

# RESPONSE TO THE COMMISSION'S STAKEHOLDER CONSULTATION ON ADDRESSING THE INTERFACE BETWEEN CHEMICALS, PRODUCT AND WASTE LEGISLATION

## *Views of The Netherlands*

### **General remarks**

The Netherlands welcomes this consultation on the interface between chemicals, products and waste legislation. Timely policy responses addressing the interface are important to reduce the current uncertainties in the market. We understand that the Commission intends to bring forward a Communication with an analysis of the issues, with solutions to be found at a later (not yet defined) stage. We urge the Commission to propose solutions earlier, in line with the Council conclusion from 20 June 2016 adopted under the Dutch presidency.<sup>1</sup>

We are fully committed to the goals of the circular economy policy as well as the chemicals legislation (REACH and adjoining regulations). The Netherlands set the target to become 100% circular in 2050. At the same time, the Netherlands want to realize non-toxic material cycles, as described in the 7<sup>th</sup> Environment Action Programme. Both policy goals are equally valid and need to be fully respected.

At the interface of the two policies, the main challenge is how to phase out or manage the legacy of SVHCs (substances of very high concern), including POPs (persistent organic pollutants), present in materials and articles produced before the use of the SVHCs was phased out, and still occurring in waste streams in the coming decades. The fundamental question is how to maximize recycling in the context of the circular economy policy, while at the same time minimizing the presence of SVHCs in materials, in the strive for a non-toxic environment. How to come to a proper balance?

The preferred option is of course to prevent the presence of SVHCs in the design and production phase. This requires changes in design and production technologies, supported by regulation and innovation policy. This 'Safe by design' is a separate issue not elaborated in the Commission's paper, nor in our response here. We will follow and elaborate on the four problems as identified in the Commission's paper.

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The relevant Council Conclusions about Circular Economy (20 June 2016): The Council of the European Union..... EMPHASISES the importance of a well-functioning chemicals legislation to support the Circular Economy and the need to fulfil the various goals in the 7<sup>th</sup> Environmental Action Programme; CALLS upon the Commission, when addressing the interface between EU chemicals, products and waste legislation by 2017, to develop, in cooperation with the Member States, a methodology to determine whether recycling, recovery or disposal provides the best overall outcome to achieve both non-toxic material cycles and increased recycling rates, while respecting the existing high level of protection of human health and the environment and taking into account the precautionary principle; in this context, EMPHASISES the need for adequate information on the presence of substances of very high concern in materials, products and waste.

## **PROBLEMS THE INITIATIVE AIMS TO TACKLE**

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

We fully agree with the analysis of the problem described. Lack of information on the presence of substances in waste streams hampers the recycling of those waste streams into new materials and/or articles. For instance, recyclers have difficulty to meet several obligations under REACH (check sameness of substances, safety information), and to provide proper information on the composition of recycling products to (potential) purchasers. Moreover, when it is not clear whether a waste stream contains SVHCs (including POPs) or hazardous substances not (yet) classified as SVHC, one cannot properly answer the fundamental question whether recycling is the preferred option for environmentally sound waste management, or destruction (through incineration or chemical recycling) or controlled landfilling.

As an addition to the Commission's analysis, we point out that insufficient or limited information is especially relevant when it comes to UVCBs and complex articles. Very heterogeneous waste streams originating from complex articles could be characterized as UVCB. In both cases basic questions are:

- Is it possible to identify the SVHC's in an effective and efficient manner?
- Is it possible to separate the SVHC's effectively and efficiently from the waste stream meant for recycling?

The ruling of the European Court of Justice with respect to the interpretation of REACH Articles 7 and 33 confirms that information and registration requirements are applicable to all individual articles in a complex article. In practice however, we are facing a lack of information on SVHC and POP content of individual articles. The infeasibility of identification and/or separation in the waste stage cannot be ignored.

We consider that particular effort is needed to obtain and make available information on SVHCs in products imported into the EU, both for the sake of enforcing compliance with chemicals legislation and for the sake of informing downstream users and consumers. Import of products containing SVHCs, whether allowed or not under the applicable chemicals legislation, causes European waste streams to remain contaminated with the respective chemicals, which adversely affects the recycling perspective for this waste. Furthermore, the EU manufacturing industry will benefit from consumers' awareness of hazardous substances in non-EU made competitive products.

The Netherlands upcoming Third National Waste Management Plan (LAP3) encourages competent authorities for the permitting of recycling companies to contact experts in industry, institutes and the academia for obtaining information on hazardous substances (SVHCs, POPs, candidate list substances) in the specific waste stream proposed to be recycled. Such case-by-case investigation may be unexpectedly successful, as experts on specific materials can be found that have knowledge not yet disclosed in literature, or not easy to find for permitting authorities.

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

We agree with the problem analysis presented in the Commission's paper, and recognize the elements in the analysis as crucial for consideration of the interface between chemicals, product and waste legislation. Other examples that are worth mentioning are flame retardants such as decaBDE in end-of-life-vehicles, electronics, construction materials, furniture, etc. and HBCDD, used in buildings and constructions. Recycled rubber infill containing PAH's used in artificial sport pitches is a recent example in our country.

The *general framework* envisaged in the Commission's paper is key: a methodology to determine the overall costs and benefits for society of the use of recycled materials containing hazardous substances, compared to disposal options. The methodology should be able to differentiate between waste streams with SVHCs that are fit for recycling and those that are not. In our view, not a new legal framework is needed. Instead of framework, the terms *methodology* and *criteria* are in our view more suitable, emphasizing that the solution is to be found within the existing frames.

The methodology (criteria) should provide a comparative assessment of the waste treatment options landfill, incineration, chemical recycling, and mechanical recycling. The steps in the methodology could be:

### 1. Specification of options to be compared

In this step the options to be compared (recycling, incineration, landfill, etc.) are further specified for a given material. This can be done for the current situation or for moments in the future (scenarios). Technical and economic feasibility should be addressed, as these affect the viability of certain options. Technical issues are, for example, whether identification and separation of SVHCs from the waste stream is feasible, and whether operational capacity for incineration is available. As to available operational capacity, we point out in particular that an obligation for incineration while there is by far insufficient available capacity would in practice result in landfilling.

Relevant economic aspects are amongst others the costs of waste treatment operations, the costs of collection and transport, and the costs of measures to comply with best available techniques.

The problem of identifying and separating SVHCs from waste streams can be illustrated by the following example. A car consists of 10.000 to 20.000 individual articles. DecaBDE, listed as a POP under the Stockholm Convention, is present in 100 to 200 articles contained in current end-of-life vehicles (ELV). Those articles should, for proper compliance with the POP regulation, be removed before the car wreck is shredded. So far however, neither identification of decaBDE in cars, nor dismantling 100 to 200 parts from a car wreck is feasible for car dismantlers. As a result, decaBDE-free and decaBDE containing plastic particles end up mixed in the post-shredder plastic residue. In view of these facts, the best choice could be a temporary exemption of recycled plastics from the prohibition to contain decaBDE, by setting an appropriate concentration limit. As the levels of decaBDE in waste streams will gradually drop due to the production ban, the concentration limit in recycled material can be gradually lowered.

## 2. Minimise chemical risks for health and environment

Recycling of wastes containing SVHCs or other hazardous substances should only be allowed if the risk to health and the environment is negligible. As to other hazardous substances, we note that also chemicals covered by other legislation than REACH should be included in this assessment. Obviously, when deciding whether recycling is the preferred option, also health and environmental impacts of disposal options should also be taken into account. A crucial element in the methodology is the envisaged use after recycling, including the fate of the hazardous substances in the end-of-life stage of the recycling products. For example, The Netherlands supported the authorization for recycling of soft PVC containing DEHP because the use was limited to low risk applications like industrial floor mats, splashguards or garden hoses while specific other uses were excluded.

Examples like soft PVC containing DEHP imply that in allowed low risk applications of recycled materials limit concentrations for SVHCs could be set higher than for primary (virgin) materials, leaving room for realistic levels present in recycled material. In such a concept, new virgin material and SVHC-free recycled material can be used in any application, whereas the use of recycled materials containing SVHCs is limited to specific low-risk applications. This approach is already accepted for spare parts for electrical and electronic equipment, under Directive 2011/65/EU (RoHS), acknowledging that extending product life through allowing the use of spare parts is likely to reduce the environmental footprint of the economy in spite of the prolonged presence of the SVHC contained by the spare part.

## 3. Overall environmental impact

An assessment of overall environmental impact would integrate aspects such as consumption of primary raw materials, water and energy, CO<sub>2</sub> emissions, and pollution of air, water and soil. This step gives additional information for the comparison of options, particularly when the assessment in step 2 does not lead to a clear preference.

The required assessment methodology comprises in the first place the scope of the integral assessment, i.e. the aspects that should be covered, and in the second place the methodologies for the assessments of each of these aspects. This assessment should lead to the best overall outcome for society, in the sense of preventing unacceptable risks for human health and environment, while realizing the smallest environmental footprint. Finalised and ongoing work by member states and the Commission should be integrated into methodologies and criteria that can be agreed upon at EU level. In time, step-by-step refinement is to be sought. The Netherlands is willing to contribute to the development of such a methodology.

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

We acknowledge that end-of-waste criteria as provided by WFD Article 6 can be a very helpful instrument for providing legal clarity to industry and competent authorities. Criteria at EU level are to be preferred, as the best way to ensure a

European level playing field. We stress however the importance of maintaining room for all existing recycling products that find sound applications. EU criteria should not impede recycling activities without proper justification based on environmental or human health risks or anticipated adverse effects on product quality or lifetime. The so far unsuccessful efforts to establish EU-criteria for end-of-waste plastics may indicate that the quality requirements set by the manifold of sub-markets involved and by applicable product legislation may be too diverse to be captured in a manageable set of end-of-waste criteria. Adopting criteria that do not properly take account of this diversity is more likely to cause a setback in recycling activity than to enhance it.

We agree with the Commission that Article 6 of the Waste Framework Directive (WFD) does not provide for formal decisions by recycling operators themselves on the end-of-waste status of their products. Such decisions are to be made by competent authorities; in the first place those in charge of providing the recycling operator's permit (or in charge of enforcement of applicable general rules), and in case of export or import, the competent authorities for the Waste Shipment Regulation.

We agree that any "tacit" end-of-waste should be replaced by an explicit verification by competent authorities. However, we stress the importance of maintaining the current room in the WFD, pointed out in the Commission's paper CA/05/2017 of 7 March 2017, for Member States to choose how to practically transpose the obligation to verify end-of-waste (e.g. through case by case decisions, when issuing permits for waste operators, general binding rules etc.). The appropriate implementation of the obligation depends on specific situations in the Member States.

The administrative form of end-of-waste verification by authorities should be proportionate to the potential risks of the respective recycling product, and should respect the principles of efficient use of public resources and prevention of unnecessary administrative burden for business operators. In particular, it should be avoided that recycling operators are forced to stop activities, which have been formally allowed for years, pending a verification of an end-of-waste status. We should not allow uncertainty to rise in this respect among recycling industry stakeholders, as this would undermine the EU policy to stimulate the transition to a circular economy.

Therefore, we urge the Commission to provide the Member States with an updated guidance document on end-of-waste verifications, as appropriate in the light of the provisions that will be set under the current revision of the WFD. Such guidance should cover verification of existing "tacit" end-of-waste products as well as future applications by recycling operators for an end-of-waste status for new recycling products.

We consider that competent authorities as well as recycling operators should become more aware of the need to subject recycling products to an end-of-waste assessment. When developing new recycling products, businesses should ensure the compliance with either European or national end-of-waste criteria or, in the absence of such criteria, with the conditions specified in WFD Article 6(1) and with applicable case law. As stated above, the formal *decision* on compliance is up to the competent authorities, however.

For the sake of proportionality between risks at stake and administrative activity, it should be left to the discretion of the competent authority in which detail to explicitly specify the compliance in the context of a recycler's permit or in a separate decision. In particular, recycling activities falling under general rules (hence not requiring a permit) should be allowed to take place without a prior explicit decision by the competent authority on the end-of-waste status of the recycling product. Due to limited resources, competent authorities may need extensive time to deal with (large numbers of) applications for end-of-waste decisions. Instead, it is more effective to devote available resources to surveillance and enforcement of compliance with the legislation (WFD, REACH, etc.), based on the authority's overview of business activities under its jurisdiction, and a risk-based determination of priority sectors and companies.

Obviously, a prerequisite for proper decision making on compliance with end-of-waste is that the competent authority sufficiently understands how to make the assessment. Whereas traditional recycling products tend to be "tacitly" considered end-of-waste, competent authorities thoroughly assess innovative recycling products, which however often have to face stagnation of decision making due to the complexity of the assessment.

Integrating the expertise domains of waste and chemicals, for instance for assessing the risks of recycling products containing hazardous substances, is crucial for the effective application of the respective legislations. We call upon the Commission to develop guidance for the Member States on the interface between (end of) waste, REACH and the POPs regulation as well as to stimulate exchange of practical experience between Member States.

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

In the past decades waste operators and their competent authorities were never confronted with an obligation to apply the CLP hazard criteria to waste, as indications to this end in Annex III of the WFD were not very explicit, and the focus of waste classification was always on the List of Waste (Commission Decision 2000/532/EC), and in fact still is, pursuant to WFD Article 7(1). Plastics, for example, did as a rule classify as non-hazardous waste, except when contaminated with hazardous substances that were not part of the plastic material itself, such as remainders of pesticides or petrochemical products.

When considering to apply the classification 'hazardous waste' to all waste that contain hazardous substances at levels above the CLP hazard criteria, two questions need to be answered.

- (i) What would be the benefit of the resulting re-classification of plastic and other waste streams as 'hazardous waste', in terms of reducing environmental or human health risks currently inadequately managed?
- (ii) How to ensure that re-classifying as hazardous waste will entail no other restrictions and requirements than those contributing to the envisaged risk management benefits?

A preliminary inquiry among Dutch local authorities in charge of issuing permits for waste collection and handling pointed out that re-classifying certain waste streams from 'non-hazardous' to 'hazardous' would affect the permitting of waste handlers throughout the collection and recycling chain, ranging from municipal waste collection centres to recycling facilities. Firstly, the competent authorities will have to make inventories of waste collection and recycling sites to which the re-classification would apply. Secondly, the permitting competence will shift from municipal to provincial authorities. Next, the necessary review of the permits will be hampered by a lack of clarity on for the additional restrictions and requirements that would apply to the specific waste streams re-classified. The WFD only contains general provisions with regard to hazardous waste. In the inquiry responses, we saw questions being raised on the applicability of, in particular:

- certain mandatory risk management measures applying to waste currently classified as hazardous, such as oil-based waste
- category 5.5 of the Industrial Emissions Directive
- the Environmental Assessment Directive
- more stringent maximum storage periods
- more stringent minimum distances to vulnerable objects such as built-up area (e.g. plastic waste collection and recycling sites may need to be moved away from their current locations, which are often at smaller distance to built-up area than allowed under the rules for hazardous waste).

Even if such restrictions and requirements would not contribute to achieving any risk management benefits, competent authorities may feel compelled to regard them as mandatory measures in the light of the prevailing implementation of the provisions of the WFD regarding hazardous waste.

It is expected that re-classifying plastic waste containing SVHCs will affect a considerable part of the current plastic recycling industry, and that the affected recycling practices would come to an end, as recycling operators commonly refuse to work with waste classified as "hazardous", and manufacturers of plastic articles are likely to refrain from using recycle produced from such waste.

*Therefore, guidance to authorities, on a European level, is of utmost importance before re-classification of certain waste streams as hazardous waste is being enforced.* Such guidance should remove current uncertainties among authorities and recycling industry stakeholders, by clearly pointing out how to determine an appropriate, tailor-made implementation of the WFD provisions regarding hazardous waste, ensuring that restrictions and requirements entailed by the hazardous waste label remain limited to measures clearly contributing to necessary management of the risks of the hazardous substances in the specific waste streams.

As to plastics recycling, *an alternative option to solve the current confusion is to create an exemption for all fully polymerized substances (i.e. plastics).* This would actually restore the 'old situation'. Any concern about the fate of hazardous additives in plastics upon recycling can be addressed under REACH and product legislation (e.g. RoHS) through restricting the application of the recycled plastic to a limited number of safe product categories.

We agree with the Commission that a lack of action will indeed 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). Where an integral assessment as described in section #2 points out that recycling of a waste stream is preferred over destruction or landfill, the waste legislation should facilitate the recycling industry and its competent authorities in achieving environmentally sound recycling, not burden them with legal uncertainty or requirements that are not effective in managing the risks of the hazardous substance.

### **Concluding remarks**

The intention of the Commission is to present a Communication with an analysis of the legal, technical or practical problems at the interface. Also, options to facilitate recycling, a better tracking of chemicals and improving the uptake of secondary raw materials in the context of non-toxic material cycles are foreseen.

Where the Commission announces further new studies and – based on studies and on-going evaluations – proposals how to address barriers or shortcomings, we fear this will easily lead to further delay, and favour that a draft of methodology is presented already by the end of this year, inviting member states and others to apply this draft and build up further knowledge. Lowering the present uncertainties and competitive disadvantages for recycling stakeholders and authorities should start right now.

Furthermore, we note that in the Commission's document the focus is mainly on the interface between waste and chemicals. However, also the third legislative framework, product legislation, should receive due attention, as an integral part of the legal framework for the circular economy.