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Companies are slow to join the era of clean chemicals

On June 1st companies in the European Union (EU) who produce, import, or use more than 1 tonne per year of a chemical substance among the 30,000 listed must start to register them with the European Chemicals Agency (ECHA) located in Helsinki. They have until November 30th to pre-register them, an intermediate step that has been set up by REACH (Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals). REACH is pursuing its public health objectives: to slow down the rampant development of illnesses, in particular cancers, most likely related to the ingestion of dangerous chemical products.

Only those companies which have done this can benefit from the ten year extension, until 2018, before permanently registering these substances by providing ECHA with the results of toxicological analyses describing the effects each one has on the environment and on human health for every possible usage scenario for the substances. To do so, they must create "fact sheets" based on the globally harmonised system (GHS) defined by ECHA. If the analysis proves chemicals to be dangerous ECHA could ban or limit the use of the said substances. Companies who do not follow this procedure will simply have their products banned from being sold.

Even though this obligation affects all industries – the chemical substances being examined are involved in the fabrication of a large variety of mass market products -, the companies do not seem to have fully realised what is at stake, according to data gathered by Ernst & Young in partnership with Eurosif for *Le Monde*, *La Stampa* (Turin), *El Pais* (Madrid), *Die Zeit Online* (Hamburg) and *Le Temps* (Geneva). For the mass market products that are immediately affected by the regulation (motor vehicle and aeronautical equipment and construction, perfumes, cosmetics, detergents, paint, varnishes, adhesives, etc.), only one out of every three companies indicates having at least started the process needed in order to meet the requirements.

Among the 19 companies having published information on REACH, most of them have set up some sort of management system, only 10 have started to take inventory of their substances (4 have

completed this), 7 have begun to anticipate the second step (risk analysis), 4 have gone through to the end of the process by abandoning at least one substance judged to be harmful.

On April 11th the European Commission was troubled by this delay, especially concerning small businesses. However, their situation is not the most worrisome. "*They are waiting for the toxicological analyses done by large companies that they cannot afford to do on their own in order to register*", assesses one expert. The weak volume and small number of concerned substances make the situation manageable over the next six months, whereas large companies have to face a bigger risk: the length of their production cycles – in aeronautical construction for example – means that a product that is made today, but put on the market in ten years, could require the use of a substance that has since been banned by ECHA!

Attain technical consensus

In addition, beyond diffusing information internally and setting up management tools, large groups have to get fully involved in the operational phase required by REACH. After putting together the pre-registration files they have to participate in consortiums and informational forums (the forums will be available via Internet in 2009), intended to take inventory of the uses of the substances and to collectively elaborate (for the consortiums) on the toxicological studies in order to arrive at a technical consensus and share the costs of the analyses. Then the GHS sheets have to be further developed and the analyses registered with ECHA.

REACH allows companies, in particular those who export to the EU and thus must comply with the regulation, the possibility to outsource the entire procedure to an "exclusive representative" who can be a branch office or importer (for those outside the EU) or even a consulting firm (for all companies), which would then become the one responsible party with regards to ECHA. This role requires a simple "expertise" and not an accreditation. These types of structures are beginning to multiply to offer their services to overwhelmed companies. "*The market will have to sort them out*", commented an expert.

Antoine Reverchon

Steps to implementing REACH

Sectors	Communication (A)	Set-up (B)	Inventory of substances (C)	Actions already completed (E)	Risk analysis (D)
Automobile equipment					
Bosch (Germany)	–	1	–	–	–
Delphi (US)	–	1	–	–	–
Valeo (France)	1	6	1	–	–
Plastic Omnium (France)	3	6	1	–	3
Automobile constructors					
General Motors (US)	–	1	–	–	–
Hyundai Motor (Korea)	1	6	1	1	–
Renault (France)	1	1	1	–	–
Aeronautical constructors					
EADS (France)	1	1	–	–	–
Raytheon (US)	1	2	–	–	–
Safran (France)	1	6	1	1	–
Rolls Royce (UK)	1	2	–	–	–
Perfumes and Cosmetics					
Procter&Gamble (US)	1	–	1	1	2
L'Oréal (France)	3	5	2	1	3
LVMH (France)	–	1	–	–	–
Beiersdorf (Germany)	1	1	–	–	–
Detergents (& Cosmetics)					
Unilever (NL/UK)	1	2	–	–	–
Henkel (Germany)	1	4	–	–	–
Reckitt Benckiser (UK)	1	–	–	–	–
Mc Bride (UK)	1	1	–	–	–
Speciality Chemicals					
BASF Coatings (Germany)	3	6	2	1	–
Akzo Nobel Coating (NL)	3	6	2	1	3
PPG Industries (US)	1	2	2	1	2
Jotun (Norway)	2	–	–	–	3

– : no detailed information

A - Level of information diffused by company about their implementation of REACH; 1: Qualitative information; 2: Qualitative and quantitative information; 3: Objective beyond REACH

B - Means dedicated to REACH implementation; 1: Participation in working groups; 2: On a global level (direction/department); 3: On an operational level (Business Units); 4: Procedures on diffusion; 5: Procedures on piloting; 6: Database for the inventory of substances

C - Progress level of inventory of chemical substances; 1: inventory started; 2: inventory done

D - Progress level of sanitary risk analysis; 1: analysis started; 2: analysis done

E - Anticipation with regards to REACH application; 1: Taken into account the Globally Harmonized System (GHS) ; 2: GHS modified factsheets; 3: Substitutions of substances already carried out or planned

Source : Ernst & Young, based on information published by companies

METHODOLOGY

Information published in this table was collected and processed by the consulting firm Ernst & Young based on documents published by 66 companies from four sectors using substances targeted by the REACH regulation in mass market products. This table includes 19 companies that delivered at least one precise piece of information on their preparation to implement the regulation, which means only one third of them. However, companies who are number 1 or 2 in their sector, like Denso (automobile equipment), DaimlerChrysler and Toyota (automobile construction), Boeing (aeronautical constructor), Johnson&Johnson (detergents) or Dow Chemical (speciality chemicals), do not appear in this table.

Anne-Marie Leroy: “When they start to ban substances, litigations could multiply”

Can companies still avoid implementing REACH for the registration, evaluation, authorisation and restriction of chemical substances?

No. There may be some exceptional arrangements and there will most likely be delays (the computerised registration system which is supposed to work on June 1st is still not ready). The lack of toxicologists capable of making a diagnosis will also slow things down. But the awareness of companies is increasing. A year ago there were two dozen people in informational meetings about REACH; six months later the room was full. The participants are wondering if they’ll be affected. In March, we saw “head of REACH” managers arrive in all industrial sectors, and engineers asking specific questions. At the end of April they started tackling the legal questions. Fifteen days ago someone asked me what my fees were for the first time! But I am afraid that a lot of companies will register their products on November 30th at midnight...



What legal risks does REACH pose for companies?

There is a serious risk concerning protection of patent rights. According to the procedure, during the informational forums companies must share toxicological data about their substances based on their use, which will force them to divulge their industrial secrets. The regulation stipulates that companies can conceal their identity in the forums by going through a “third party representative”. But there are certain markets where the number of actors is so small that no one will be fooled... Another risk is that the text states that the companies can group together in a “consortium”. Here it is the right to a competitive market that could be damaged, because this practice paradoxically pushes producers towards working together! The head of competition in Brussels said they would be watchful.

Most of all, when the European Chemicals Agency (ECHA) will start to issue bans of certain substances – we estimate that 300 out of the 30,000 concerned products are “worrying”, and that 15 to 30 of them could be banned –, the litigations could multiply. On one hand because the companies will be able to object to a ban by arguing the fact that there are no substitution products, or that eliminating the product will have more harmful environmental (elimination of waste) or social (unemployment, shutdown of activity) affects than the health risks of using it. On the other hand, because the official declaration that a product is dangerous can engage the “responsibility” of a company, a judge could decide that a company that would sell a product before REACH revealed its dangerousness should have carried out this analysis on its own.

How do countries outside the European Union react?

The Chinese government has just created an agency in Helsinki that will be the sole representative for all exporters with regards to ECHA. – but a lot of Chinese companies do not seem to be interested in their services, which requires them to share their practices and secrets with authorities. The American companies, who have renounced their threat to file a complaint with the World Trade Organisation (WTO), are watching closely what is happening since the American lobbyists hope to obtain a trans-Atlantic vote equivalent to that of REACH: they are letting their European subsidiaries handle things...

Interview conducted by A.R.

CV

2007 Anne-Marie Leroy, associate at Denton Wilde Sapte law firm, participates in the creation of LTS Reach, a consulting structure in partnership with Cehtra and Environ (toxicological studies), Patrick Lévy Consulting (management) and Trasys (computer services).

2005 Enters the Denton Wilde Sapte law firm, after having been at the national ministry of education, the World Bank, the OECD and the prime ministers’ cabinet.

1986 Auditor then head of research at the Council of State.

1984 Work inspector, she enters l’ENA by an entrance exam.