



Position Paper

Only Representatives and late Pre-registrations

Introduction

The issue

Non-European manufacturers and formulators regularly appoint Only Representatives to take over REACH obligations from their European customers, the importers, at a time where their products are already on the EU market. They generally perform these 'late OR appointments' for commercial reasons; to reduce the administrative burden of their customers, to support their EU/EEA customers so they should not have to submit registrations themselves, to ensure the confidentiality of their formulations, to give REACH compliance of their products in more competent hands, and most importantly, to service new customers and new markets, or those customers who only wish to do business if an Only Representative is involved.

Today, REACH IT only allows 'late pre-registrations' in the case of 'first-time imports'. This means that an importer can still avail of pre-registration after the pre-registration deadline has passed, if he imports a substance for the first time or his import of a substance reaches 1 tonne or more per year for the first time and he completes the pre-registration no more than one year before the applicable registration deadline.

In the case of a 'late OR appointment' it could be misinterpreted that, since the non-community manufacturer's products were already on the EU market prior to this appointment, this is not a case of 'first time imports' and that therefore the Only Representative may not pre-register any of his new Principal's substances.

However, in such a case of a 'late appointment', the OR still needs to be able to pre-register substances. If he could not do so, the provision of his services would become disproportionately cumbersome and expensive. Registrations well ahead of the appropriate deadline could become necessary, possibly even at a time when the lead registrant's registration has not yet been submitted and no Letter of Access is yet available. In addition, REACH Inquiries would likely become necessary for every substance that would otherwise meet phase-in requirements. It should also be noted that the transfer of pre-registrations from an importer to a newly established OR is not possible in REACH IT.

Barrier to trade

The possibility for non-community manufacturers to appoint an Only Representative given in REACH Art. 8 reduces the barrier to trade that REACH would otherwise pose. Flexibility is necessary. Non-community manufacturers and formulators are frequently confronted with existing importers who no longer wish to organise their own REACH compliance and potential new customers who will only do business if an Only Representative has been appointed; 'no OR, no market' is often the result. The flexibility to appoint an Only Representative at all times is therefore essential to prevent REACH from becoming a barrier to trade and to the acceptance of REACH by the WTO community.

If the appointment of an Only Representatives were to lead to disproportionate burden and expense, the aim of Art. 8 is not achieved; a new barrier to trade is introduced. It is therefore essential that Only Representatives should be able to submit pre-registrations, even if their



appointment takes place after 2008 and when the non-community manufacturer's or formulator's products were already on the market through EU/EEA importers prior to the appointment.

Legal situation unclear

REACH Art. 28.6 states that in the case of first time imports, the importer (and therefore the Only Representative via REACH Art. 8.2) may submit a pre-registration. A frequently encountered interpretation is that this is therefore also the only circumstance under which 'late pre-registration' is possible.

The actual legal situation is however not so clear-cut. REACH Art. 8 in no way limits in time the appointment of an Only Representative or indicates that a late OR appointment should lead to considerable administrative burden and high costs. If the Only Representative were not allowed to submit pre-registrations, this would have adverse legal consequences that in many cases would form non-defendable and serious barriers to trade in themselves.

Analysis of Article 8:

- No limit in time: REACH Article 8 allows the non-community manufacturer or formulator to appoint an Only Representative. There is no indication that the non-community manufacturer should have appointed an Only Representative before 1 December 2008 or before first importation of substances originating from them. The non-community manufacturer or formulator may appoint an Only Representative at any time and, as a result, the Only Representative may also begin his work at any time.
- No restrictions: OR appointments after 1 December 2008 are not subject to any restrictions. Art. 8 gives no indication that a 'late' OR appointment should lead to additional burden and expenses or an obligation to register substances sooner than otherwise would be the case.
- No reference to the past: Art. 8 contains no indication that the situation existing before the OR appointment somehow influences this appointment or the Only Representative's work. It is irrelevant to both the non-community manufacturer or formulator and the new Only Representative that the importers, which are about to become downstream users, having already pre-registered or registered the imported substances previously.
- No dependence of existing importers: Art. 8 contains no indication that the non-community manufacturer or formulator or the Only Representative in any way requires the permission, support or cooperation from the existing importers. The non-community manufacturer or formulator is free to appoint an Only Representative and the OR is free to render the service required, without being dependent on existing importers.

Non-defendable adverse consequences

Adverse consequences that cannot reasonably be defended would result from not allowing the Only Representative to submit late pre-registrations. Below some examples are given to substantiate this statement.



- If the non-community manufacturer's or formulator's products are today sold on the EU market through a non-EU distributor, this non-community manufacturer or formulator may not know the quantities sold in the Community or who the importers are. He may even not know that his products are already on the EU market.
- Where a non-community manufacturer or formulator wishes to find new EU-based customers for his products, he cannot use the services of an OR if these products were previously already imported into the EU by others.
- Where a non-community formulator has developed a new product for which he wishes to find new European customers, he cannot use the services of an OR if some of the components (substances) were already part of his earlier products imported into the EU by importers.
- A non-community manufacturer or formulator could establish an EU legal entity and make that entity the sole importer for his products. In this case there would undeniably be 'first time imports', but the de facto situation would be the same as if they appointed an OR; the REACH obligations of the 'old' importers would be transferred to the 'new' importer, under new pre-registration numbers. This would of course circumvent the issue; but only at the high additional cost of establishing an EU legal entity that would have to be more than just an 'agent' to qualify as an importer under REACH. This would also be a case of failing to provide equal treatment of Only Representatives as a 'potential registrant' under REACH Art. 28.6.
- Where a sole importer stops purchasing the non-community manufacturer's or formulator's product, the non-community manufacturer or formulator could not rectify the situation and find new EU based customers who require him to have appointed an Only Representative.
- Where a sole importer experiences force-majeure issues, enters bankruptcy or similar, the non-community manufacturer or formulator would be at a disadvantage and would not have the flexibility to continue supply to Downstream Users further down the supply chain; without acquiring the sole importer, finding another importer willing to take the REACH obligations upon himself or establishing its own EU-legal entity.

No undue advantages

There are no undue advantages attached to late pre-registrations by Only Representatives, even if the substances or formulation were already on the EU market previously and pre-registered by their importers.

- If the importers were not in compliance with REACH (for example if they had not pre-registered or registered the substances), this situation is rectified from the moment of the appointment of the OR, but the importer's non-compliance during the period before the appointment would remain.
- For the newly appointed Only Representative the registration deadline is determined by the sum of the annual tonnages for all the importers covered. As a rule this amount will be higher than the amount imported by any of the individual importers. Especially where the non-community manufacturer or formulator is expanding imports, registration are likely to be brought forward due to this aggregate affect.

Simple procedural solution

Legal case

From the above analysis of Art. 8 and the examples of non-defendable adverse consequences that would result from not allowing the Only Representative to submit late pre-registrations, it can be seen that a convincing legal case could be built for changing the 'late pre-registration only in the case of first time imports' interpretation of REACH.

The Only Representative Organisation is however of the opinion that an acceptable and simple procedural solution exists, that can be accepted and implemented without delay. This is considered preferable to having to build a time consuming legal case aiming at changing the current interpretation of REACH Art. 28.6, since such a change in interpretation might also have non-desirable consequences in other REACH areas.

Procedural solution

In 2008, importers, and also therefore Only Representatives, were allowed pre-register substances that were not yet actually imported at the time of pre-registration: pre-registrations could be submitted for imports that were expected in the future.

The same can be applied in the case of a late OR appointments. This means that the Only Representative may upon his 'late appointment', pre-register substances with a view to service potential new European customers of his new Principal. In such a case, the Only Representative pre-registers 'first time imports', albeit in advance of the actual imports by these new customers.

Once an OR has submitted these pre-registrations for the 'first time imports' that are expected, he is also in the position to cover his Principals 'old' customers, since for each Principal he needs only one pre-registration per substance.

The procedure can of course not be retrospective: the Only Representative cannot cover imports that took place before his appointment.

Conclusion

Where an OR is appointed at a time when his Principal's products were previously already marketed in the European Union, he may submit a late pre-registration with a view to cover the first time imports of potential new European customers of his Principal.

Where an Only Representative has submitted these late pre-registrations, he may also cover the previous European customers of his Principal and their future imports.

For the newly appointed Only Representative the registration deadline is determined by the sum of the annual tonnages for all the importers covered.