



REACH Post Registration: Next Challenges

Craig Simpson

Enforcement

STEPTOE & JOHNSON ^{LLP}

steptoe.com

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Enforcement Framework – Basics

- National inspection authorities or courts (not ECHA)
 - Member States shall maintain a system of official controls
 - Member States shall adopt 'effective, proportionate and dissuasive' sanctions for infringements
- Sanctions implemented in national laws:
 - criminal and/or administrative
 - fines (EUR 5,000 to 55,000)
 - injunctions (incl. market withdrawal)
 - prison sentences (1 month to 25 years)
 - 'naming and shaming'
- Wide search, sampling and seizure powers for health inspectors, customs officials

Enforcement Framework – Basics

- REACH Forum for exchange of information on enforcement
 - aim: cooperation, coordination and exchange of information between EU 27, ECHA and Commission
 - use of a minimum inspection criteria, electronic information exchange

Enforcement Trends under REACH-EN-FORCE-1

- REACH-EN-FORCE-1: First Coordinated REACH Enforcement Project of Forum (over 20 Member States)
 - started 2009, extended to April 2011
 - 'no data, no market' principle focus: pre-registration, now registration, SDS format and language provisions
- Project report on REACH-EN-FORCE-1:
 - 1,600 entities inspected: EU manufacturers, importers and ORs
 - main target sectors: manufacturers / wholesalers of chemicals / chemical products, minerals and basic metals
- 2 obvious inspection scenarios: importer of products (or clearing agent) entering EU (examples in Netherlands and Belgium) or premises of EU-based downstream user

Enforcement Trends under REACH-EN-FORCE-1

- Intelligence on site inspections – practices vary, but typically:
 - warning letter 1 week before, request to prepare REACH compliance overview
 - review of documents (invoices, receipts, records of tonnages manufactured / imported / supplied, safety data sheets, certificates of analysis, confirmatory letters / emails from suppliers)
 - focus on non-EU country products
 - request supplier contact details: notification of pre-registrations, application of exemptions
 - identification of non-compliance (e.g., incorrect pre-registrations)

Enforcement Trends under REACH-EN-FORCE-1

- OR credentials: Dutch Prosecution of Chinese OR – threatened with EUR 1 million/week fine
 - **detailed** investigation: comparison of OR's importer quantity and use information inconsistent with importers' own records
 - insufficient background or Community presence (email address only) (Article 8)
 - threaten to request ECHA to delete relevant pre-registrations → knock on effects for downstream users
- Substance-specific approach:
 - UK HSE: amounts of PAHs in tyres (restricted substance) and pre-registration of ammonium dichromate (120 actions by September 2009)

Are You Non-Compliant? Examples

- Manufacturing / importing without first deadline registration?
 - ECHA statutory obligation to report late registrations to Member States
 - ECHA: Estimate 400 late first registration deadline registrations
- Incorrect or incomplete dossier?
 - ECHA plans several hundred first registration deadline compliance checks in 2011
- Failure to notify classification and labelling by 3 January 2011?

Are You Non-Compliant? Examples

- Potential consequences of failure to demonstrate REACH compliance:
 - **withdrawal** of substance from the EU market and significant marketing gap prior to registration
 - OR / importer being held **liable** by national enforcement authorities
 - imposition of substantial **fin**es on EU based manufacturers, importers, downstream users, ORs, and/or imprisonment of relevant individuals
 - negative effect on company **reputation and relationship** with its EEA-based customers (customers seek alternative suppliers?)

Remedying Non-Compliance

- Scope for approaching authorities
 - pragmatic approach in certain cases?
 - reliance on others in supply chain
 - complex legislation: scope for inadvertent infringement
 - possibility of 'grace periods'?
- Enforcement agency as educator as well as prosecutor:
 - UK HSE: 'Enforcement...includes a variety of different approaches to securing compliance including issuing enforcement notices to change behaviour, as well as approaches to **help companies understand their legal duties** and **how to meet them**'.
- Director's Contact Group (Commission, ECHA, industry reps)
 - incomplete registration permitted in 'exceptional cases'

Remedying Non-Compliance

- case-by-case, complete discretion of ECHA
- not a solution if done nothing
- C&L notification deadline: 'notify without delay' if missed (ECHA)

Non-Compliant Competitors?

- REACH compliance costs passed on to customers?
 - avoided by non-compliant companies
- Right to operate on a **level playing field**
- Some enforcement authorities (UK HSE) specifically encouraging companies to raise non-compliance of competitors

Future of Enforcement: REACH-EN-FORCE 2

- Future REACH-EN-FORCE 2 to begin May 2011:
 - target **downstream user formulations** of mixtures
 - focus: substance (pre-)registration and CLP notification
 - inform downstream user customers of SDS requirements and use-related obligations
 - development of electronic tools permitting communication between ECHA, CAs and enforcement agencies
 - RIPE tool: enforcement agency access to registration dossiers

Are You / Is Your Supply Chain Prepared for Inspection?

- Avoid **business interruption** and possible **sanctions**
- Can you / your importer / your OR / your downstream user produce necessary documents if inspected?
- Do you understand REACH enforcement priorities in EU jurisdictions where market?
- Importance of verifying OR credentials – need to change OR?

Are You / Is Your Supply Chain Prepared for Inspection?

- How Steptoe can assist:
 - user-friendly internal compliance manual: likely enforcement scenarios for your company, practical procedures on inspection, specific responsibilities of supply chain actors
 - pre-inspection audit, identify and remedy compliance gaps
 - on-site support during inspection
 - experience in liaising with enforcement agencies in case of infringement – avoid / minimise sanctions or business interruption
 - advising on the ground enforcement practices in different Member States
 - liaising with enforcement agencies concerning non-compliance of your competitors