

Health and Safety Executive Board		Paper No: HSE/08/33	
Meeting Date:	17 th July 2008	FOI Status:	Partially Closed
Type of paper:	HSE/08/33	Exemptions:	Section 36 exemption for paragraphs 21 and 22.
Trim reference:			
Defra Consultation on REACH Enforcement			

Purpose of this paper

1. To inform the Board of the current Defra consultation on the enforcement of the REACH Regulation, and request a response to Defra before the closing date of 25th August.
2. A suggested response is included at appendix 1. The consultation documents are included at appendices 2-5.

Background

3. REACH is a European system intended to protect both human health and the environment. It is a direct-acting Regulation, not a Directive, and is managed centrally by the new European Chemicals Agency (ECHA).
4. Defra are responsible for implementing REACH in the UK. Although REACH is direct-acting and does not need to be transposed into UK law, UK government does need to establish the means to manage domestic aspects of the regime and to enforce compliance.
5. Defra first consulted on proposed enforcement arrangements in Spring 2007. The HSC response to that consultation is attached at appendix 6.
6. Subsequently, Defra have drafted the necessary statutory instrument (SI), and have opened this to public consultation. HSE worked closely with Defra in drafting those proposals, and have subsequently commented extensively on both the broad approach taken by Defra in drafting the SI, and detailed points.
7. HSE officials are broadly content with the Defra arrangements.

REACH enforcement overview

8. REACH enforcement can be categorized into three broad areas, all relating to information about chemical hazards and risks:
 - **registration** - taken here to include all requirements re submitting information to ECHA;
 - **supply-chain** - passage of information duties, similar to those in the HSE-enforced Chemicals (Hazard Information and Packaging for Supply) Regulations 2002, or CHIP; and
 - **use** – duties regarding safe use of chemicals across several areas of enforcement, including occupational safety and health.
9. HSE will play a key role in enforcing REACH. As Competent Authority we will enforce 'registration' duties across the UK, and as the GB health and safety regulator we will enforce all 'supply-chain' type duties and, where they relate to occupational safety and health, 'use' provisions.

10. As Competent Authority, we will also co-ordinate liaison between other enforcers, and have drafted a memorandum of understanding establishing working principles between the various REACH enforcers (including, for example, the Environment Agency, Scottish Environment Protection Agency, and the Environment and Heritage Service Northern Ireland). This has been included in the current consultation (appendix 5).

Powers and penalties

11. HSE, as the Competent Authority, requires new powers to enforce some 'registration' aspects. Also, as Competent Authority for the UK, HSE will enforce registration duties in Northern Ireland, under agreement with HSE Northern Ireland.

12. Defra have chosen to provide REACH enforcement powers for HSE Inspectors by means of a schedule to the SI, instead of reference to the Health and Safety at Work etc. Act 1974 (HSWA). Defra are similarly providing powers for all other REACH enforcers by means of schedules to the new SI, and not by reference to existing legislation.

13. HSE officials had proposed to Defra that the SI be made a relevant statutory provision of HSWA, which would have secured HSWA powers for enforcement of the relevant REACH duties, and also captured the established mechanisms for allocating enforcement responsibility amongst UK occupational safety and health enforcers.

14. However, after a lengthy dialogue on this point, Defra have preferred an approach whereby REACH dutyholders should not need to refer to other laws to identify the powers under which enforcement can be taken. This has resulted in a complex SI.

15. HSE officials have sought in discussion with Defra to ensure that penalties for occupational safety and health-related breaches of REACH resemble penalties for breaches of other occupational safety and health legislation, in particular the Control of Substances Hazardous to Health Regulations 2002 (COSHH).

16. However, we also recognise that the REACH penalty system has to reflect legacy approaches and expectations more broadly than solely those relating to occupational safety and health, because REACH affects several other enforcement topic areas (e.g. environment, consumer protection, etc.). For this reason, Defra have established a separate penalty regime for REACH, established within the text of the SI instead of reference to HSWA.

17. Despite these differences of view, HSE officials are satisfied that effective penalties are secured in the SI by establishing the principle that breaches can, where necessary, be 'tried either way' (i.e. high level penalties are available should a breach be serious enough to warrant pursuit through the Crown Courts). Imprisonment is also an option for Courts, both following summary conviction and conviction on indictment.

Enforcing importer duties

18. 'Registration' duties on manufacturers and importers are a key feature of the new regime, and will be enforced by HSE across the UK as the Competent Authority.

19. As Defra note in their cover letter for the consultation, respondents have in the past highlighted the ability to enforce duties on importers as a key concern. It is

important that enforcement can be even across both UK manufacturers and importers, so that neither sector is disadvantaged.

20. Because of the way the REACH Regulation is drafted, enforcing compliance amongst importers will pose significant challenges, not least in terms of identifying importers who have duties they should be meeting.
21. → In particular, HSE and Defra officials have sought to involve HMRC directly as a named enforcing authority in the SI. HMRC have, however, argued that they should become involved only when asked to do so by other enforcers, and are therefore not named among the enforcing authorities in the SI.
22. HSE officials are concerned that, as a result, requirements placed on enforcing authorities to communicate and co-operate with one another will not apply to HMRC, who are likely to be one of the few sources of information available to HSE in identifying importers with REACH duties. The proposed response at appendix 1 makes the point that HSE expects Defra to ensure we receive support from all government agencies in fulfilling the registration enforcement duties placed on us in their draft SI. ←

Awareness and compliance

23. Between 1 June and 30 November this year, manufacturers and importers with REACH registration duties must 'pre-register' their interest in given substances, in order to benefit from postponed deadlines for submitting full registrations. If they have not pre-registered, dutyholders will be legally required to register by the 1 December this year or remove their product from the EU market and cease manufacture and/or import.
24. Like most other REACH processes, pre-registration (and related awareness-raising) is the responsibility of the European Chemicals Agency in Helsinki. Awareness of pre-registration, and of REACH generally, amongst some sectors of potential registrants (including importers) is low throughout the EU.
25. UK government communications activity on REACH, including publication of guidance, is Defra's responsibility as policy lead. As Competent Authority, HSE have managed a programme of information provision where we have deemed this essential and within the scope of our role. We are concerned, however, that greater awareness and understanding of REACH is necessary in order for dutyholders to comply, and suggest making this point in the consultation response.

Costs and Benefits

26. The Defra consultation is accompanied by an impact assessment. It identifies key costs are to business and enforcers in the range £541k to £661k, with a midpoint of £601k, and estimates potential human health benefits of the proposed approach at a monetary value of £43m over thirty years, should enforcement result in 1% of overall compliance.

Financial/Resource Implications for HSE

27. HSE have agreed to enforce 'registration' duties (principally, registration) as part of the new Competent Authority role. Defra paid HSE £1.1m to deliver the Competent Authority for the first year, tied to a Business Plan establishing the delivery parameters for 2007/08. Similar arrangements are in place for 2008/09,

with a figure of £1.5m to cover increasing activity. Defra and HSE have agreed that a PES baseline transfer will be actioned when activity levels are fully established.

28. HSE activity in 'supply-chain' and 'use' enforcement is outside the scope of this funding. Practical enforcement of downstream requirements of REACH will not be a significant issue for some years following the first tranche of registration under REACH. Thereafter, HSE resourcing for REACH 'supply-chain' and 'use' enforcement will be based on strategic priorities, as a feature of enforcing chemicals laws within our remit.

Action / Next Steps

29. The Board is invited to respond to the Consultation with broad support, expressing particular interest in the enforcement of new duties on importers and the importance of all relevant agencies being fully engaged to implement this important aspect of REACH, and emphasising the need for strong and active leadership on communications from Defra.

30. A draft response is attached at appendix 1.

Paper Clearance

31. This paper was cleared by the SMT on 2nd July 2008.

Contact

Tim Harris, International Chemicals Unit, Disease Reduction Division, Policy Group, tel (020) 7717 6403, email tim.harris@hse.gsi.gov.uk.

Appendices

- 1 Suggested draft consultation response from HSE (below)
- 2 Defra consultation document (attached)
- 3 Draft Defra statutory instrument (attached)
- 4 Defra consultation impact assessment (attached)
- 5 Draft enforcers' memorandum of understanding (attached)
- 6 HSC response to previous Defra consultation (below)

→ Appendix 1

Suggested draft consultation response from HSE

Dear Ms Olubodun,

The Health and Safety Executive welcomes the current public consultation on arrangements to enforce the new European Regulation on Registration, Evaluation, Authorisation and restriction of Chemicals (REACH).

It is clear that a great deal of work has been undertaken since the earlier consultation on this topic, and we congratulate Defra on the significant progress made. We were pleased to learn of the continuing cooperation between your Department and HSE officials and other bodies in making these arrangements.

We note that your proposal secures powers and penalties for all named enforcers within the text of the draft statutory instrument itself. Although it would be usual for HSE to secure both powers and penalties for our operational divisions through reference to the relevant provisions of the Health and Safety at Work etc. Act 1974, we recognise that REACH implementation has to reflect approaches and expectations more broadly than solely those relating to occupational safety and health. Further noting the value for dutyholders of consistency across the different topic areas, we are able to endorse the approach described here.

The proposed role for HSE in enforcing registration-related aspects of REACH leads us to note that particular comment was made in the previous consultation on the enforcement of requirements on importers. Clearly it is important that both domestic producers and importers feel that the requirements of REACH are being applied fairly. This cannot be the responsibility of HSE alone, and we look to Defra for support in ensuring that all relevant agencies are fully involved.

In light of the important and time-limited window for pre-registration, and recognising that awareness is a pre-requisite for compliance, we also note the need for strong and active leadership on UK Government communications from Defra, where Member State guidance and activity is appropriate.

With these points, HSE is content to endorse the approach described in your consultation.

Yours, ...

cc:

etc. ←

- 2 Defra consultation document (attached)**
- 3 Draft Defra statutory instrument (attached)**
- 4 Defra consultation impact assessment (attached)**
- 5 Draft enforcers' memorandum of understanding (attached)**

Appendix 6

HSC response to previous Defra consultation



Health and Safety
Commission

Kate Perry
Chemicals & Nanotechnologies Division
Defra
Area 2A, Nobel House,
17 Smith Square,
London SW1P 3JR

From the Chair

Bill Callaghan

Rose Court
2 Southwark Bridge
London SE1 8HS

Tel: 020 7717 6610
Fax: 020 7177 6616
chairman@hse.gov.uk

www.hse.gov.uk

5 June 2007

Dear Ms Perry,

RE: REACH enforcement consultation

The Health and Safety Commission welcomes the recent public consultation on the development of arrangements to enforce the new European Registration, Evaluation and Authorisation of Chemicals Regulation (REACH).

REACH is an important development in our aim to reduce occupational ill-health by improving standards of control of risks to workers posed by chemicals used in the workplace. The Commission also recognises that the REACH system brings together a number of different areas where chemicals can cause harm if not properly controlled, including the environment and wider public health.

We were pleased to learn that the arrangements described in the consultation document published on the 13 March have been developed in co-operation with the Health and Safety Executive and other bodies.

Section 2.2 and questions 1 to 2b propose an approach to the enforcement of REACH that builds on arrangements for enforcing existing regimes. The Commission generally endorses the way forward and allocation of responsibilities (questions 1 and 2) suggested in the consultation document.

The Commission notes that the proposed enforcement regime will require a high degree of cooperation between all the bodies taking on enforcement responsibility. The Commission welcomes the proposal that the Health and Safety Executive 'will have an ongoing role in monitoring the level of consistency' in the approach to enforcing compliance with REACH on behalf of the several bodies with a proposed enforcement role. We trust that you will provide the necessary impetus and assistance to enable the enforcing authorities to develop the appropriate liaison arrangements. In the period following this consultation, the Commission will welcome further discussion of the envisaged responsibilities for the HSE in monitoring consistency in the


enforcement of REACH, and the role this monitoring will play in the wider context of the successful UK implementation of the Regulation, for which your Department has the lead.

Section 3 of the consultation document proposes an approach to setting penalties for failing to comply with REACH. Here also the Commission generally endorses the approach proposed in the consultation document. The Commission would favour an initial single-tier penalty regime for REACH that dovetails with the current approach to penalising breaches of health and safety law (question 3).

It is the Commission's view that the current penalties for breaches of health and safety law could reasonably be higher to act as an effective deterrent. In the context of REACH registration, where costs associated with compliance are likely to vary considerably, the Commission would be pleased to discuss further the need for an effectively dissuasive penalty regime for non-compliance, and the feasibility of including monetary and other administrative penalties in such a regime (question 4). The suitability of administrative penalties as an enforcing tool for HSE must be considered in the wider context of UK health and safety enforcement, and the ongoing debate surrounding the availability of new regulatory powers resulting from the Hampton and Macrory reviews.

The Commission endorses the use of existing procedures for issuing enforcement notices on behalf of REACH enforcing authorities (question 5), taking into account our comment above on the need for arrangements to fully ensure a consistent approach and establish clear roles and responsibilities in this.

The Commission congratulates your department on the ongoing work to implement REACH in the UK, and looks forward to continuing dialogue and the opportunity to comment on the draft regulations in a future consultation.

Yours sincerely
Bill 

Bill Callaghan
Chair, Health and Safety Commission