

Health and Safety Executive Board		Paper No: HSE/09/51	
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UPDATE ON THE REACH ASBESTOS RESTRICTION			

Purpose of the paper

1. To update the Board on recent developments responding to unintended consequences of EU asbestos controls moving from the legacy 'Marketing and Use Directive' into the REACH Regulation, in order to safeguard the current UK approach to controls on asbestos.
2. To seek Board approval for shortened consultation on this issue in summer 2009, as set out in paragraphs 23-25.

Background

3. Asbestos is part of the fabric of many items in use today. While controls on new asbestos use are rigorous, the Government has not previously attempted to ban the sale of all existing items containing asbestos - for instance buildings, heritage machinery such as cars or steam trains, and others.
4. Instead, certification and licensing schemes have been used in the UK to protect the markets in these items and ensure necessary work can continue, as long as risks are well controlled.
5. REACH, the new EU chemicals regime, adapts and repeals many pre-existing aspects of EU chemicals law. In particular, it repeals several Directives (which had been transposed into Member State laws), and adopts those provisions into a new (and direct-acting) Regulation text.
6. When transferring the wording of the Marketing and Use Directive restrictions into the REACH Regulation, the European Commission encountered a number of drafting problems. The relevant Regulation annex (XVII) has subsequently been extensively reviewed.
7. At a late stage in that review, the UK identified a discrepancy between provisions in the old Marketing and Use Directive and the new Regulation, which led to a very significant and unintentional increase in the scope of the asbestos restriction and threatened to criminalise sale of many items containing asbestos, including houses and other buildings. Potential costs to UK industry alone could have run into billions of pounds, and this even threatened HSE's ability to permit safe testing and removal of asbestos.
8. Having worked with European Commission colleagues to understand the issues, HSE for UK pursued a negotiating line aimed at allowing us to maintain the scope of the asbestos restriction regime as it was in place in the UK before REACH unintentionally extended its scope.
9. The European Commission circulated proposals at short notice throughout this process, and the Chair was asked to provide clearance for the negotiating strategy on behalf of the Board, with regular updates otherwise provided in the

'Update on EU Health and Safety Dossiers' section of the Chief Executive's report to the Board.

10. In February a proposal was secured in comitology that the revised REACH asbestos restriction should provide a right for Member States to continue allowing the sale of items which are already in use and which contain asbestos, under certain conditions protecting human health.
11. UKRep notified us on 27 April that this proposed amendment would be adopted by the European Parliament, providing us with certain knowledge of the Community level provisions we would be able to implement.
12. Subsequently, HSE officials have worked with Defra to agree a way to implement this new right to derogate and, having arrived at a proposal, now seek clearance for the proposed way forward, including a shortened consultation to be nominally 'owned' by Defra (as the REACH policy lead in government).

Argument

13. REACH Annex XVII will enter into force on 1 June. REACH will simultaneously repeal the EU Marketing and Use Directive(s).
14. In preparation for this, existing provisions in the UK law which implemented the Marketing and Use Directives were repealed last year in the Defra-led REACH Enforcement Regulations 2008, which in line with EU requirements are to come into effect on 1 June this year.
15. These regulations included repeal of the parts of the Control of Asbestos Regulations 2006 which allow HSE to issue exemptions from prohibitions within the regulations, including the issuing of exemption certificates, as this would not have been permitted under the original Annex XVII text.
16. Now that Annex XVII has been amended to allow Member States to continue issuing exemptions, officials believe the repealed provisions should be replaced as soon as possible, within criteria set out in the new REACH text, to allow HSE to continue permitting sale (where safe) of items such as buildings, heritage cars, steam trains, re-usable cylinders for supply of acetylene, and also to permit continued monitoring, removal and disposal of asbestos. All of these activities (where considered safe) have been permitted under the existing approach to managing asbestos, and are important in either socio-economic terms, or in order that the legacy of asbestos use can be effectively managed.
17. Legal advice from Treasury Solicitor's Department (formerly the HSE Legal Adviser's Office), and from Defra lawyers, indicates that the most appropriate way forward is to follow a precedent in the REACH Enforcement Regulations 2008 allowing for exemptions permitting the continued use of lead in paint.
18. Officials therefore propose to replace the Control of Asbestos 2006 exemption provisions with powers written into the REACH Enforcement Regulations, mirroring the existing approach for leaded paint exemptions. We believe it is desirable to do this for the 1 October 2009 (the common commencement date), as the earliest practicable entry into force date for the necessary legal amendment, in order to minimise the inevitable gap after repeal of the old provisions on 1 June.

19. Where HSE has previously been the exempting authority (as part of the regime set out in the Control of Asbestos Regulations 2006, and its predecessors), the aim is to name HSE as the exempting authority under REACH.. There would be no change in the scope of the exemptions which HSE could grant using this power.
20. However, in responding to the increased scope of the REACH restriction, it may be necessary to issue exemptions in areas that were previously outside the scope of asbestos restriction, and also outside HSE's normal vires - for example environment-related activity, or non work-related public health. The case for this will be explored in the consultation
21. In any such cases, it will be necessary to provide responsible authorities elsewhere in UK Government (i.e. not HSE) with formal competence to issue exemptions. This can be done by naming the formal REACH UK Competent Authorities (i.e. the devolved administrations, and Secretary of State for reserved matters) as the exempting authorities for matters within their respective competencies.
22. HSE could then issue exemptions on their behalf under the existing REACH CA arrangements, including under the oversight of the REACH CA Steering Committee (which provides for political input and responsibility for the formal Competent Authorities on matters outside HSE's normal operations).
23. As this is a proposal essentially aimed at replicating current provisions, and preserving the scope of existing activity so far as this can be achieved, the Better Regulation Executive has provisionally accepted a shortened consultation. However, as the proposal has not yet been finalised (pending Board agreement), they have not yet been formally approached for approval.
24. The timing now means if new regulations are to come into force in October, public consultation must begin in July and be shortened to a maximum of six weeks October, to allow for subsequent responses and for Parliamentary process.

Action

25. The Board are asked to:
 - approve the proposed means of maintaining the current UK approach to controlling asbestos (paragraphs 18-22 above);
 - agree that the Better Regulation Executive be formally approached for consent to shorten consultation to six weeks; and
 - note that further Board decisions will be needed on this issue in the next few months.

Paper clearance

26. Robin Foster, Sarah Mallagh, Giles Denham.