

Ms Cristina de Ávila, Head of Unit B2, DG ENV
Mr Sylvain Bintein, Team leader Chemicals in
particular REACH and CLP, Unit B2, DG ENV

Mr Giuseppe Casella, Head of Unit F1, DG GROW
Mr Otto Linher, Senior Expert of Unit F1, DG
GROW

Brussels, 18 May 2022

Ref.: ASMoR supports the enclosed Mayer Brown letter regarding the Essential Use Concept and notably on the application of the definition of essential use stemming from the Montreal Protocol

Dear Ms de Ávila and Mr Casella,
Dear Mr Bintein and Mr Linher,

The Alliance for Sustainable Management of Chemical Risk (ASMoR) represents manufacturing, importing, formulating and downstream user sectors of chemicals. We are committed to realise the EU Chemicals Strategy for Sustainability (CSS)'s overarching strategy's objectives and make the transition to even more innovative, safe and sustainable chemicals. To that end, we are actively participating in streams of work aimed to inform the revision of the EU REACH regulation and develop common positions on the future of EU Chemicals Risk Management including the possible role of the Generic approach to risk management (GRA) and the Essential Use Concept (EUC).

In this context, we have carefully considered and responded to the *'Targeted' stakeholder consultation on a Study supporting the Commission in developing an essential use concept in chemicals legislation*. We note that this consultation has been built on the key criteria provided in the Montreal Protocol on Substances that Deplete the Ozone Layer, i.e. (i) necessary for health, (ii) necessary for safety, and (iii) critical for the functioning of society – and taking into account the assessment of available alternatives. We regret that criteria and considerations beyond the Montreal Protocol have not been integrated, especially given that the EU Chemicals Strategy for Sustainability was acknowledging that *"the scope of chemicals regulatory framework is much broader than the specific scope of chemicals covered by the Montreal Protocol"*.

We would therefore concur with the comments outlined by Mayer Brown law firm in the enclosed letter. ASMoR supports the views that the consultation process on the EUC is not sufficient as it takes the application of the definition of essential use from the Montreal protocol for granted.

The CARACAL Papers on "Essential Uses" (CA/61/2020) and "Essential Uses – A possible concept for REACH" (CA/14/2021) do not take the criteria from the Montreal Protocol as the only legal basis to be considered for the preliminary work on the EUC. In its note, Mayer Brown highlights that *"the Montreal Protocol addresses a very limited number of substances with undisputed and irreversible environmental impacts"* while REACH covers a broader range of substances/uses, re-confirming the acknowledgment made in the CSS Strategy itself. Therefore, we believe that it is essential to build the stakeholders' consultation and more broadly the preliminary work on the EUC on a legal basis and considerations beyond the Montreal Protocol. This is necessary to ensure impartial and open consultation(s), serving as a basis for developing informed policy options, taking into account all legitimate factors – in accordance with Better Regulation principles and tools.

Importantly, we would like to recall that in the CARACAL Paper CA/14/2021, the Commission committed to regard the *"definitions of the Montreal Protocol [...] only [...] as a starting point to initiate the discussion"*. It undertook that it would be *"part of the current process to establish definitions and criteria that will apply to the Union Legislation."* In consequence, we call for the

Commission to live up to this commitment and to start a discussion on further criteria that may need to be considered when defining essentiality in this new and broader context.

ASMoR stands ready to support the Commission in the upcoming consultation steps on the EUC – one of the key building blocks of the EU CSS implementation – with the goal to allow the sectors' (continued) transformation towards the successful implementation of the EU Green Deal objectives.

Yours sincerely,

The Secretariat of the Alliance for Sustainable Management of Chemical Risk

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The Wood Survey on the Essential Use Concept (EUC) is not suitable in that it takes the application of the Montreal Protocol Criteria for granted

On 13 April, Wood E&IS GmH ('Wood') invited stakeholders to participate in a survey to assist in their project supporting the Commission on the development and implementation of an "essential use concept" (EUC) to be applied horizontally in EU Chemicals legislation. Stakeholders have until 4 May to respond.

There is a major problem in the starting premise of the survey. The survey is based on the fundamental assumption that the essential use criteria as defined in the Montreal Protocol should be used in EU legislation, including REACH. It takes this for granted without stakeholders having the opportunity to give their opinion on whether, and to what extent, the Montreal Protocol criteria are suitable as a starting point for REACH/EU legislation purposes and/or what other criteria should be applied.

The Wood survey assumes that the EUC to be applied to EU legislation should, as with the Montreal Protocol, only allow derogations for substances if their use is, first, necessary for health, safety or is critical for the functioning of society and, second, if there are no suitable alternatives. The survey takes this for granted and only raises questions as to what factors could be used to assess whether a substance is: (i) necessary for health, (ii) necessary for safety, and (iii) critical for the functioning of society. The survey also asks for input on the factors to be taken into account in the assessment of alternatives.

Indeed, the substantial part of the survey starts with a "reminder" that implies that the Montreal Protocol criteria have already been adopted (page 8). It also claims that the Chemical Strategy for Sustainability (CSS) "commits" the European Commission (COM) to defining criteria for essential uses on the basis of the Montreal Protocol criteria (page 2). This is both incorrect and unacceptable.

First, it should be noted that the CSS has introduced concepts (such as the EUC and GRA) without any prior public consultation nor impact assessment on the introduction of such concepts. It is therefore necessary that COM to organize an extensive and detailed stakeholder consultation on such concepts rather than taking them for granted. The introduction of these concepts into chemical legislation must be open for public consultation in line with the Commission's Better Regulation commitments.

The CSS makes a brief reference to the need to define criteria for essential uses and refers to the Montreal Protocol. 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". The clear implication of this is that changes to the Montreal Protocol criteria should at least be considered to reflect the broad scope of REACH and other horizontal and sectoral EU legislation. Thus these potential changes must be addressed in the EUC Survey and should be subject to detailed and extensive stakeholder consultation.

The first Commission paper on Essential uses (CA/61/2020) of 12 November 2020 acknowledged 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". The various questions raised in that document were very broad and did not take the criteria in the Montreal Protocol as a given.

The second Commission paper (CA/14/2001) of 2 February 2021, summarizing the comments received from CARACAL, was called "Essential Uses – A possible concept for REACH". On the Montreal Protocol, it reported the following (Section 2.1.2): "There was a mixed response whether the criteria for essential uses in the Montreal Protocol are useful for REACH. Some advocated that they would be a good starting point, whereas others claimed that they would not at all be suitable and should not be used in REACH". The Commission then says: "The Commission wishes to highlight 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". In other words, the Montreal Protocol criteria are a starting point only.

With this in mind, why does the Wood survey now state that the Montreal Protocol criteria are a given? It assumes that the decision to accept the Montreal Protocol criteria as such has been made, bypassing the consultation process on this vital and fundamental issue. This is not acceptable and must be addressed.

The Montreal Protocol addresses a very limited number of substances with undisputed and irreversible environmental impacts. It does not address the huge range of substances/uses that are covered by REACH. It cannot be appropriate, without considerable experience of how essential use might work in practice, to extrapolate the requirements for substances that deplete the ozone layer to the full range of thousands of other substances/uses. The criteria for a use to be considered essential need to be much broader than those in the Montreal Protocol. The criteria need to bring within the scope of 'essential uses' those that contribute to the achievement of the objectives in the Green Deal (GD) (e.g. green energy generation), the Chemicals Strategy for Sustainability (CSS) and wider EU policy objectives (e.g. e-mobility, digitalisation, greater EU supply chain autonomy) as well as health, safety and 'critical for the functioning of society'.

It is imperative that the Wood Survey be broadened to also question stakeholders as to what extent the Montreal Protocol criteria are suitable as a starting point and if not what other criteria should be applied.

The absence of public debate and consultation on the criteria and implementation of the EUC would not only be contrary to the Commission's commitment to better regulation. It would also risk doing irreparable harm to the EU's interests if it leads to substances being removed from the EU market, many of which are vital to the achievement of key EU objectives including those in the Green Deal and the CSS itself.

Jean-Philippe Montfort & Andrew Fasey
Mayer Brown Europe-Brussels LLP
20 April 2022

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