possible tradeoffs between performance and chemical composition** in a way waste legislation does not, and REACH only assesses at the very end of the authorization process.

Within certain industries, e.g. the automotive industry, the use of chemicals for specific functionalities is inter alia driven by legal safety requirements. The use of flame retardants is based on the obligation of Directive 2001/95/EC on the General Product Safety Directive (GPSD) under which universal safety requirements are imposed for any product placed on the market. Recycling of a product that contains flame retardant is technically very challenging and would require special skills from recyclers to handle hazardous substances. Furthermore, since the flame retardant will eventually have to be added again, from an economical point of view, this procedure would not make very much sense. Rather than imposing recycling purely based on chemical content, the technical feasibility and economic aspect should be equally considered.

We recommend that the Commission reflect on the possible tradeoffs between performance requirements and chemical content as part of its reflection on the interface between waste/chemicals and product legislation. When choosing the appropriate material for their products, manufacturers take many variables into account. Product functionality and safety, price, quality and

availability of the raw material, consumer preferences and demand are among the key elements they consider. In the toy industry, it is technically and economically extremely challenging for a manufacturer to ensure that a toy using recycled materials meets all safety requirements laid down in the Toy Safety Directive, REACH, and other pieces of legislation, which are among the strictest in the world. Therefore, for safety reasons, reputable manufacturers generally do not use these materials.