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The Consumer Voice in Europe

REGULATORY FITNESS CHECK OF CHEMICALS LEGISLATION EXCEPT REACH – A CONSUMER VIEW

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**Ref.: ANEC-PT-2016-CEG-019
BEUC-X-2016-048 – 24/05/2016**

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Why it matters to consumers

Consumers have a right to expect that the products they use do not contain chemicals which could pose a threat to their health and safety. Over the past 50 years, the EU has put in place a broad legislative framework to protect consumers from chemical risks in food, drinking water and consumer products. The European Commission is currently consulting the public on whether this important legislative framework performs as intended or if shortcomings can be identified. ANEC and BEUC are concerned that this exercise could weaken vital legislative provisions that exist to protect consumers, workers and the environment.

Summary

Assessing whether existing EU legislation is fit to protect consumers from harmful chemicals should be at the heart of the fitness check of EU chemicals legislation. This exercise could therefore, in theory, offer an opportunity to address shortcomings in the legislative framework, especially with respect to chemicals in consumer products.

Regrettably, the fitness check suffers from a clear and unequivocal bias towards industry views and interests. As designed by the Commission, the fitness check will fail to produce a balanced, quality assessment of the legislative framework governing chemicals. This holds true in particular for the significant gaps and inadequate chemical provisions in product regulations which need to be addressed as a matter of priority. We therefore strongly caution against using the results of the fitness check to guide decisions on the future course of EU chemicals policy.

The fitness check will fail to provide a sound view of the EU chemicals *acquis*, its implementation and its functioning, which can feed into the Commission's work on a strategy for a non-toxic environment. Instead, the unbalanced focus on regulatory costs will divert attention from a progressive agenda on regulating chemicals of concern in consumer products.

1. Introduction

The European Commission has announced a regulatory fitness check of EU's chemicals and chemicals-related legislation excluding the REACH Regulation. According to the Commission, the "aim of this particular fitness check is to assess whether the current legislative framework for chemicals is fit for purpose and delivers as intended/expected."¹ The results of the fitness check are expected by end of 2017.

As a part of the fitness check, the **Commission is consulting stakeholders on the functioning of the legislative framework for chemicals (except REACH)**.² The consultation is meant to inform the Commission Staff Working Document, presenting the results of the fitness check.

Combined with our response to the public consultation (see annex), this joint ANEC and BEUC position paper outlines our view of the Commission fitness check of EU chemicals legislation.

2. The purpose and possible implications of the fitness check are unclear

We regret that the public consultation has been launched before a roadmap for the fitness check is available. According to the Commission's Better Regulation guidelines,³ stakeholders must be able to give feedback on fitness check roadmaps. Yet, no opportunity has been given to comment on the scope of this fitness check, its methodology and approach as well as the issues it will address.⁴

While the Commission on 18 May released a [roadmap](#) for the fitness check, it still fails to provide **sufficient clarity with respect to the reasons for this exercise and in particular regarding the concrete regulatory consequences that could follow from it**. The roadmap thus states that the fitness check "will identify possible further burden reduction actions",⁵ but neglects to explain how the Commission might act on them. The Commission in short seems to put the cart before the horse. We therefore ask that the Commission respects its own Better Regulation practices to ensure transparency and predictability for stakeholders.

¹ European Commission, Fitness check on the most relevant chemicals legislation (excluding REACH), as well as related aspects of legislation applied to downstream industries. [Background document](#), no date.

² http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8695&lang=en&title=Consultation-on-the-regulatory-fitness-of-chemicals-legislation-%28excluding-REACH%29

³ http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf

⁴ The Commission explains that "Roadmaps give a first description of planned Commission initiatives. They describe the problem that the initiative aims to address and possible policy options. They also provide an overview of the different planned stages in the development of the initiative, including consultation of stakeholders and impact assessment work." http://ec.europa.eu/smart-regulation/impact/planned_ia/planned_ia_en.htm

⁵ European Commission, Roadmap: Fitness check on the most relevant chemicals legislation (excluding REACH), as well as related aspects of legislation applied to downstream industries, 18 May 2016. http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_env_005_reach_refit_en.pdf

3. As designed, the fitness check will generate biased results

The fitness check should primarily look at identifying shortcomings in the EU legislative frameworks governing chemicals with a view to strengthen consumer protection.

We question, however, whether the fitness check will result in a valid and balanced assessment of the extent to which EU chemicals legislation is fit for purpose. As designed by the Commission, the fitness check suffers from significant flaws and its eventual results should not be used to guide decisions on the future course of EU chemicals policy.

3.1. The scope of the fitness check is too broad

The fitness check considers 45 pieces of legislation from different areas such as worker protection, consumer protection and environmental legislation. However, it is impossible to consider information with sufficient detail with regard to all relevant legislation. Even if the fitness check does not seek an in-depth evaluation of each of these separate and diverse pieces of legislation, we doubt that it can lead to anything but a superficial assessment of the overall functioning of the chemicals framework given the large number of laws operating according to diverse principles and circumstances.

Most of the questions asked in the public consultation are meanwhile formulated at a highly aggregate level such as for instance “to what extent are the following elements of the overall EU legislative framework for chemicals satisfactory?” (Q16) From a consumer perspective, the assessment will however differ significantly from toys over cosmetics to the CLP Regulation. Estimating an average performance level is meaningless and will not provide the Commission with useful information on the actual state of EU chemicals legislation or where improvement would be needed. Unfortunately, both the fitness checks and the public consultation include a number of such ambiguities.

3.2. The fitness check adopts a biased focus on costs and redundancies

The EU chemicals *acquis* intends to achieve *both* a high level of protection of human health and the environment *and* the proper functioning of the internal market in chemicals. The fitness check therefore needs to devote *equal* attention to assessing whether the legislative framework achieves *both* of these objectives. Nonetheless, the fitness check adopts a narrow focus on identifying regulatory burdens to industry, quantifying costs, and eliminating redundancies.

For example, the public consultation does not aim primarily at assessing whether the current legislative framework is fit for achieving the crucial goal of protecting consumers. In fact, the questions are unfit to identify the serious legislative gaps we – often echoed by national authorities – as consumer organisations have long denounced, especially with respect to consumer products. We further elaborate these criticisms in our response to the public consultation annexed to this paper.

The fitness check must adopt a balanced approach to the costs and benefits of EU chemicals legislation. This should also include a comprehensive review of whether the enforcement of EU chemicals legislation is effective and achieves a high level of protection as the legislation intends. Equal attention needs in this context to be paid to the costs to society of non-compliance with legal requirements, such as for example costs related to disease, productivity loss, increased sick leave, morbidity, health care costs, etc.

We call on the Commission to approach the fitness check as an opportunity to strengthen – not weaken – the legislative framework governing chemicals. Consumer and environmental protection – rather than primarily economic considerations – must be at the heart of this exercise.

4. The fitness check threatens to compromise consumer protection

According to the Commission, the aim of the fitness check is to assess the relevance, coherence, effectiveness, efficiency and added value of the legislative framework for the **risk management of chemicals**.⁶

While the fitness check covers a wide range of diverse laws, only one aspect of the legislative framework, risk management, is singled out for in-depth examination. We strongly object to this narrow focus: as the aim of the fitness check is to assess whether the current legislative framework for chemicals is fit for purpose and delivers as expected, it needs to provide a comprehensive review of the extent to which chemical hazards are identified, communicated *and* addressed in a robust manner.

At the same time, the fitness check aims to examine the “merits and shortcomings” of risk management approaches based on generic risk considerations and specific risk assessments⁷ – also known as the distinction between hazard-based and risk-based approaches.⁸ Combined with the strong focus on costs to industry – rather than consumer protection – we are concerned that the fitness check will fail to generate a valid assessment of the two risk management approaches adopted in EU chemicals legislation.

Based on the documents released by the Commission to date, including the original tender specifications,⁹ the fitness check appears specifically designed to generate evidence to support one particular conclusion: that hazard-based standards are disproportionately burdensome to industry. We reject this premise and instead insist that the fitness check needs to focus on how the EU can strengthen – not weaken – the legislative framework protecting consumers from harmful chemicals.

The EU should apply a precautionary approach in all consumer relevant chemicals legislation. Hazard-based standards allow the EU to ban certain groups of chemicals at once based on their intrinsic properties, such as for instance CMRs in cosmetics or toys. Greater reliance on hazard-based standards would therefore greatly speed up the implementation of legislation meant to protect consumers. We further insist that all relevant chemicals legislation should place the burden of proof on the economic operator, including responsibility for providing sufficient evidence to demonstrate safe use. However, unlike the current prevailing REACH practice the evidence must be independently verified rather than relying on an industry self-assessments. This could be done, for instance, by introducing hazard based exclusions (e.g. for CMRs) with possible derogations or approval systems for (certain) chemicals in consumer products (following the example of colourants,

⁶ http://ec.europa.eu/growth/sectors/chemicals/ec-support/index_en.htm

⁷ European Commission, Roadmap: Fitness check on the most relevant chemicals legislation (excluding REACH), as well as related aspects of legislation applied to downstream industries, 18 May 2016.

⁸ See e.g. <http://chemsec.org/news/news-2016/january-march/1538-hazard-vs-risk-what-is-best-practice-when-assessing-chemicals>

⁹ European Commission, Study on the regulatory fitness of the legislative framework governing the risk management of chemicals (excluding REACH), in particular the CLP Regulation and related legislation, December 2014.

preservatives and UV filters in cosmetics). For both measures evidence should be provided by industry followed by judgements of scientific committees.

Most risk-based standards by contrast fall short of providing a sufficient level of safety. We know from experience that these methods are slow, expensive and inefficient and that they fail to provide adequate protection of consumers.¹⁰ We therefore reject wider use of such risk management methods in EU chemicals and chemicals-related legislation.

5. The fitness check distracts the EU from needed action on chemicals

Beyond 2018, EU chemicals policy aims to achieve a non-toxic environment that is conducive to public health, innovation and the development of sustainable substitutes.¹¹ All available evidence however suggests that the EU is falling short of this mark: chronic and severe diseases attributable to chemicals exposure such as cancer, cardiovascular diseases, fertility problems, obesity and allergies are on the rise in the EU. Harmful chemicals are found in many products consumers come in very close, frequent and prolonged contact with, such as clothes, kitchen tools, toys, cosmetics, and the list goes on. Chemical pollutants are further widespread in the air we breathe, the food we eat and the water we drink. A renewed drive to stem the growing toxics exposure is urgently needed if we want to achieve the vision for a non-toxic environment outlined in the EU's 7th Environmental Action Programme.¹²

In this light, **the flawed fitness check of EU chemicals legislation diverts political attention and scares resources from a progressive EU agenda on harmful chemicals.** The EU chemicals *acquis* is inadequate in multiple ways that requires urgent attention.

First, robust chemical provisions are largely non-existent for many consumers products, such as materials in contact with drinking water, products releasing emissions to indoor air, clothing and other consumer textiles, child use and care articles, other articles for children, tattoo inks, personal protective equipment, furniture, sports and playground surfaces and equipment, car interiors etc.¹³ REACH does not, and will not, compensate for these deficits as 'articles' – particularly imported ones – are barely covered under REACH. Any meaningful strategy for the chemicals area therefore needs a specific approach addressing chemicals in consumer products in sector specific regulation.

Second, current EU chemicals-related legislation regulating consumer products too often fail to set sufficiently ambitious thresholds to ensure adequate protection of consumer health. For example, the Toy Safety Directive falls short of adequately protecting children since endocrine-disrupting chemicals or sensitizers other than allergenic fragrances are not covered, while requirements for CMR substances are not strict enough. At the same time, the Directive lacks a comprehensive comitology procedure which would allow limits for *all* kinds of substances and *all* kinds of toys to be adopted and modified.¹⁴ Strengthening such legislation must be a priority.

¹⁰ See for example European Environment Agency, Late lessons from early warnings: science, precaution, innovation, 2013.

¹¹ Decision No 1386/2013/EU of the European Parliament and the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'. <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013D1386&from=EN>

¹² <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013D1386>

¹³ See ANEC, Position Paper. Hazardous chemicals in products - The need for enhanced EU regulations, June 2014, <http://www.anec.eu/attachments/ANEC-PT-2014-CEG-002.pdf>

¹⁴ See ANEC and BEUC, EU Subgroup on chemicals in toys fails its mission. Critical review, November 2012. <http://www.beuc.eu/publications/2012-00799-01-e.pdf>

Third, enforcement of EU chemical-related legislation at Member State level remains inadequate. The comparative product tests undertaken by our members frequently detect unwanted chemicals in many everyday consumer products. Every year, the EU RAPEX system moreover contains more than 2.000 notifications of dangerous products of which some 20% can be linked to harmful chemicals. However, this figure most likely represents only the tip of the iceberg as the majority of dangerous products are not detected as a result of inefficient and ineffective market surveillance and a lack of clear rules with regard to chemicals in consumer products.

Fourth, hormone-disrupting chemicals (EDCs), combination and low dosage effects of chemicals, nanomaterials, and sensitizers represent risks to consumer safety which are currently not being addressed in a comprehensive manner. For instance, it has now been over two years since the Commission missed the deadline for adopting criteria to identify EDCs, while a compulsory review of the Cosmetics Regulation with respect to these harmful chemicals is more than one year overdue. We thus see a failure to adapt EU legislation to ensure adequate protection of human health and the environment. At the same time, the transition to a circular economy will create new consumer risks where recycled secondary raw materials and reused consumer products incorporate toxic legacy chemicals.¹⁵

The pace of EU action to address these issues is already scandalously slow – or altogether absent – and the fitness check of EU chemicals legislation should not serve as a distraction from an ambitious agenda on better protecting consumers against harmful chemicals. We are however concerned that under the current Commission many pending decisions are either delay or indefinitely deferred, potentially creating unnecessary and unacceptable health risks for consumers. We therefore remind the Commission that safety delayed is safety denied.

END



ANEC is supported financially by the European Union & EFTA.



This publication is part of an activity which has received funding under an operating grant from the European Union's Consumer Programme (2014-2020).

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BEUC would like to thank the European Environment and Health Initiative (EEHI) for providing funding for the development of this publication.

¹⁵ See CHEMTrust, Circular Economy and Chemicals. Creating a clean and sustainable circle, August 2015, <http://www.chemtrust.org.uk/wp-content/uploads/chemtrust-circulareconomy-aug2015.pdf>