

FETSA provides an update for independent tank storage companies

The REACH regulation

REACH is a difficult and complicated body of law that leaves many questions unanswered for those enterprises affected.

The risk assessment phase

The REACH pre-registration stage ran from 1 June to 1 December 2008.

Independent tank storage companies were not obliged to pre-register, but were advised to consult customers and relevant authorities to see if there were any advantages in doing so.

The idea of REACH is to compile a register of producers and importers in a very short space of time, and ensure they entered their products based on the current EINECS¹ and/or CAS² identifications.

Around 2.6 million entries were received, but some were multiple entries for one substance. For example for one particular product, there are four producers (in the EEA³), but 150 pre-registrations were received.

And some products even received over 1,000 pre-registrations.

It is not only individual producers or importers that were able to pre-register. Interested consultants, universities or NGOs were also able to form substance cluster SIEF (Substance Information Exchange Forum). SIEF not only is a data exchange forum where members also share the costs involved.

The SIEF members (pre-registrants) are jointly obliged to agree on classification and labelling and to facilitate data sharing with the aim to complete a joint submission of data.

This involves Extended exposure scenarios (EES), Chemical safety assessments (CSA) and Chemical safety reports (CSR).

In selected cases testing



Hennie Standaar, FETSA's secretary general

needs to be approved by the ECHA and testing proposals involving vertebrate animals require prior internet publication to minimise testing on animals.

The time lock on this stands at 30 November 2010, only two years after the closure of the pre-registration phase.

This will be very tight, given that some SIEFs are fairly large groups and testing, if needed, is a time consuming process with limited capacity available. Some say that the research capacity in Europe will be booked up by mid-2009. Some business sectors anticipated this and have already carried out the necessary research and organisation.

Safety assessments

The above mentioned assessments to be carried out by SIEFs must follow precise protocols to avoid incomparable outcomes. The

facilities. Does this create a formal requirement for tank storage? The answer is no, but the pre-registrant joined with others in the SIEF is, if agreed, bound to produce and maintain (updating) the safety assessment for registrations of substances in excess of 10 tonnes per year. For this he may wish to know about and interfere with the tank storage operations and provisions on site.

Attempts to shift obligations

Reportedly, in the period of uncertainty after the pre-registration phase, some players in the logistics chain tried to shift the responsibility of unspecified failures.

It should be said that this seems impossible, if not beyond the boundaries of law. REACH is a regulation that has defined and divided the responsibilities in a particular manner which can only be (partly) moved by civil agreements that are specifically mentioned: the third party representative [Article 4] and the only representative [Article 8].

Bulk-making principal

This is a common feature in some tank storage operations. This Principal is selling into the EEA. Generally, this Principal assembles stock of product by buying smaller quantities from various producers in the EEA and perhaps abroad. Assuming all this is REACH compliant, the SDS (Safety Data Sheet)⁶ is available from the various producers but for the time being the exposure scenario is not.

The Principal sells to a large number of buyers out of this product volume. The question is which SDSs must be forwarded. Some Principals have tried to move this task to the tank owner,

asking him to set up a precise administration. This of course is impossible, because to do this properly one should be able to identify the origin of each and every molecule.

Therefore, it should be realised that this Principal, who may be an importer (buying product from abroad), is through this also a downstream user and is obliged to forward all SDS to his buyers downstream.

If his business is static (which is unlikely) he may consider issuing one separate SDS. The fact that this customer is a downstream user in this case will not allow him to discharge his responsibilities / accountabilities to a third party.

He may ask for an administrative type of agreement which is up to the tank storage company to accept or reject, but the tank storage company cannot be held responsible, indemnifying this Principal from all breaches of the REACH regulation.

Third party representative

Article 4 states that 'Any manufacturer, importer, or where relevant a downstream user', which is established in the EEA, 'may, whilst retaining full responsibility for complying.... appoint a third party representative for all proceedings under Article 11, 19, Title III and Article 53...'

This third party representative can therefore represent only for submission of data, information exchange (SIEF) 'involving discussions with other registrants or if relevant downstream users'.

The responsibilities are however, not transferable. The identity of the principal 'shall not normally be disclosed'.

What the legal significance is of 'not normally' is guesswork for the time being. It should be made quite clear that such an appointment can only be concluded by mutual agreement.

Only representative

This refers to Article 8 sub 1, 2 and 3. The Only representative (OR) is a totally different body than the aforementioned third party representative.

The Principal for the OR is by definition not established

in the EEA. Typically, he is a producer and wants to import his substance(s) into the EEA.

He may, by mutual agreement, appoint a natural or legal person established in the Community to fulfil, as his OR, the obligations on importers under this title. Like the third party representative the OR is based in the EEA (the Community) and there must be a mutual agreement.

But there it stops; the third party representative has no obligations under REACH whilst the OR has the burden of '...all other obligations of importers under the Regulation'.

For this reason he must have sufficient background in the practical handling and upkeep of records, including information of quantities moved and customers sold to.

Also the disclosure is different. The non-Community producer '...shall inform the importer(s) within the same supply chain of the appointment'. Some tank storage company may have reasons to assume such a role to accommodate their Principal, but it is strongly advisable to support this with a watertight back-to back agreement.

Fiscal representation

Generally this involves the handling and completion of fiscal and customs procedures concerning import duties, VAT and excises on behalf of the Principal. The question has been raised whether this provokes certain duties regarding REACH.

In various correspondence around this issue it appears that the full responsibility remains with the Principal (le mandant Fr, der Auftraggeber Ge, de lastgever Ne). This is fully compliant with the rules of the IncoTerms 2000 where the buyer (who is the new owner of the traded substance inside the EEA): 'must obtain at his own risk and expense any import licence or other official authorisation.' This phrase is repeated for all 22 IncoTerms mentioned (such as FAS, FOB, CIF, DDU, DDP).

Tank cleaning

This area is fairly unclear. Certainly cleaning substances, if required, purchased on the market should be

REACH compliant, and the after-cleaning remaining sludges or liquids will be waste, which is exempt from REACH [article 2.2].

But under REACH the use of the cleaning product may sometimes also be listed as part of the exposure scenario.

Terminals should contact the supplier to ascertain if the use of this product must be included in the exposure scenario.

Later changes to the exposure scenario should be reported as soon as possible to the ECHA, but the registrant must be convinced first.

Heel

This unrecoverable volume at the bottom of the tank is said to be owned, but obviously not produced, by the tank storage company. Unless it ends as waste (exempted from REACH) its REACH status is as yet totally unclear.

Retention and insolvency of principal

This exceptional situation occurs if the product in a tank is used as a substitute for payment of the storage fee.

A principal of a tank storage company will practically always have a role under REACH, be it manufacturer, importer, downstream user, or even all three. It may even be an OR (but not a third party representative).

Even assuming the product is compliant to REACH, i.e. registered and documented, the question remains what the position of a tank storage company is if the product becomes collateral.

A similar situation may also occur if the Principal becomes insolvent, leaving creditors suddenly becoming substance owners, without having any formal position under REACH. No doubt such a situation will occur sooner or later, but for the time being there are not any provisions such as a temporary transfer of the right to sell this product in the market in the current REACH regulation.

Exit pre-registration

Some tank storage companies which pre-registered may want to give up the pre-registration. There

is no clear prescription for this. At the moment it is not possible to completely erase the pre-registration data. The general recommendation is to keep a zero profile, i.e. not to reply to surveys, or other communications from the SIEF.

Ultimately this will indicate that the pertaining pre-registrant wants to become dormant, implying no intention to register. This is likely to terminate further communications.

Looking to the future

The REACH regulation has not been a major concern for storage operators so far. Terminals provide transshipping and balancing facilities from the producer to the end-user, which may be in different parts of the world.

This makes them an extricable part of the transport system, and transportation has been placed outside the scope of REACH rightfully in view of the very extensive body of law that exists for the transportation of dangerous goods (very often liquids).

REACH however, will change the tank storage business environment even to the extent that some of the product flows from producer to end-user may decline, grow, reverse, disappear or be replaced by other products.

Therefore it is and will remain important for tank storage companies to have a sufficient understanding of some of the processes and responsibilities that are involved in this body of law. ●

For more information:

Tank storage companies that want to get to a better understanding of the SIEF process should visit <http://www.cefic.be/templates/shwNewsFull.asp?HID=1&NSID=707&NID=1>

1 European Substances Information System

2 Chemical Abstracts Service

3 The European Economic Area which includes the EU countries and EFTA countries since 1994, note this does exclude Switzerland

4 Guidance on information requirement and chemical safety assessment Chapter R.12: Use descriptor system

5 Nomenclature générale de Activités Economiques dans les Communautés Européennes

6 Requirements for the Safety Data Sheets to be found in Title IV article 31 sub 6 showing the 16 prescribed aspects to be covered.