



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SME's
Chemicals and Consumer Industries

REACH
Chemicals and Plastic Industries

Directorate-General for Environment
Circular Economy and Green Growth
Sustainable Chemicals

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38th Meeting of Competent Authorities for REACH and CLP (CARACAL)

Open session

3- 4 March 2021

WebEx

- Concerns:** Follow-up to ECHA-COM joint paper on intermediates
- Agenda Point:** 4.1 CA session and 5.1 Open session
- Action Requested:** Competent Authorities and observers are invited to take note of the enclosed document

INTERMEDIATES: FOLLOW-UP TO CARACAL DISCUSSIONS ON 17.11.2020

At the CARACAL meeting of 30 June 2020, the Commission and ECHA consulted Member States and stakeholders on a paper (CA/37/2020) intended to analyse the definition of intermediates following the Judgment of the Court of Justice in case C-650/15/P (“Acrylamide Judgment”) According to the conclusions in that note, it was considered that some modifications would need to be made to the ECHA Guidance Document on Intermediates (‘the Guidance’) to reflect the Court’s interpretation.

In the joint paper the Commission and ECHA have attempted to provide clearer criteria to distinguish between intermediate and non-intermediate uses. However, based on the comments received and discussions at the CARACAL meeting in November, it seems that some of those elements, in particular those concerning storage and equipment, were not clearly explained or could have been perceived as going, to some extent, beyond the limited elements provided by the Court.

It is therefore proposed to update the Guidance using a clearer argumentation based on the objectives of the REACH Regulation, the provisions on intermediates and the three criteria identified by the Court,. The Commission, in co-operation with ECHA, will therefore propose to amend the Guidance to reflect the acrylamide Court Judgment within the spirit of the above considerations. Ultimately, the Commission will consider the need to clarify the definition of intermediate use or to complement those criteria by more explicit provisions, through a review of the legal text which the Commission plans to propose in the framework of the upcoming targeted REACH revision.

MAIN CHANGES DUE TO THE JUDGEMENT

The Court clarified the three cumulative conditions that the use of a substance has to fulfil to be considered an intermediate use in accordance with Article 3(15) of REACH. These are (i) the intended purpose at the time of the manufacture and use of a substance as an intermediate, which consists of transforming that substance into another; (ii) the technical means by which the transformation takes place, known as synthesis; and (iii) the confinement to a controlled environment.

As regards the first condition, namely the “intended purpose”, the Court concluded that:

“Article 3(15) of that regulation contains no additional criterion allowing a differentiation to be made according to whether that purpose was primary or secondary in nature or examination of whether or not the chemical process by which one substance is transformed into another is indistinguishable from the end use for which that substance is intended” (paragraph 38 of the Judgment).

Therefore, following this finding of the Court, ECHA will eliminate, in relation to that first condition, the reference to the ‘main’ aim of the transformation process.

The Court did not provide a full explanation of the second or third condition to define an

intermediate. However, since the first criterion will be fulfilled by a wider range of substances (chemical substances are in many cases used for chemical processing, which involves to a great extent their transformation into other substances), increased importance will have to be given to applying the second and third criteria to distinguish between intermediates and non-intermediate uses. Indeed, should only the first criterion have a determining role, the majority of substance uses would be considered as intermediate uses. Such a situation would not be consistent with the system established by the REACH Regulation and its objectives.

NEXT STEPS

For the purposes of supporting industry and authorities when implementing the registration and authorisation requirements, ECHA will adapt the Guidance¹ to provide as much clarity as possible on the basis of the legal text and the interpretation given by the Court. The Commission will also include options to amend the legal text in the preparatory work for the upcoming REACH revision.

CARACAL members will be informed once this work has been further developed. It is appropriate to proceed with an update of the Guidance without further delay.

¹ The exact process for this revision to be discussed