To Whom It May Concern,

As representatives (Manager of) of the Chromium Trioxide Authorisation Consortium (‘CTACSub Consortium’), we would like to draw your attention to the current Resolution XYW before the JURI Committee of the European Parliament related to the granting of a REACH Authorisation for the use of Chromium Trioxide for several uses in several industrial sectors (*Chemservice et al*).

The CTACSub application was granted a REACH Authorisation after nearly 6 years in the Decision-making process. During the course of this process, there were thorough discussions with the experts of the European Chemicals Agency (ECHA) Risk Assessment Committee (RAC) and the Socio-Economic Committee (SEAC), the European Commission and amongst the Member States within the REACH Committee.

**The conclusion from all of these discussions has been that this Authorisation should be granted.**

Furthermore, on July 10, 2020, a Resolution came before the Plenary of the European Parliament in a related (similar) application. In this Resolution, the Parliament itself concluded that the European Commission had **NOT exceeded** the powers granted to it under the REACH Regulation in the then draft decision.

Furthermore, to address uncertainty around the possibility of the availability, or not, of suitable alternatives generally available the Commission removed one of the uses from the current Decision, holding it back for further clarification while moving forward with the uses for which it was clear that suitable alternatives were not available.

We would like to emphasise that this application impacts many essential industry sectors including, aerospace, automotive, defence, construction, printing, textile, machinery, steel, steel for packaging and other sectors that are critical to the good functioning of the European Union and on which many thousands of jobs rely. Moves to annul the Decision will re-introduce uncertainty for these economic actors at a period of already unprecedented negative economic pressures.

In a previous EU court case on another REACH authorisation (T-837/16), the General Court concluded that the respective application for REACH Authorisation did not meet the burden of proof set-out under Article 60(4) of the REACH Regulation. This conclusion was supported by the fact that uses of the substance in that application had been substituted in 2 EU Member States and Norway, and this conclusion of availability of alternatives was further supported during the public consultation on that application by several industrial associations of actors.

**This is simply not the case for the CTACSub application** and, therefore, parallels cannot be drawn between the 2 applications.

In **Annex 1** to this letter, and for your information, we have prepared a legal analysis of the differences between the case T-837/16 and the situation of the CTACSub application.

We, therefore, urge the Members of the European Parliament to object to the initiative in the JURI Committee (to be voted on February 22, 2021) to initiate a legal challenge at the EU Courts (Rule of Procedure 149, no Resolution in Plenary required in principle) against the CTACSubSub authorisation decision.

Please also note the following:

* The Decision is the basis for continued use of chromium trioxide in approx. 1500-2000 companies in the European Union. These companies do not have and cannot afford their own applications for REACH authorisation. A company specific REACH authorisation costs approx. EUR 200,000 (for a period of 7 – 12 years), and the same amount for periodic renewal thereafter.
* REACH authorisations for similar uses of chromium trioxide were granted by the European Commission to individual applicants with long review periods. These were not challenged by the European Parliament. Challenging an upstream authorisation (such as CTACSub) which mostly benefits SMEs is not fair.
* The CTACSub applicants invest into substitution and actively run R&D programs to substitute hex chrome. There is a long experience in hex chrome substitution. In the analysis of alternatives of the application for authorisation, the applicants took other technologies, like PVD, Thermal Spraying from third parties into account.
* Third party companies that offer alternatives are not obliged to disclose the details of their technologies in the authorisation processes. Consequently, only basic marketing information is very often available but no solid evidence that these technologies are technically feasible.
* RAC, SEAC, the public and the Commission were able to scrutinize the alternative research, taking economic feasibility, technical feasibility and healthy/environmental risks of alternatives into account.
* The uncertainty that would be created by the European Parliament court challenge which would persist for at least three years (pending the EU Court proceedings) would create substantial economic uncertainty for the concerned companies. They will not make investments, receive loans for any investments, and they will not create jobs. They may dislocate to outside the EU if they can, or they may close their shop. Note that Chromium trioxide can be used for similar uses outside the EU and treated articles can be imported into the EU without any restrictions.

Should you need further information, we are at your disposal to further discuss.

Thank you for your time.

Kind regards,

**Annex 1: Differences[[1]](#footnote-1) between the CTACSub (*Chemservice et al)* REACH Authorisation Decision and the**

**DCC Maastricht Lead Chromates[[2]](#footnote-2) REACH Authorisation Decision (each ‘AD’)[[3]](#footnote-3)**

| **1,2,3,4** | **Issue** | **DCC AD** | **CTACSub AD** | **General Court Appraisal** | **Comment Jones Day** |
| --- | --- | --- | --- | --- | --- |
| 1 | Uncertainty in relation to availability of alternatives | Recital 12:  The authorisation should therefore be subject to the condition that the authorisation holder submits a report on the status of the suitability and availability of alternatives for his downstream users and on that basis refines the description of the authorised uses | Recital 16:  The Commission considers that, given the economic and other incentives towards substitution that already arise from inclusion in the authorisation system, and in the light of the objective of progressive substitution, as a starting point, the Commission should not consider a potential alternative to be technically viable where such losses to performance or technical compromises are not minor. Nevertheless, the Commission considers that it must be possible to depart from this approach where justified by particular circumstances, including the specific function of the substance for the use applied for, the public interests at stake, or a low net difference between the socioeconomic benefits and the risk to human health or the environment. The Commission considers that no particular factors justify less strict technical feasibility requirements in this case as regards uses 1, 2, 4, 5 and 6. Where the Commission is able to conclude on lack of technically feasible alternatives to the substance, it is unnecessary to consider economic feasibility of substitution.  Recital 19:  In order to ensure that the authorisation covers only those uses for which no suitable alternatives are available, it is necessary to further specify the description of uses 2, 4 and 5 by aligning it with the conclusions of the analysis of alternatives as presented in the application and as assessed by SEAC. The Commission considers that the applicants have discharged their burden of proof in demonstrating the absence of suitable alternatives as regards uses 2, 4 and 5, only with regard to such limited scope of the uses.  Recital 20  Therefore, the description of uses 2, 4 and 5 should be further specified by referring to uses where any of the following key functionalities is necessary for the intended use: wear resistance, hardness, layer thickness, corrosion resistance, coefficient of friction, and effect on surface morphology concerning use 2; corrosion resistance/active corrosion inhibition, chemical resistance, hardness, adhesion promotion (adhesion to subsequent coating or paint), temperature resistance, resistance to embrittlement, wear resistance, surface properties impeding deposition of organisms, layer thickness, flexibility, and resistivity concerning use 4; corrosion resistance/active corrosion inhibition, layer thickness, humidity resistance, adhesion promotion (adhesion to subsequent coating or paint), resistivity, chemical resistance, wear resistance, electrical conductivity, compatibility with substrate, (thermo) optical properties (visual appearance), heat resistance, food safety, coating tension, electric insulation, and deposition speed concerning use 5.  Recital 22  The Commission, having evaluated SEAC’s assessment, and taking the above considerations into account, agrees with the conclusion that there are no suitable alternative substances or technologies for uses 2, 4 and 5.  Recital 27:  Furthermore, in order to facilitate the enforcement of this Decision, with regard to uses 2, 4 and 5, it is necessary to require the authorisation holders’ downstream users to include in the notification sent to the Agency pursuant to Article 66(1) of Regulation (EC) No 1907/2006, an explanation of the key functionalities listed in Article 1(1) of this Decision which are necessary for their use, including a justification why they are necessary for that use. | Para 64:  the Commission must, in the context of good administration and taking into account its duty of care, play its part, using the means available to it, in ascertaining the relevant facts and circumstances  Para 67:  Where there is no information which seriously casts doubt on the opinions of those ECHA committees, the scientific analysis contained in such an opinion may, in principle, be sufficient to enable the Commission to grant or refuse an authorisation in accordance with Article 60(4) of Regulation No 1907/2006, without there even being any need for additional scientific assessments by the Commission.  Para 79:  Therefore, where, in spite of the submission of evidence by the various stakeholders involved in the authorisation procedure, including evidence which the Commission has collected by its own efforts, there remain uncertainties as regards the condition relating to the lack of availability of alternatives, it must be concluded that the applicant for authorisation has not discharged the burden of proof and, therefore, that he cannot be granted authorisation. In that context, it is also worth noting that none of the stakeholders involved in the authorisation procedure or, moreover, ECHA or the Commission is required to prove the opposite of the condition relating to the absence of alternatives, that is to say that alternatives do exist.  Para 81:  If, after the examination concerning the lack of availability of alternatives, there exist only hypotheses, it must be concluded that the specific conditions provided for in Article 60(4) of Regulation No 1907/2006 are not fulfilled and that the Commission is therefore not entitled to grant an authorisation, even one which is conditional.  Para 82:  ..the conditions imposed in accordance with Article 60(8) and (9)(d) and (e) of Regulation No 1907/2006 cannot purport to remedy any shortcomings in an application for authorisation or in the analysis of alternatives submitted by an applicant for authorisation or any deficiencies in the Commission’s examination of the conditions provided for in Article 60(4) of Regulation No 1907/2006.  Para 83:  In other words, the possibility of attaching certain conditions to an authorisation, as provided for in Article 60(8) and (9)(d) of Regulation No 1907/2006, cannot be interpreted as allowing the Commission to leave open the question of whether the conditions of Article 60 of Regulation No 1907/2006 have been met and to respond to that situation by attaching to that authorisation conditions purporting to remedy any deficiencies or gaps in the assessment incumbent on it under that latter provision.  Para 85:   If, following examination of the condition relating to the lack of availability of alternatives, as provided for in Article 60(4) of Regulation No 1907/2006, there remain uncertainties relating to the scientific assessment which it was possible to dispel neither with the evidence adduced by the applicant for authorisation, at the request of either the Commission or one of the ECHA committees, nor with the information gathered by the Commission or those committees or even by third parties or Member States, it must be concluded, as has been pointed out in paragraph 81 above, that in principle that condition is not fulfilled and that the Commission is therefore not entitled to grant an authorisation, even one which is conditional.  Para 86:  At the time of the adoption of that decision, the Commission had in its possession both information supporting and information refuting the absence of technically viable alternatives for all the uses referred to by the application and no clear conclusion could yet be drawn in that regard. | In the DCC case, several Member States had prohibited the use of the substances for certain uses applied for, thereby casting doubt on non-availability of alternatives.  Also ECHA (SEAC) according to the General Court was contradictory on this point.  The General Court (as also advocated by the Advocate General (‘AG’) in the appeal of this case[[4]](#footnote-4) and on reasons of proportionality, does not require that all uncertainty must be eliminated. There needs to a reasonable standard of proof (para 57, AG opinion). The Commission cannot act on assumptions on unavailability of alternatives (para 59 AG opinion). |
| 2 | Tonnage | Recital 13 DCC  In order to ensure that the quantities of lead sulfochromate yellow and lead chromate molybdate sulphate red placed on the market for the uses within the scope of this authorisation do not increase above the quantities reported in the application for EN 5 EN authorisation, it is appropriate to accordingly define maximum annual tonnage limits for each substance. |  |  | The fact that there is uncertainty about tonnage and the Commission assumes in theory that tonnage can increase adds substantial uncertainty.  This is not the case for CTACSub, as the conditions for use of chromium trioxide are clearly related to key functionalities and their justification must be notified to ECHA and can be enforced. Increased tonnage is therefore not possible. |
| 3 | Uncertainty available alternatives | Art 1(1)  Subject to the conditions in paragraph 3, an authorisation is granted in accordance with Article 60(4) of Regulation (EC) No 1907/2006 for the following uses of lead sulfochromate yellow (EC No 215-693-7, CAS No 1344-37-2), under the condition that the performance of the pigment premixes, paints and pre-compounds containing that substance, or of finished articles containing them, in terms of shade functionality and chroma, opacity (hiding power), dispersibility, durability (light and weather fastness), heat stability or non-leaching behaviour, or a combination thereof, is technically achievable only by using that substance and that such performance is necessary for the intended use | Art. 2 (2)  An authorisation for the use of chromium trioxide is not granted for functional chrome plating where none of the key functionalities listed in paragraph 1 regarding that use is necessary for the use. |  | Because in CTACSub the use of the substance is only granted authorisation if key functionalities clearly named in the decision are required and this is enforced via Art. 66 notification of the key functionalities and justification thereof and national inspections, the conditions of use are set out clearly and use is only possible if the conditions are met. Therefore no uncertainty.  The key functionalities cannot be met by alternatives. See Recital 22. |
| 4 |  | Art. 1(3)(c)  the amount of lead sulfochromate yellow placed on the market by the authorisation holder for the uses referred to in paragraph 1 shall not exceed 2100 tonnes per year and the amount of lead chromate molybdate sulfate red placed on the market by the authorisation holder for the uses referred to in paragraph 2 shall not exceed 900 tonnes per year; |  |  | See above at 2) |
| 5 |  | Art. 1(3)(d)  for all the uses referred to in paragraphs 1 and 2, the authorisation holder's downstream users to whom this Decision applies by virtue of Article 56(2) of Regulation (EC) No 1907/2006 shall submit no later than by 30 June 2017 to the European Chemicals Agency (‘Agency’), for transmission to the authorisation holder, information on the status of the suitability and availability of alternatives for their use(s), providing a detailed justification of the need to use lead sulfochromate yellow or lead chromate molybdate sulfate red, including information on the status of the performance requirements referred to in those paragraphs, as well as any national legal requirements; | Art. 5  As regards authorisation bearing numbers REACH/20/18/7 to REACH/20/18/27, the downstream users shall include in the notification to the Agency pursuant to Article 66(1) of Regulation (EC) No 1907/2006 an explanation of the key functionalities of chromium trioxide EN 13 EN listed in the Article 1(1) which are necessary for their use, including a justification why such key functionalities are necessary for that use. |  | Contrary to DCC where authorisation holders have to submit report on availability of alternatives to Commission, this is not the case for CTACSub. Commission clearly stated that no alternatives available for uses authorized (Recital 22).  Authorisation holders are only asked for purposes of enforcement to submit within 3 months of publication of the authorisation decision their status on compliance with key functionalities concept. |
| 6 | How to deal with uncertainty | Art. 1(3)(e)  The authorisation holder shall submit a report to the Commission on the elements referred to in point (d) by 31 December 2017 with regard to the uses with authorisation numbers REACH/16/3/0, REACH/16/3/1, REACH/16/3/3, REACH/16/3/4, REACH/16/3/6, REACH/16/3/7, REACH/16/3/9 and REACH/16/3/10. In the report, the authorisation holder shall also refine the description of the authorised uses, based on information on alternatives provided by downstream users within its supply chain. |  |  | See above at 5).  Also, there is no uncertainty on uses. The uses are known. |
| 7 | How to deal with uncertainty | Art. 1(4)  The authorisation of the professional, non-consumer application of paints as road marking and of the professional use of solid or liquid colour premixes and precompounds containing pigment in the application of hot melt road marking, referred to in paragraphs 1 and 2, shall not apply in Member States where a national measure in force on the date of this Decision prohibits the use of the substances referred to in paragraphs 1 and 2 in road marking applications. |  |  | Indicates that in the DCC case, alternatives seem to be available. |
| 8 | How to deal with uncertainty | Art. 3(b)  At the request of the competent authority of the Member State where the authorised use takes place, the downstream users to whom this Decision applies by virtue of Article 56(2) of Regulation (EC) No 1907/2006 shall substantiate why the conditions of Article 1(1) and (2) apply and why the performance parameters are necessary for the intended use. |  |  | See above at 5) |
| 9 | Level of performance of alternatives |  |  |  | In the appeal to the DCC decision, the AG states Para 84:  My understanding of that approach is that a suitable alternative is technically feasible only if it offers, for the intended uses, the same technical performance as the substances at issue.  AG Para 90:  …the assessment of suitable alternatives must be assessed concretely in light of the relevant circumstances and capacities of the alternative to carry out the function of the substance for the uses applied for. By establishing a threshold for loss of technical performance without taking account of the function to be fulfilled by the substance for which that performance is necessary in the uses applied for, such an approach disregards the fact that technical feasibility of the alternative should be assessed against the function to be performed for the intended use and not against the performance of the substance of very high concern.  It follows that there has to be an assessment relevant to the function in a specific case. By inserting the key functionalities and justification thereof for the individual Downstream users into the text of the authorisation decision of CTACSub, that requirement is fulfilled. |

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1. These comparison is submitted by Jones Day. Jones Day law firm act as the Consortium Manager for the CTACSub REACH authorisation consortium for certain uses of chromium trioxide. For further information, please contact Ursula Schliessner at +32-2-6451460 or mail uschliessner@jonesday.com. [↑](#footnote-ref-1)
2. DCC Maastricht Lead Chromates REACH AD was subject to the General Court decision T-837/16. [↑](#footnote-ref-2)
3. Both available from this link: <https://ec.europa.eu/docsroom/documents/44775> [↑](#footnote-ref-3)
4. [http://curia.europa.eu/juris/document/document.jsf?text=1907%252F2006&docid=233045&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=  
   1&cid=2845227#ctx1](http://curia.europa.eu/juris/document/document.jsf?text=1907%252F2006&docid=233045&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2845227#ctx1) [↑](#footnote-ref-4)