

Clarity needed on the criteria for the EU's essential use concept

INSIGHT | GUEST COMMENT | 26 October 2022

With more questions than answers remaining on this key, and complex, aspect of the chemicals strategy for sustainability, more time is needed for debate, says Jean-Phillippe Montfort, a partner at law firm Mayer Brown



Exactly two years after the publication of the chemicals strategy for sustainability (CSS), we remain in the dark as to the criteria that will be used for the implementation of the essential use concept (EUC), one of the fundamental new features of the CSS.

The EUC was introduced in the CSS with neither prior public consultation nor an impact assessment. These should take place in line with the European Commission's Better Regulation commitments.

The CSS itself makes a brief reference to the need to define criteria for essential uses and refers to the Montreal Protocol (MP) under which a similar concept has been used. However, it does so "while acknowledging that the scope of chemicals regulatory framework is much broader than the specific scope of chemicals covered by the Montreal Protocol".

A Commission paper on essential use, published on 12 November 2020, acknowledges that "comparing certain criteria under REACH with some of those established under the Montreal Protocol ... does not suggest that it would be conclusive to apply those in REACH".

Starting point

In a second paper, published 2 February 2021, the Commission states that: "... the definitions of the Montreal

Protocol are only used as a starting point to initiate the discussion. It will be part of the current process to establish definitions and criteria that will apply to the Union Legislation".

The Commission then appointed Wood E&IS GmbH (Wood) to support the development and implementation of an EUC. Both the initial March 2022 Wood Report, and the April 2022 Wood Survey refer to the MP criteria as if they had already been adopted.

Indeed, the substantial part of the survey starts with a "reminder" that:

"Essentiality for uses of 'the most harmful chemicals' = Necessary for health and/or safety OR critical for the functioning of society – AND there are no alternatives that are acceptable from the standpoint of health and the environment."

The survey didn't include any questions on the criteria that would be relevant in the context of REACH.

Meanwhile important elements are missed. The MP criteria includes the words 'encompassing cultural and intellectual aspects' after 'society' and 'technically and economically feasible' before 'alternatives'.

Since then, nothing has surfaced from the Commission.

Six months after the Wood Survey, the final Wood Report has not been published. No further public consultations have taken place, and no impact assessment has been published.

The only Commission paper issued recently that refers to the EUC does not describe the essential use criteria to be applied other than by a mere reference to the criteria in the MP – in the same truncated way as in the Wood Survey (Caracal 45, July 2022). It only refers to the conditions under which the EUC could apply to authorisations and restriction.

Unsuitable

The MP criteria are not suitable for REACH purposes. The MP addresses a very limited number of substances with undisputed and irreversible environmental impacts. It cannot be appropriate to extrapolate the requirements for substances that deplete the ozone layer to the full range of thousands of substances/uses regulated under REACH.

The criteria for a use to be considered essential need to include those uses that contribute to the achievement of the objectives in the Green Deal (for example, green energy generation) and wider EU policy objectives (for example, mobility, digitalisation, greater EU supply chain autonomy). These are 'critical for the functioning of society' but, in the absence of criteria confirming this, who knows what would be covered by that concept?

And importantly, how can one assess the impact that the concept may have – a pre-requisite before proposals are drafted – without knowing what these criteria may be?

Misconceptions

The debate has centred on many misconceptions. First, contrary to many public statements, there are very few chemical uses that would be "obviously non-essential" or "obviously essential" – and very few about which a quick consensus could be reached. Chemicals are expensive and rarely used without serving a particular necessary function. Assessing the essentiality of most uses would require a detailed analysis that considers not only whether the substance is needed for safety, but also the functionality and sustainability of the products made with the substance.

Second, the objectives served by those end-use products and applications are also important to analyse. Indeed, the essentiality of the function that a substance may serve will clearly depend on the end product. Also, if you limit the use of certain chemicals to only very few 'essential' uses without considering the volumes required to keep such chemicals economically viable, you might risk losing critical supply chains, including manufacturing, in the EU.

If the EUC is applied on the basis of robust, transparent criteria, it is hard to imagine how the concept will "streamline" or "facilitate" the existing REACH processes – the main objective behind the EUC's introduction. Legal and regulatory practitioners fear that, confronted with this reality, the authorities will end up having to take arbitrary, political decisions on the basis of loose criteria and without the necessary checks and balances required. This will inevitably lead to a flurry of legal cases.

Third, whatever the EUC criteria will be, the availability of alternatives will be key to the determination of essentiality. Submitting alternatives to the same level of scrutiny as the substances subject to a proposed ban or restriction in order to avoid regrettable substitution will also be key. When applied at the scale that the Commission intends to use the EUC, a proper analysis of the suitability of alternatives for each substance in each use would be a herculean task unlikely to streamline existing processes.

Unfortunately, the Commission seems to be closed to constructive ideas. For example, industry requested that the concept of "safe use" be considered so that uses demonstrated to be safe would not need to undergo an EUC analysis. Yet, the Commission's most recent paper addressing the subject (Caracal 45, July 2022) refers only at the very end to possible consideration of "minimal exposure" throughout the life cycle.

There is no rationale for banning uses of chemicals that are demonstrated to be safe, on the sole basis that they present a particular hazard, even if alternatives exist.

Next steps

So, what to do next? Let's start a real debate, a real assessment and give it time. The CSS is a very ambitious policy document that could have very serious implications for an industry that is currently faced with other serious challenges. It is also extremely complex. The Commission should take the time it needs to design and consult properly on all aspects, including on the EUC, for a better reform, a better understanding and a better implementation of the CSS. The REACH Regulation itself, the "mother" of modern chemical legislation, took much more time than expected to be adopted, but ended up with a reform that was generally well accepted and used as a global model. This is the only recipe for success.

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