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

A response to the above issues from The European Solvent Recyclers Group (ESRG) relating to the publication of the Roadmap Document dated 27 January 2017 and its associated paper in respect of 'Context'.

Background:

ESRG is a pan European trade body with 37 professional members from EU and other countries engaged in a wide range of solvent recovery activities. The group is organised under the roof of the German Chemical Distribution Association (Verband Chemiehandel - VCH), domiciled in Cologne, which is member of FECC. Our aim is to promote the safe and economic management of post-use solvents. In the interests of resource efficiency used chemicals, such as contaminated solvents that were costly in resource terms to originally produce, become mostly hazardous waste reflecting their original inherent properties and should therefore be fully recovered and reintroduced into reuse. Only under exceptional cases should they be disposed of in another manner where energy recovery is then favoured. The goal is to re-use solvent waste as production material and not to unjustifiably dispose of it in a less environmentally friendly way. This is also the philosophy behind the recycling and waste disposal waste hierarchy legislation of the European Waste Framework Directive [WFD] (2008/98/EC) and new policy made under Circular Economy proposals.

ESRG is a strong proponent of setting high standards for EU chemical and waste law and their inherent requirements. However, ESRG believes at the interface the two sets of legislation have often floundered in implementation due to issues of legal interpretation, definitions and competencies, where the latter can have further divided responsibilities at Member State level.

Comments:

1. General

ESRG member activities sit at the interface of chemical and waste law as delivered through the REACH/CLP Regulations and the Waste Framework Directive. It therefore claims to have especially important expertise to offer in commenting on the Roadmap. Many ESRG

members have experienced frustration in the way that REACH regulation and waste law has often been implemented in the EU. Some Member States have signalled a willingness to transform waste status substances to non-waste with either little or no proper standards to be met - apparently with the concept that if something is recycled it must be a 'good thing', or conversely, through excessive bureaucracy and a lack of competency, to demand such a detailed process be followed that in the limit the economics of recovery fail and disposal becomes a cheaper option.

2. Scope of the Roadmap Analyses;

ESRG believes the Context Paper has correctly and succinctly identified the significant points at issue.

3. Where do the problems lay?

(i) REACH/CLP Regulations are essentially strongly focused on a legal process following robust scientific processes leading to methodologies and analyses that cannot be too widely or further interpreted at Member State level. Thus REACH/CLP are together driven centrally through a pan EU body (ECHA) that ensures a high level of consistency with a powerful technical thrust.

EU waste law on the other hand is largely developed through a non-technical Directive setting out broad policies for Member States to (*mostly*) interpret into national law.

Conclusion (1):

We should not be surprised that there a wide discrepancies in Member State behaviour where by End of Waste for example, must centre largely on technical arguments and competencies against a background of qualitative desires.

(ii) Is this a question of REACH/CLP versus the WFD?

It would be churlish to separate out one piece of legislation in order to identify a 'bad one', since both have the shared ideology of ensuring protection of human health and the environment. Nevertheless logic suggests that in general principle REACH/CLP requirements precede the waste status of substances (or mixtures or articles).

Therefore if something is recovered and placed back on the market it must do so fulfilling the requirements of REACH/CLP for otherwise the purpose of protection is lost.

That is not to say that a recovered substance has to be identical through mimicry to the 'original', it is a question of understanding what standards are being set and any attendant risks are clearly identified. To illustrate that point many virgin materials and indeed waste derived materials can reasonably have a range of qualities offered to the market. Without standards the status of a virgin substance or of a waste will remain unclear.

We then see the default position that to ensure protection a waste remains a waste (an expression that largely turns on the expression 'to discard') unless its status is otherwise agreed. Words including 'by-products' surely have little meaning – either something is placed on the market as a substance with standards etc., or it isn't! This is where definitions and notably those in the WFD are often vague and too widely interpreted.

Conclusion (2):

Moving from waste to non-waste (recovered) status requires a large element of REACH logic in the process while standards are essential.

(iii) Hazards and Risk

There is a danger in the thinking by some that because many wastes may have hazardous properties they are then deemed undesirable for recovery. This is nonsense. While REACH /CLP set out to explain the hazards of many substances and to allow suitable risk assessments to be made, it does so in order that the risk of using them is best understood and other alternatives can be considered.

Nevertheless there are many substances with hazardous properties that are required by modern society and some of their properties of course are challenging in user situations. It is not only their toxicity to humans or the environment that is at issue, it may be flammability or some other property. Thus in the case of solvents they will largely retain their hazardous or non-hazardous properties both pre and post use.

An issue arises when through its use a non-hazardous or a hazardous substance may become 'more' hazardous either through contamination or where deliberately other substances have been added in order to improve performance.

While REACH/CLP can manage those issues, it may not be economic for a recycler to do so, particularly since most recyclers are SME's, say if restrictions or authorisations are then to be considered.

It does not mean that REACH/CLP should be ignored, but it does augur for a more collective responsibility for waste hierarchal considerations when the original substance was placed on the market. Too often the waste stage of a Safety Data Sheet (SDS) includes little in the way of helpful advice to the user simply implying that disposal should be considered carefully.

Conclusion (3):

Hazardous materials can be properly managed in the context of both of the legislative requirements. There is scope for a greater input by original manufacturers' when developing SDS's and the waste stage requirement leading to original manufacturers working with recyclers to develop standards for recovery operations.

(iv) The Role of Competent Authorities

The evolution of REACH/CLP ensured the focus was primarily on those originally placing substances on the market i.e. the chemical supply industry; with little effort made in ensuring a downstream fit for the recovery industries.

Conversely, the waste industry were the main interlocutors of deriving waste legislation so there is no surprise that on approaching the interface of substance to waste and vice versa, it would bring with it a large number of issues where the solution has often been to 'let the Courts decide'. If the law is tested then it will probably be on one or other of the legislative requirements but rarely taken together. It is a moot point whether even after testing in law if adequate clarity has subsequently been derived; but whatever the answer it is likely SME's cannot afford substantive litigation.

ESRG is sensitive to the issue of what comprises a Competent Authority, but identifies procedures are regularly devolved at Member State level including those left to local decisions by those with insufficient experience. That can be worsened by separating REACH / CLP competencies from those of the environmental bodies. There is then scant evidence of many End of Waste decisions having been given to the Commission's Technical Adaptions Committee (TAC).

Conclusion (4)

The issues here centre on the need for meaningful standards and in an ideal world there needs to be a body who can address this at pan EU level.

4. Closing Comments

ESRG welcomes the opportunity to input to the proposed discussions and offers to continue with the dialogue.

Required in the legislations are better definitions and that the concept of putting something on the market be it original or waste derived, is the key principle. Managing hazard and risk is at the centre of this discussion.

REACH/CLP has a large element of standards setting procedures and that concept needs moving further into waste legislation. ESRG recognised that attempts to widen pan EU standards for End of Waste scenarios have been problematic, but this is an issue of how to go about it. Driving the need for better advice in the hierarchal waste stage for SDS preparation is a starting point as it will motivate original manufacturers to work with recyclers who too must fulfil their responsibilities. At present ESRG adopts a voluntary **Code of Practice** that is designed to underpin official EU Guidance on waste and the **End of Waste issues**.

The role for Member State Competent Authorities where split responsibilities occur is not helpful. We need to encourage more open agreements on waste decisions and widen the role for the TAC ensuring greater transparency and validation of Member State actions.

ESRG

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