Re: draft authorisations for uses of chromium trioxide (Chemservice GmbH and others, and REACHLaw Ltd)

To: Members of the REACH Committee

Brussels, 8 May 2020

Dear Madam/Sir,

We are writing to you regarding the REACH Committee meeting that will take place on May 13. At this meeting, discussions and potentially votes are planned on two draft Commission Implementing Decisions granting authorisation to uses of chromium trioxide under the REACH Regulation:

- A draft decision addressed to **Chemservice GmbH and others**, previously named "**LANXESS and others**".
- A draft decision addressed to **REACHLaw Ltd**, a consultancy acting as only representative of the Russian chromium trioxide manufacturer, "NPCC".

We want to express our concerns with these two draft decisions (which are extremely similar). If you adopt these two decisions, it would unlawfully allow the continued use of chromium trioxide, a non-threshold carcinogen and mutagen. Indeed, in both cases, the applicants failed to provide the necessary evidence 1) regarding the risk, notably, for the workers exposed and 2) that no suitable alternatives were available for all applications covered in the very broad scope of these similar authorisations.

The **Chemservice** case was already subject to an objection through a resolution of the European Parliament which the Commission is proposing here to merely "take note" of, and fails to draw any lessons from. It also fails to learn from the lead chromate judgment (T-837/16)[1].

The **REACHLaw** application is a mere copy-paste of the Chemservice application prepared by the CTAC consortia. It is therefore equally vitiated.

First, as the proposed decisions highlight (para. 6 for REACHLaw and 10 for Chemservice), RAC identified substantial uncertainties in the risk assessment provided, that call into question the **reliability** of the assessment and the **representativeness** of the data for this applicant's situation. It is particularly obvious from the "conditions" defined in these drafts authorisations that **the Commission is missing crucial data to be able to evaluate the risks arising from the SVHC's use.**

[1] Judgment of the General Court (Fifth Chamber) of 7 March 2019, *Sweden v European Commission*, T-837/16, EU:T:2019:144.

Indeed it is requiring the applicant to provide, later on: "*specific exposure scenarios for representative processes, operations and individual tasks (including automatic versus manual systems and open versus closed systems and combinations thereof), describing risk management measures and operational conditions representative of all sites where the authorised uses take place [...]*".[2]

Since this information was not in the risk assessment provided, and considering it is obvious that such information is the essence of chemical safety reports under Annex I, how can the Commission justify granting the authorisations with such blatant gaps in key information ?

Second, the proposed decisions also highlight that "*Due to the very broad scope of those uses, SEAC could not exclude possible uncertainty with regard to the technical feasibility of alternatives for a limited number of specific applications that are covered by the description of uses 2 and 4*".[3]

What are, exactly, these "*limited number of specific applications"*? The Commission does not seem able to answer this question on the basis of the information it received, as it was not able to answer the Court in the 'lead chromates' case when asked about the "niche applications" (for which the applicant had allegedly no alternative).

Similarly to the 'Cromomed S.A. and others' case, discussed during the last REACH Committee meeting of 30th April, the Commission's draft decisions proposes to grant authorisation at the condition that the companies - already willing to use the substance of very high concern - decide that using this substance is "necessary" for the intended use (i.e. provided they consider that chromium trioxide is needed to achieve any of the "key functionalities" listed by the authorisation). The Commission alleges that such 'condition' limits the scope of the authorisation.

It does however manifestly not achieve such result. This 'condition' merely amounts to a re-phrasing of the information that should have been provided in the application so that a meaningful analysis of alternative could be carried out, and so that the scope of the authorisation could be defined precisely. Failing to identify with a meaningful degree of details which uses are covered by the authorisation, **reveals that the Commission was missing the necessary information** to do so. **In essence, it delegates the decision to the applicants, under the supervision of the Member State enforcement authorities**. This new allocation of responsibility is not what the legislator intended.

Requiring Downstream Users to provide "*an explanation of the key functionalities of chromium trioxide listed in Article 1(1) which are necessary for their use, including a justification why such key functionalities are necessary for that use*" (Article 5 of the draft decisions) cannot remedy these shortcomings. Indeed, again, this information was necessary for the Commission to conclude on whether to grant authorisation or not in the first place, and for which use, **exactly**.

We would like to remind the European Commission that requesting such substantial data after the authorisation is granted, whether on the analysis of alternative or on the risk, was clearly sanctioned by the Court in case T-837/16 (see para. 82).[4]

Finally, we are concerned with the attitude of DG GROW in systematically failing to take due account of the European Parliament's objections and the General Court's judgment in case T-837/16. DG GROW's inability to adapt and introduce the necessary changes to correct the implementation of the REACH authorisation procedure is deeply undermining the European citizens' trust on the European Commission's motivations to protect public health and environment. It seems much more concerned by protecting the short-term, narrow, economic interest of certain companies incapable of providing

[2] see Article 2(2) and Article 7 of the REACHLaw draft decisions and Article 2(2) and 9 of the Chemservice draft decisions.
[3] Draft decision REACHLaw para. 12; Draft Chemservice decision, para. 18
[4] "it should be emphasised that, in principle, irrespective of their content, the conditions imposed in accordance with Article 60(8) and (9)(d) and (e) of Regulation No 1907/2006 cannot purport to remedy any shortcomings in an application for authorisation or in the analysis of alternatives submitted by an applicant for authorisation or any deficiencies in the Commission's examination of the conditions provided for in Article 60(4) of Regulation No 1907/2006"

information as basic as *how* their workers are *actually* exposed to this extremely hazardous substance, or why they and their customers need this substance in the first place.

REACH was meant to place the burden of proof on the private sector (See Article 1(3) of REACH). We deplore that DG GROW is working hard to ensure this burden remains theory. The result is not only illegal authorisations, but the direct penalisation of EU companies that create innovative alternatives and see the expansion of their market blocked by the laggards and their prehistoric technologies endangering the life of their workers.

Therefore, we respectfully ask you to:

- Reject the proposed authorisations to REACHLaw and Chemservice; and,

- Request the Commission to prepare new draft decisions that reject these authorisations for lack of adequate data provided, or, at the very least, grant an authorisations that only include, **in a meaningfully precise and concrete manner**, the uses for which the applicants, have truly shown that no suitable alternatives are available.

Yours faithfully,

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On behalf of:

ChemSec

ClientEarth

European Environmental Bureau (EEB)

Heath and Environment Alliance (HEAL)