

Forum

Advice on enforceability of the Annex XV restriction proposal regarding “Creosote and creosote-related substances”

Adopted on 30 May 2023



Advice of the Forum on the enforceability of an Annex XV restriction proposal

Preface

According to Article 77(4) of the REACH Regulation, the Forum shall examine proposals for restrictions with the view to advising on enforceability.

This advice was elaborated according to the Working Procedure for developing Forum advice on enforceability of the Annex XV proposals for restriction and the Activity Plan of the Forum Working Group (WG) on enforceability of the proposed restriction. In January 2023, the Forum received the Annex XV report submitted by France concerning the proposal for a new entry in Annex XVII.

Proposed restriction**Brief title: Restriction on creosote and creosote related substances**

Column 1: Designation of Substance, of the group of substances or of the mixture	Column 2: Conditions of Restriction
<p>(a) Creosote; wash oil EC number: 232-287-5. CAS number: 8001-58-9.</p> <p>(b) Creosote oil; wash oil EC number: 263-047-8. CAS number: 61789-28-4.</p> <p>(c) Distillates (coal tar), naphthalene oils; naphthalene oil EC number: 283-484-8. CAS number: 84650-04-4.</p> <p>(d) Creosote oil, acenaphthene fraction; wash oil EC number: 292-605-3. CAS number: 90640-84-9.</p> <p>(e) Distillates (coal tar), upper; heavy anthracene oil EC number: 266-026-1. CAS number: 65996-91-0.</p> <p>(f) Anthracene oil EC number: 292-602-7. CAS number: 90640-80-5.</p> <p>(g) Tar acids, coal, crude; crude phenols EC number: 266-019-3. CAS number: 65996-85-2.</p> <p>(h) Creosote, wood EC number: 232-419-1. CAS number: 8021-39-4.</p> <p>(i) Low temperature tar oil, alkaline; extract residues (coal), low temperature coal tar alkaline EC number: 310-191-5. CAS number: 122384-78-5.</p>	<p>1. Wood treated with such substances shall be placed on the market in the conditions and derogations defined by the BPR.</p> <p>2. Wood treated with such substances and placed on the market in accordance with paragraph 1: a. shall not be reused or subject to secondary use ; b. shall not be placed or made available on the second-hand market.</p> <p>3. By way of derogation to paragraph 2.a, wood treated with such substances can be reused for the same use in the same country, under similar conditions and by the same original user.</p> <p>4. Once considered as waste, treated wood referred to under paragraphs 1 and 3 should be handled as hazardous waste according to the waste directive framework 2006/12/EC (Art. 17).</p> <p>5. The restriction shall apply 12 months after its entry into force.</p>

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Abstract

The Forum considers that the conditions and range of conditions of the restriction proposal are well described. Regarding the wording of the proposal, the Forum considers that the following definitions might require further explanation: "reuse", "secondary use", "treated" or "second-hand market". Regarding paragraph 2, the Forum has doubts whether the restriction applies to wood treated with the substances in the scope of the restriction proposal before 2003. It is not clear for the Forum how the restriction targets treated wood with creosote that is already in use, especially if the treatment was made according to older legislation previous to BPR

Scope of the restriction

Issues for enforceability related to the proposed scope

The Forum acknowledges that reuse is banned except for the original user, so the general impression is that the proposed scope would have as a result an enforceable restriction.

Sampling, sample preparation and analysis of substances

The Forum assumes that sampling, if necessary, might be feasible for inspectors, despite the fact that taking sleepers or poles as samples would not be simple. Another point that must be considered is the effect of weather conditions on the wood, whose impregnation layer would be

undergoing decomposition and rinsing out of components of the creosote oil.

The Forum acknowledges that the preparation of samples for determining the content of the restricted components will depend on the part of wood that is sampled.

The Forum also considers that it would be appropriate to include the four specific marker PAHs (acenaphthene, phenanthrene, fluoranthene and pyrene) in the restriction proposal too, in line with the suggestions made by a stakeholder. The identification of these four PAHs in a piece of wood sampled for analysis would reveal that it has been treated before with creosote. However, Forum anticipates that inspectors in most cases will enforce this restriction by checking documentation or asking the resellers for other relevant additional information.

There is no limit value for the restricted substances. the Forum recommends setting a limit value in case an analysis is required to verify the compliance of the conditions of the restriction proposal. For this case, an analytical method might be needed to analyse the restricted PAHs that could appear in the treated wood.

Wording of the restriction

The Forum considers that the wording of the proposal is clear, but the following terms will require a more precise definition to avoid loopholes and different interpretations by dutyholders and enforcement authorities: "*reuse*", "*secondary use*", "*treated*" and "*second-hand market*". Besides, the Forum has pointed out some additional expressions that might need further explanations.

Recommendations on the wording to improve the enforceability:

Firstly, Forum recommends that paragraph 1 refers to authorisation conditions in the BPR, to avoid confusion as the BPR does not directly restrict substances. A reference to the REACH restriction in the version of Regulation (EC) No 1907/2006 may be made in that paragraph 1: entry 31 in the Annex to REGULATION (EC) No 552/2009 amending REACH as regards Annex XVII.

Regarding paragraph 2, the Forum has doubts whether the restriction applies to wood treated with the substances in the scope of the restriction proposal before 2003. It is not clear for the Forum how the restriction targets treated wood with creosote that is already in use, especially if the treatment was made according to elder legislation previous to BPR.

Forum recommends that the ban of second-hand usage for others than the original users would be in accordance with paragraph 3. A possible rewording of paragraph 2 should be: *“Wood treated with such substances should not be placed on the market or made available irrespective of the date of impregnation with these substances for other purposes than exempted in paragraph 3”*.

Finally, the reference of the Waste Framework Directive in paragraph 4 should be updated with the most recent version.

Practicability/Enforceability***Enforceability***

The Forum considers that the proposal for restriction is enforceable.

Practicability

There is a doubt about the practicability of the labelling of the treated wood. It has been assumed that if reuse by the same actor is not possible for consumers and no distribution occurs in those Member States not included in the ECHA list (established according to BPR for those MS that had expressed their need of having creosote treated wood), labelling and sampling requirements would be unlikely to be needed.

Enforcement costs

The Annex XV dossier does not provide any information about the costs for enforcement authorities, but it is expected that the amendment would not cause considerable additional efforts or costs compared to the current version of the restriction in entry 31.

Miscellaneous

The Forum recommends including the date from which the restriction applies in the legal text (it is known that the restriction shall apply 12 months after its entry into force).

The change from the old restriction to the new one may lead to some loopholes, such as the mentioned use of treated woods that were placed on the market before the entry into force of the new restriction. The Forum suggests mitigating this confusion with a restriction on the use of treated woods.

In addition, linking the restriction to the BPR authorisation conditions can also lead to future difficulties when these conditions are changed.

Paragraph 2b of the proposed restriction refers to "making available on the {second hand} market", a term not in use under the REACH Regulation. Therefore, no reference to "making available on the {second hand} market", but only to "placing on the {second hand} market" should be included in paragraph 2b of the proposed restriction.