Minority position Simon Cogen

I find myself unable to agree with the present opinion which was supported by a majority of SEAC members.

While I might personally agree with the initial sentiments of the Commission that the current restriction was poorly conceived (lack of reporting requirements, lack of clear end date for the derogation), the proposed amendment does not make things any better. On the contrary… This proposal can be attacked from so many different sides that I had to edit some lines of thought from this minority position to keep it manageable.

As was pointed out many times by another SEAC member, a prerequisite of a restriction proposal is that a substance poses an unacceptable risk. The Annex XV dossier does not show this to be the case.

It also states that it only wants to improve clarity and transparency. All the RMO-options (the ones which were withheld for further analysis at least) actually go well beyond that stated goal.

The dossier is poorly conceived as well since it doesn't take the viewpoint of society but instead seems tailored to 2 companies, but Dow in particular.

Another member of SEAC described this restriction "*essentially a piece of policy advocacy wrapped in the rhetoric of socioeconomic analysis*". I wholeheartedly agree with this assessment of the dossier.

ECHA has also stated during SEAC-25 that an authorisation mindset was used to handle this dossier and that this is essentially an authorisation application prepared by ECHA. This equates to inequal treatment of companies.

1. Wording

The wording of the proposal is where the problems start. It includes the explicit approval for the import of asbestos fibres (past, present and near future).

Some words on this… Extending the scope of the derogation to allow the import of the chrysotile fibres is not only contrary to the goals of the European Union when it comes to phasing out asbestos, but is most importantly not corroborated by the information in the ANNEX XV dossier (see pages 35 & 36):

a) For AAK:
"*Projected use*
AAK uses chrysotile in hydrogen production. Based on previous experience, it would need to refurbish its equipment and import cells with diaphragms containing chrysotile again in 2020/21. However, as a result of increasing maintenance and reliability issues, AAK has decided to replace its electrolysis-based hydrogen production with a chrysotile-free hydrogen production method. The two existing electrolysis units containing chrysotile will be used until the new production method is in place, by 2025 at the latest. ***There is no need for further imports of chrysotile***" (emphasis added)

b) For Dow:

"*Projected use*

Dow uses chrysotile in the production of chlorine, which in turn is used as feed stock/raw material in an integrated production system at the site. The total stock of chrysotile contained within the Dow electrolysis installation is about 270 tonnes. Each year, Dow replaces about 10% of the diaphragms, containing about 21 tonnes of chrysotile, and uses about 50 tonnes of chrysotile fibres for maintenance of the diaphragms. Both chrysotile and the diaphragms containing chrysotile are imported. ***Dow has recently purchased a large stock of chrysotile fibres and has (at the time of writing of this report) about 540 tonnes stored at the Stade site. With current use, this stock would permit the maintenance of the existing diaphragms for over 10 years****."* (emphasis added)[1]

If the Commission adopts this amendment, they will effectively legalize the import of asbestos fibres which is currently illegal in the REACH regulation (I do not subscribe to the very broad interpretation of the current restriction the Commission's services provided to SEAC[2]).

A similar argument could be made for the fact that the current SEAC opinion introduces the possibility to extend the derogation even further on the "say so" of the two companies. How this can even be considered to be an incentive for substitution is baffling to me. It also undermines the goal of "creating more clarity". It is assumed that if an alternative will not be ready-to-use by that date, the restriction will be amended again. Therefore there is no clarity about the actual end date and therefore the provided justification does not seem supportable.

This addition to the opinion is also not corroborated by the information which was presented to us in the dossier and by a representative of DOW in SEAC meeting 23 (10-13 june 2014). For AAK you can take a look at the earlier quote where they clearly state that the new production method will be in place by 2025 at the latest. Dow on the other hand actually seem to have downplayed their ability to substitute since large scale testing (1/3rd of the total diaphragms) of their asbestos free alternative has been underway for quite some time and providing satisfactory results (SEAC-23 meeting). The restriction dossier also states that Dow has enough stock to last until the end of the derogation in 2025. This is in direct contradiction with statements made by the DOW representative in SEAC-23 where there was a mention of a "voluntary agreement" to end imports in 2017[1].

2. Timing

The annex XV dossier states that Dow is currently undertaking production level testing with a view to adopt a chrysotile-free diaphragm. These results will be known in 2015 after which an informed decision will be taken by the company.

[1] In the SEAC 24 meeting (9-12 september) the Dow representative stated that that further "small" imports could be necessary because the quality of this mineral can be very variable. This has also been reflected in the SEAC-proposed wording of the restriction.

[2] This is corroborated by the European Court of Justice judgment of 7 March 2013 (case C-358/11) which says: that " *…derogation from restrictions under REACH are exceptional and must be interpreted strictly*"

It would therefore have been more appropriate to wait until 2015 when reliable results for the feasibility of alternatives are known. Now the committees had and the Commission has to work off of insufficient data to really take an informed decision. Data which comes solely from a consultation with the two applicants[3]. This has led to Dow having a pessimism bias[4].

3. Alternatives

Let's disregard for clarity's sake that the alternatives assessment is based on outdated information (BIPRO study, for example, dates from 2006).

An article in the peer-reviewed Journal of Applied Electrochemistry (issue 19, 1989[5], pp 571-579) states:

"*New capacities installed in Western Europe, the USA and Japan since 1984 are without exception based on membrane cell technology. Membrane cell technology is economically and technically superior to the two older technologies. (…) It is estimated that this process could take 30 years until all diaphragm cells are replaced by membrane cells.*"

According to this peer-reviewed statement Dow's plant must be older than 1984 or older than the 30 years which were needed to replace all diaphragm cells. From this it becomes extremely evident that they have a very narrow view on what is considered to be a suitable alternative. Which explains why they have been overly reluctant to do what other chlor-alkali plants (among which the Dow Schkopau chlor-alkali plant, but also the Stade plant itself[6]) have already done and what is considered to be a clear objective within the European Union, to wit, the phasing out of all uses of asbestos. Dow acknowledges this objective since it has been searching for over 40 years to find a suitable alternative for their very specific situation. After 40 year however, one should stop having such an overly strict view of what a suitable alternative is and look at the other available and viable options which are clearly out there… ECHA's committees would raise serious concerns if the arguments put forth in this restriction dossier, were made in an AoA as part of an application for authorization[7].

CONCLUSION:

In light of the above I cannot agree to the majority position of SEAC.

SIMON COGEN

[3] During the COM review of the derogation in 2008 ETUC also faulted the Commission for having such a limited view.

[4] See document SEAC/18/2013/03 "How the Committee for Socio-Economic Analysis will evaluate economic feasibility in applications for authorization" for a definition of "pessimism bias"; http://echa.europa.eu/documents/10162/13580/seac_authorisations_economic_feasibility_evaluation_en.pdf

[5] The paper itself was already presented in 1987 (see first page of the article).

[6] According to the 2013 annual review report by Eurochlor 1/3rd of the nameplate capacity is produced with membrane cell technology. http://www.eurochlor.org/media/70861/2013-annualreview-final.pdf

[7] See SEAC-22 minutes point 7.1.A.1 on the ECHA website regarding the authorization application of ARKEMA, DEZA and ZAK.