

Securing REACH guarantees from suppliers

Much has been said about the need for companies to pre-register their phase-in substances between the 1 June and 30 November 2008, in order to ensure their continued legal production and importation in the EU and companies are taking steps to do so.

In many circumstances, however, companies must also ensure that other actors pre-register and then register substances in time. This is the case, for example, for downstream users that are supplied substances or preparations in the EU. This is also the case for EU importers that are to be covered by the 'only representative' (OR) designated by their suppliers. They need to make sure their suppliers meet their REACH obligations or they risk no longer receiving the supplies they need. They could also find themselves using and/or trading materials illegally manufactured or imported, which could be seized by enforcement authorities.

In all of these cases, companies should communicate with their suppliers to ensure that they pre-register and register in time and should obtain legal guarantees that they will do so.

Pre-registration deadline

To this end, companies are advised to insert REACH clauses in their supply contracts and general conditions of purchase. This may serve to cover new business relationships, but it does not address the issue of existing

suppliers. From these, companies should seek guarantees, in particular in terms of pre-registration, sufficiently before the end of the pre-registration period so that if a supplier fails to respond, the company can seek an alternative, REACH compliant source of supply.

Reaching out to existing suppliers is not an easy exercise. Companies operating in the EU may have hundreds, sometimes thousands of suppliers located all over the world that supply either substances, preparations, polymers or articles either in, or outside the EU. Each such situation creates different legal obligations with respect to REACH compliance and must be handled differently.

But addressing a specific tailored communication to each supplier is often practically impossible. Another difficulty is to draft a communication that is at the same time:

- * sufficiently simple and straightforward to be understood even by foreign suppliers that may never have heard of REACH,
- * sufficiently detailed to specify their obligations or the information they need to supply their customers for them to comply with REACH, and
- * sufficiently precise to constitute a legal commitment that covers the supplier's liability in case it fails to act as required.

Communication strategy

Ideally, a stepwise approach should be developed whereby companies first inform their suppliers of their obligations and of the company's expectations, then request feedback on suppliers' specific plans, and eventually require these to be transformed into legal commitments. Ideally also, this process should have started months ago. Many companies did indeed begin communicating with suppliers, but often they did not get a suitable response, if any, or were told REACH was not yet applicable, that they were waiting for guidance documents, or that the supplier could not answer specific questionnaires.

For suppliers with multiple customers, the natural approach will be to favour a generic rather than a case-by-case approach and, in as much as possible, to provide commercial

assurances rather than legal guarantees regarding REACH compliance.

Running out of time

However, now that the time left until the end of the pre-registration phase is limited, and the legislative obligations on each actor have been very largely clarified (even if some uncertainties remain, for example with respect to ORs), our advice to companies that have not yet achieved the necessary steps, would be to combine:

- * a generic approach to all their suppliers in the form of a letter that includes a description of their expectations, offers and requests a REACH contact point, and requests binding REACH commitments,
- * a more personalised approach (e.g. a physical meeting) with those suppliers that are the most critical for their operations, in terms of sensitivity of supply (e.g. where there are only very few possible suppliers, and/or where there are no alternative products) and importance of the product/processes that use these supplies (e.g. best sellers, major brands);
- * the development of safeguard mechanisms in case the necessary guarantees cannot be obtained in time in order to allow or avoid pre-registration and registration of the substances at stake. These could include pre-registering substances as a "potential importer" from another source, finding alternative suppliers or supplies, or changing production sites or commercial channels.

Of course, the above will not suit every specific situation and each case needs to be reviewed individually. But some sort of combination of the above elements is likely to be needed in most cases.

As regards obtaining legal commitments from suppliers, it will be difficult in some cases to amend all existing contracts and here again companies should concentrate on most important and sensible supplies first. They should also keep in mind that obtaining contractual guarantees will not necessarily be sufficient to guarantee continued supply (the failing company can eventually be required to pay damages but that does not bring in the supplies). Therefore safeguard mechanisms should be adopted for sensitive supplies in addition to legal guarantees.



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