EEB main comments on the HAZBREF WP 3.1

On this page we list, in decreasing order of importance, the main points of criticism EEB would like to make on the final draft of the HAZBREF WP 3.1 document, published in November 2019.

1. IED-incompatible interpretation of the word 'hazardous'

Any reading of word 'hazardous [chemical]' in the meaning of the IED must include substances classified under CLP (or fulfilling the classification criteria) and persistent substances, as well as SVHCs and substances restricted under REACH. As it stands the focus seems to be recognised SVHC or otherwise already restricted substances only.

This point is detailed on the following pages.

2. Useful document for policy coherence

Overall this document is comprehensive, clear and balanced. If implemented, usefully serves the objective of increased coherence between pieces of European legislation as well as of increased environmental and human health protection.

3. REACH is not a Swiss army knife

Throughout the text, comments on REACH appear to overstate the effectiveness or ambition of REACH. These statements should be assessed, amended for complemented by references to REACH articles as appropriate.

4. Information available on substitutes

The text should mention substitution guides[1] and websites[2] as sources of information and that substitutability functionalities should be included in ECHA's databases. The end objective served by improving synergies or effectiveness of the various instruments i.e. achieving an improved level of environmental and human health protection as well as implementing the circular economy objectives to achieve the new EU Green Deal 'Zero pollution ambition for a toxic free environment' should be highlighted. Substitution is a key (BA)Technique to achieve this. Practical workflow procedures could be further highlighted. In this regard we would like to highlight in particular the 9 Golden Rules for sustainable chemicals developed by the UBA. Those rules are key assessment criteria for assessing better alternatives in the BAT selection process relating to chemicals management in accordance to the wider IED objectives to address resource use and the integrated approach regarding industrial activities.

In addition to this, it should mention that industrial actors generally have access to non-public information from chemical suppliers, sector-specific and company-specific expertise and a workforce that includes trained and skilled development scientists.

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[1] Such as the German UBA's "Guide on Sustainable Chemicals" https://www.umweltbundesamt.de/sites/default/files/medien/479/publikationen/161221_uba_fb_chemikalien_engl_bf.pdf

[2] Such as ChemSec's Marketplace.

5. Lack of references to the Biocidal Products Regulation (BPR)

Biocidal products are used pervasively in many industries to preserve, protect and sanitise products and equipment. Biocidal active substances are normally hazardous substances;[3] therefore, links to the BPR need strengthening.

6. No reference to IED Art. 58

This article obliges certain industries to substitute substances that present certain hazards; therefore, this article should be acknowledged in the WP 3.1 document.

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[3] CLP Art. 36 (2), as well as provisions in the BPR (Regulation 528/2012).

This document analyses, explains and summarises the use of the word "hazardous" in European legislation when referring to certain chemicals. For policy coherence and effectiveness, the development of horizontal IED guidelines for dealing with hazardous chemicals (HAZBREF) project should ensure its interpretation is aligned with the IED provisions.

Hazardous chemicals: interpretation guide

Different pieces of European legislation refer to and deal with different aspects and types of chemicals, most importantly hazardous chemicals. Importantly for the HAZBREF project, the IED stipulates (Annex III point 2) that the *use of less hazardous substances* is a central criterion for setting BATs, hence the information exchange.

Lack of a definition

In its article on definitions, the IED[4] defines 'hazardous substances' (Art. 3 (18)) by referring to Art. 3 of the CLP regulation[5], the regulation on hazard classifications for chemical substances and mixtures and on the hazard identification process. Art. 3 of CLP reads as follows: *[…] A substance […] fulfilling the criteria relating to […] hazards, laid down in Parts 2 to 5 of Annex I is hazardous […]*

At least five aspects are worth highlighting about this statement:

1. The hazards listed in Annex I are: physical (part 2), health (part 3), environmental (part 4) hazards and hazards to the ozone layer (part 5);
2. It does not define 'hazardous', but refers to a list of hazard classes;
3. It has the form of a logical consequence, i.e. p ➔ q, not of an equivalence p ➔➔ q. One may thus logically not infer from this that "a hazardous substance fulfils the criteria […]" or even "a substance not fulfilling the criteria […] is not hazardous". In still other words, CLP acknowledges hazards (but not hazard classifications) outside Parts 2 to 5 of Annex I;
4. The condition is 'fulfilling' the criteria, not 'being classified';
5. All classifications laid down in CLP Annex I Parts 2 to 5 are included when one refers to 'hazardous chemicals'.

Therefore, the term 'hazardous substances' in the IED necessarily refers to all substances in CLP Annex VI, but is not restricted to this list.

It is worth noting that REACH[6] refers to 'hazardous chemicals' in many instances, but it does not provide a definition either.

[4] Industrial Emissions Directive 2010/75/EU
[5] Regulation 1272/2008
[6] Regulation 1907/2006

Additional hazards in REACH

Inclusion of substances in the Authorisation (Title VII) and Restriction (Title VIII) procedures is based on identified risks (Art. 55 and Art. 68 (1), respectively). The identification of a risk logically implies the existence of a hazard. Such a hazard often corresponds to a CLP classification, but is not limited to it: other hazards may justify inclusion in the Restriction or Authorisation list (i.e. Art. 57 (d-f)).[7]

Hazard through persistence and bioaccumulability

Hazards recognised under REACH Art. 57 (d-e) and specified by REACH Annex XIII, i.e. PBT and vPvB, are not part of CLP Annex I Parts 2-5. Nevertheless, the existence of these hazards is explicitly acknowledged in CLP recital (75) and Art. 53 (2) and was described in 2008 as a need for CLP to adapt to scientific and technological progress.

Hazards related to persistent chemicals are also acknowledged and regulated in the legislation covering biocides[8] and plant protection products[9], as well as, rather obviously, in the legislation on persistent organic pollutants[10].

More importantly, Annex II to the IED also lists "persistent hydrocarbons and persistent and bioaccumulable organic toxic substances" as water pollutants.

For these reasons, it appears undisputable that PBT and vPvB hazards must also be considered as chemical hazards in the IED.

Other hazards according to REACH Art. 57 (f)

Substances can be included on a case-by-case basis in the Authorisation list (and the SVHC list) via REACH Art. 57 (f) if they "give rise of an equivalent level of concern" (ELoC) to CMRs, PBT and vPvB substances. Hazards giving rise to ELoC may include endocrine disruption and sensitisation and may also apply to some persistent substances.[11] In addition, ELoC could probably apply to substances with a strong climate impact, such as some halogenated gases.[12]

Hypothetical impact of an interpretation tweak

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[7] Although most restrictions are based on harmonised classifications under CLP, there are some exceptions, such as some substances in restriction #52. The Venn diagram in the annex illustrates this.
[8] Regulation 528/2012
[9] Regulation 1107/2009
[10] Regulations 850/2004, 756/2010 and 757/2010, 2019/1021
[11] E.g. substances that do not meet the PBT or vPvB criteria but display persistent and biaccumulable properties.
[12] Unless they have already been classified as ozone-depleting (CLP Annex I Part 5) or identified as potent greenhouse gases by Regulation 842/2006.

The statistical analysis in the annex of this document shows the high proportion of hazardous substances that would not be scrutinised if the IED wording were bent to an interpretation in the direction of REACH SVHCs.

Conclusion

The wording of the IED does not allow for any narrow interpretation of the term 'hazardous', nor indeed to exempt certain types of hazards or any regulatory status of a substance from scrutiny in processes regarding hazardous chemicals, most importantly setting BATs.

Consequently, any reading of word 'hazardous [chemical]' in the meaning of the IED must include the following:

1. **Substances with harmonised classification under CLP,**
2. **Substances fulfilling the criteria for (1),**
3. **Substances with hazards related to persistence,**
4. **Substances that meet the properties of being SVHCs as per Art. 57 of REACH, candidate list SVHCs as per Art. 59 and substances restricted under REACH.**

Annex

Logical and numerical analysis of the different hazard types

As explained above, the hazards related to a chemical substance, and its regulatory implications can be described in several dimensions:

- A certain hazard property of a substance can be recognised or not,
- A substance can have none, one or multiple hazards,
- Hazards can be recognised by CLP, REACH or both,
- A substance may be restricted under REACH or not,
- A substance may be registered under REACH or not.

To gain a better understanding of the number of substances (with or without recognised hazards) that would not be scrutinised if HAZBREF attempted to narrow down the concept of 'hazardous' beyond the IED meaning, we have analysed the following lists available from ECHA:

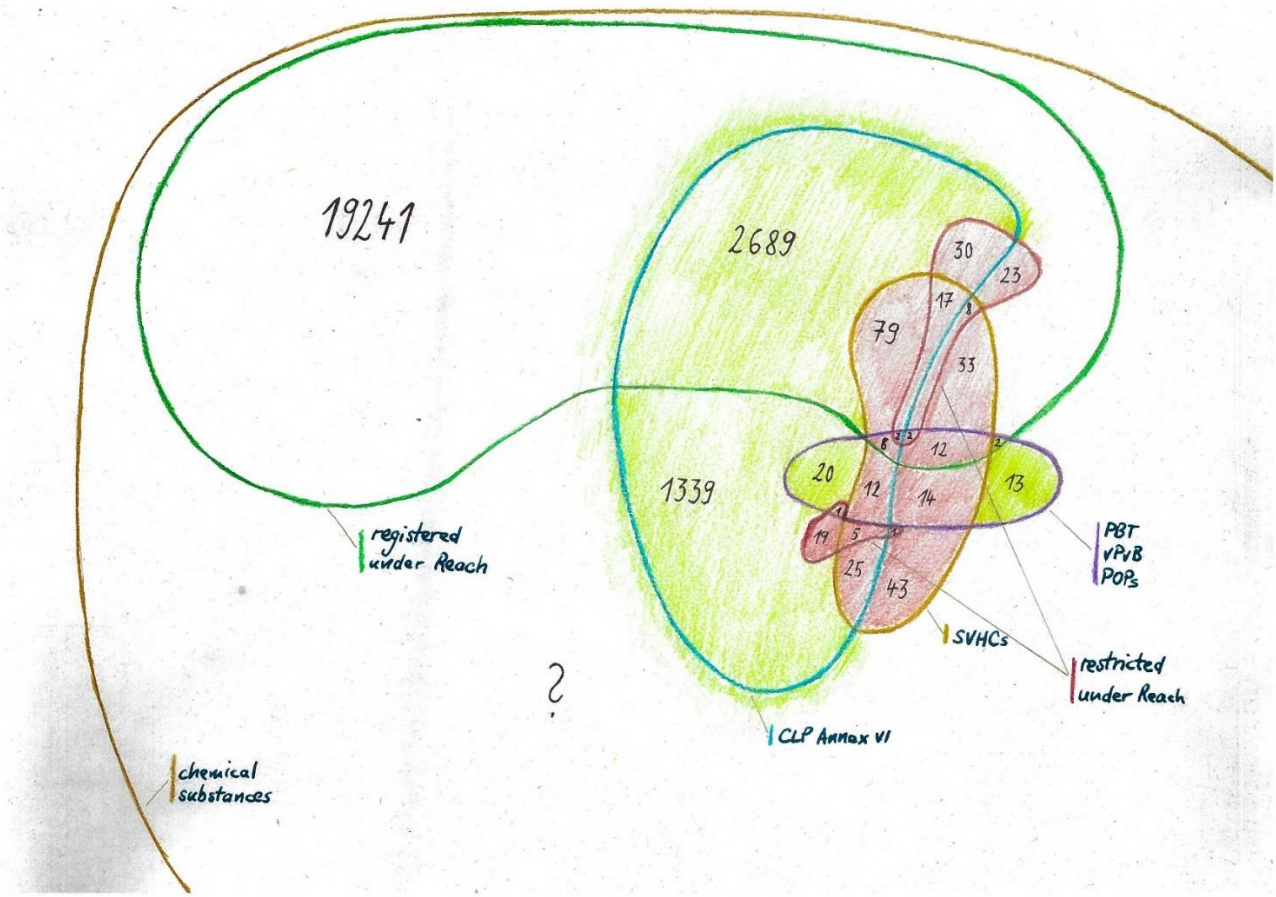
- Th_e list of substances registered under REACH,[13]
- The list of substances with harmonised classification under CLP,[14]
- The Candidate List of SVHCs,
- The list of substances restricted under REACH,
- For PBT/vPvB/POPs, the lists of SVHCs included under Art. 57 (d-e) and the substances listed in the POPs regulation.

We have only included those substances that have an EC code in order to streamline the analysis.[15] All lists were reduced to unique entries by removing potential duplicates. We then counted the number of substances contained or not in the different lists. The figure below gives an overall impression of the number of substances in the different regimes. Areas do not scale accurately with the number of substances but are intended to illustrate relative magnitudes.

[13] Status September 2019

[14] Annex VI of CLP, ATP13

[15] It should be borne in mind that this exercise is not about the exact number of substances, but about orders of magnitude. Relying on substances with EC codes made analysis substantially easier and should not compromise validity of the results.



The area filled in red represents the hazard types on which the current HAZBREF document appears to focus (or in some instances: to restrict itself); the area filled in light green[16] must be added to be aligned with the provisions of the IED.

While the numbers of substances in the green area is impressive and may appear as a bureaucratic monster, it should be borne in mind that electronic chemicals management systems are commonplace and often mandated by BAT and quality or environmental certifications.

A high level of environmental protection is obviously not achieved with a substance-counting exercise: while the SVHC list is very likely populated with many of the most problematic substances, it is evident that the term 'hazardous substances' may not be interpreted in such a restrictive manner, but must include all hazard types.

[16] The light green colouring fades out only outside the area of CLP Annex VI substances. This illustrates that an unknown number of substances fulfil the CLP hazard criteria but have not received harmonised classification.