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23rd Meeting of Competent Authorities for REACH and CLP (CARACAL)
Open Session

Room: 1A Centre Albert Borschette
Rue Froissart 36
1040 Brussels, Belgium

Concerns: **Commission's Note to Council regarding Article 6 of the Waste Framework Directive and its link to REACH**

Agenda Point: **12.2**

Action Requested: **For information**



EUROPEAN COMMISSION

Non-Paper to Member States

Links between Article 6 of the Waste Framework Directive (WFD) and the REACH Regulation¹

Important considerations regarding potential amendments to Article 6

Introduction

In the course of the ongoing Council discussions regarding proposed amendments to the Waste Framework Directive (WFD), a number of Member States requested the Commission to clarify the connection between Article 6 of the WFD and the REACH Regulation and the potential consequences these amendments to Article 6 could have for REACH. In response to these requests, the Commission has drafted this Note for the consideration of Member States.

Summary of the REACH Regulation

REACH aims to ensure a high level of protection of human health and the environment, as well as the free circulation of substances on the internal market.

REACH essentially defines obligations for data generation, collection and sharing (through the operation of titles on Registration of substances and Evaluation) with the ultimate aim to adequately manage chemicals. It also establishes processes designed to control/reduce the risks posed by substances, on their own, in mixtures and in articles (through the operation of the titles on Restrictions and Authorisation).

The Regulation is based on the principle that it's for manufacturers, importers and downstream users to ensure that the substances they manufacture, place on the market or use do not adversely affect human health or the environment.

Waste, REACH and "recovered" substances: the current situation

Substances and materials considered as 'Waste' under Waste Framework Directive are not within the scope of REACH² but materials that have ceased to be waste are subject to the same REACH and CLP requirements applicable to virgin substances on their own, in mixtures and in articles unless an exemption from those requirements is applicable.

¹ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, (OJ L 396, 30.12.2006, p. 1).

² According to Article 2(2) of REACH, waste as defined in the WFD is not a substance, mixture or article in REACH which are the three types of material covered by REACH.

In Article 2(7)(d) of REACH, a conditional exemption is provided for substances "which are recovered"³ in the EU from certain REACH requirements relating to Registration of substances, Evaluation and certain obligations for downstream users.

In order to benefit from this exemption, a recovery operator must be able to demonstrate 1) that his recovered substance is the same as a substance that has already been registered under REACH and 2) that safety information on that substance is available to the recovery operator (so that he can supply that safety information, together with his recovered substance⁴, to downstream users further down the supply chain).

Article 2(7)(d) of REACH does not set any specific provisions on how the use of this exemption for recovered substances is to be monitored by ECHA or by Member States. Consequently, even though it is possible that a recovery operator who avails of the exemption may be required⁵ to submit the information substantiating his compliance with the conditions in Article 2(7)(d), he has no explicit obligation in REACH to notify ECHA or the competent authority of a Member State that he is using the exemption. Therefore, the practical ability of either ECHA or Member States to know who is using the exemption and to monitor compliance with the complex conditions of Article 2(7)(d) is currently quite limited.

Current Article 6 of the WFD and possible effect of its amendment

The Commission has discussed the interplay between REACH, Recycling and Article 6 of the WFD with the Member States on a number of occasions⁶ in the context of the Meetings of the Competent Authorities for REACH and CLP (CARACAL).

In line with those discussions with Member States and based on the current wording of Article 6 of the WFD, the Commission's view is that, in the absence of national or EU-harmonised End-of-Waste criteria, it's for the Member States (and not for a recovery operator by himself), by virtue of Article 6(4) of the WFD, to determine on a case-by-case basis whether certain waste has ceased to be waste taking into account the applicable case-law. Consequently, some type of active monitoring or control by Member States is required for the proper implementation of Article 6 of the WFD.

One effect of this obligation on Member States under Article 6 is that it provides some administrative control regarding the operation of the recovered substances exemption in Article 2(7)(d) of REACH as the competent authorities for chemicals and waste in Member States could potentially share information regarding what materials had ceased to be waste and had become subject to product/chemical legislation.

³ In REACH, "recovered substances" are substances that have ceased to be waste within the meaning of the Waste Framework Directive.

⁴ Recovery operators are not exempt from obligations to provide safety information in the supply chain in accordance with Title IV of REACH.

⁵ Under Article 36 of REACH, a manufacturer (which includes recovery operators), importer, downstream user or distributor is obliged to "assemble and keep available all the information he requires to carry out his duties" in REACH for a period of at least 10 years after "he last manufactured, imported, supplied or used the substance or mixture".

⁶ The most recent discussion took place during the 15th CARACAL Meeting on 8-9 July, 2014 where the Commission presented a Paper to the Member States entitled 'Further Considerations on REACH and Recycling' CA/69/2014.

In the Commission's proposal regarding the WFD, presented to the Council in December 2015, the proposed amendments to Article 6(1) are intended to clarify that national authorities are responsible for ensuring that waste ceases to be waste if it complies with the conditions specified in that paragraph and with the applicable case law. The Commission also recalls that this being a directive⁷, Member States are free to choose how to practically transpose such an obligation (e.g. through case by case decisions, when issuing permits for waste operators, general binding rules etc.) provided that the obligation is fulfilled⁸.

During the previous discussions of the Council's Working Party regarding Article 6, one of the amendments proposed by the Presidency⁹ was to make it optional for Member States to have an active administrative role in determining when a waste ceases to be waste. Under such a system, a recovery operator could be allowed to declare, based on his self-assessment, that his material has ceased to be waste in accordance with Article 6(1) of the WFD. That recovery operator could then also conclude that the substance he has recovered from waste meets the conditions in Article 2(7)(d) of REACH to be exempt from Registration requirements.

In such a situation, and in line with the Commission's position on the interplay between REACH and Article 6 outlined above, the Commission considers that additional enforcement and/or notification mechanisms would need to be established to enable Member States to effectively ensure the conditions of Article 6 of the WFD and Article 2(7)(d) of REACH were met appropriately by the recovery operator as, at present, the recovery operator has no explicit obligation to notify ECHA or the competent authority of the Member State that he is benefiting from either provision.

The latest Presidency compromise proposal regarding Article 6¹⁰ follows the approach set out in the Commission's proposal. This means that the control of the exit of materials from waste status continues to be exclusively the responsibility of authorities (EU or national).

In view of the above considerations, Member States are asked to reflect upon the scope of measures needed to monitor the regulatory compliance of recovery operators who claim their recovered materials to be exempt from REACH registration, pursuant to the provisions of Article 2(7)(d) of REACH, and what would still be necessary to support Member States in effectively performing this activity.

⁷ In accordance with Article 288 of the Treaty on the Functioning of the European Union, directives are binding as to the result to be achieved but "shall leave to the national authorities the choice of form and methods."

⁸ Article 4(3) of the Treaty of the European Union

⁹ Proposed amendments to Article 6 were presented to the Working Party in Presidency non-papers prior to the WPE meetings of 12 April and 4 May 2016. No of previous documents: 7502/16 and 8335/16

¹⁰ Document No: 10525/16- circulated by the Dutch Presidency on 24 June