



**TOWARDS HARMONISATION OF THE  
ENFORCEMENT OF REACH AT THE EU BORDERS  
CHEMICAL WATCH ENFORCEMENT SUMMIT**

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# ENFORCEMENT OF REACH AT THE BORDERS: WHAT HARMONIZED MEANS

- I. Setting the scene & principles
- II. Customs issues
  - Examples REACH and Customs codes
  - Customs & Wastes
  - Survey in the Metal/Alloys Industry
- III. Other enforcement issues
- IV. Conclusions

# INTRODUCTION

- EUROALLIAGES is the European Association of ferro-alloys and silicon producers represents about 95% of ferro-alloy and silicon production in Europe (EEA).
- The sector has a long European history in delivering essential materials for the European economy, forming an integrated part of major value chains (steel, cars, buildings, electronics, renewable energies, cosmetics).
- Euroalliages was set up initially for trade defence activities. EHS/REACH and Energy/Climate topics were further added.
- This sector is facing an overwhelming unfair international competition with companies that do not abide by the same environment, social and financial standards.
- One of the Associations having launched most anti-circumvention trade cases in Brussels.

# I. SETTING THE SCENE & PRINCIPLES

## Art. 5: No data, no market !

One of the strongest provisions ever adopted in environmental legislation!

Eleven years after REACH entry into force, not all relevant areas have been covered by REACH enforcement programs yet:

A legal opinion from the Commission (CARACAL Nov 2017, from a joint collaboration between DG TAXUD, DG GROW, and DG ENV) has been issued considering that under the current EU legal framework (Union Customs Code, Market Surveillance regulation and REACH) the customs controls are not limited to the enforcement of customs legislation. Customs controls can and should ensure compliance with other legislations, such as REACH.

# I. SETTING THE SCENE & PRINCIPLES

ECHA and Members States are working hard... with fewer and fewer resources.

EU member state and European Economic Area (EEA) countries declared in a report of 2016: [http://ec.europa.eu/environment/chemicals/reach/pdf/final\\_report\\_2016.pdf](http://ec.europa.eu/environment/chemicals/reach/pdf/final_report_2016.pdf)

*“insufficient financial and human resources are impeding the successful operation of REACH and CLP in their countries”*

Commission Work Programme 2018 states (2018 (Strasbourg, 24.10.2017, COM(2017) 650 final):

*“The effective enforcement of existing EU law is just as important as the work devoted to developing new legislation”.*

BUT there is a growing number of restrictions, authorizations etc. making controls even more difficult with hence a more acute lack of level playing field and therefore unfair competition...We know from our experience in trade defence activities how creative defrauders can be when they want to circumvent laws. The problem is to trace them.

# I. SETTING THE SCENE & PRINCIPLES

## Competition and level playing field provisions of REACH, triggering actions at the EU borders

- Legislation should be applied in a **non-discriminatory way** whether substances are traded on the internal market or internationally in accordance with the Community's international commitments (recital 3)
- This Regulation should be **without prejudice** to the full and complete application of the Community **competition rules** (recital 48).
- To ensure transparency, impartiality and consistency in the level of enforcement activities by Member States, it is necessary for Member States to set up an appropriate framework for penalties with a view to imposing effective, proportionate and dissuasive penalties for non-compliance, as non-compliance can result in damage to human health and the environment (recital 122 and Art. 125-127 ).

→ **Since REACH came into force, what has happened at the borders ?**

## II. CUSTOMS CONTROLS & PROCEDURES

### SCREENING OF COMMON CUSTOMS TARIFFS - COMMISSION IMPLEMENTING REGULATION No 2017/1925 (OJL 282 OF 31.10.2017)

#### Screened sections

- Mineral Products
- Products of chemical or allied industries (except pharmaceuticals, fertilizers, cosmetics)
- Plastics and articles thereof; rubber and articles thereof
- Articles of stone, plaster, cement, asbestos, mica or similar materials; ceramic products; glass and glassware
- **Base metals and articles of base metal**

## II. CUSTOMS CONTROLS & PROCEDURES

### SCREENING OF COMMON CUSTOMS TARIFFS - COMMISSION IMPLEMENTING REGULATION No 2017/1925 (OJL 282 OF 31.10.2017)

#### Results

- More than 540 “Other” basket headings,
  - of which more than 180 for the section “Base metals and articles of base metal”

This is generating many opportunities for putting substances under general headings (« Other ») and creates uncertainty with respect to their identification in the customs control phase

➔ How to ensure proper control by national customs authorities ?



## II. CUSTOMS CONTROLS & PROCEDURES

### WHAT HAPPENS IN THE ABSENCE OF SPECIFIC CUSTOMS CODE (TRADE NOMENCLATURE)?

Goods are identified at the borders by their CN code (6 digits at World level – Harmonized System - and 8 digits at EU level).

REACH covers about 22 000 Substances of which

- Only a few hundreds are identified in the CN with a specific customs tariff code.
- Many belong to a “basket heading” (a subdivision called “other”).

**→ There is no “matching” between REACH registered substances and CN codes. Fraud at the border is very easy!**

## II. CUSTOMS CONTROLS & PROCEDURES

### EXAMPLE 1 - RESTRICTION OF MERCURY\* (1/2)

Entry 18a of Annex XVII of REACH:

5. The following mercury-containing measuring devices intended for industrial and professional uses shall not be placed on the market after 10 April 2014:

- a) barometers;
- b) hygrometers;
- c) manometers;
- d) sphygmomanometers;
- e) strain gauges to be used with plethysmographs;
- f) tensiometers;
- g) thermometers and other non-electrical thermometric applications.

\* ANNEX to Commission Regulation No 847/2012 of 19 September 2012

## II. CUSTOMS CONTROLS & PROCEDURES

### EXAMPLE 1 - RESTRICTION OF MERCURY (2/2)

#### Common Customs Tariffs of Commission Implementing Regulation No 1001/2013

9025 Hydrometers and similar floating instruments, thermometers, pyrometers, barometers, hygrometers and psychrometers, recording or not, and any combination of these instruments:

– Thermometers and pyrometers, not combined with other instruments:

9025 11 – – Liquid-filled, for direct reading:

9025 11 20 – – – Clinical or veterinary thermometers .

9025 11 80 – – – Other

9025 19 – – Other:

9025 19 20 – – – Electronic .

9025 19 80 – – – Other

9025 80 – Other instruments:

**9025 80 20 – – Barometers, not combined with other instruments**

**– – Other**

9025 80 40 – – – Electronic

9025 80 80 – – – Other

9025 90 00 – Parts and accessories

**→ How to make the distinction between barometers with or without mercury content?**

## II. CUSTOMS CONTROLS & PROCEDURES

### EXAMPLE 2 - RESTRICTION OF CADMIUM\*

*Mixtures and articles produced from plastic material as listed above (i.e. PP, PET, PVC, LDPE, PUR ...) shall not be placed on the market if the concentration of cadmium (expressed as Cd metal) is equal to or greater than 0,01 % by weight of the plastic material.*

Chapter 39 of Common Customs Tariffs : Plastics and articles thereof

There are at least 40 entries named “other”. Cadmium presence is not reported in the tariff headings or related explanatory notes.

**Identification with ad hoc tariff headings is impossible**

**→ How to make the distinction between plastics above or below the required threshold and how to ensure control at the borders ?**

\* ANNEX to Commission Regulation No 835/2012 of 18 September 2012

## II. CUSTOMS CONTROLS & PROCEDURES

### EXAMPLE 3 – RESTRICTION ON CADMIUM

*Cadmium and its compounds shall not be used, or placed on the markets in paints [3208][3209] if the concentration of cadmium (expressed as Cd metal) is greater than 0.01% by weight.*

#### Common Customs Tariffs:

**3208** Paints and varnishes (including enamels and lacquers) based on synthetic polymers or chemically modified natural polymers, dispersed or dissolved in a non-aqueous medium; solutions as defined in note 4 to this chapter:

3208 10 90 – – Other

3208 20 90 – – Other

3208 90 19 – – – Other

**3209** Paints and varnishes (including enamels and lacquers) based on synthetic polymers or chemically modified natural polymers, dispersed or dissolved in an aqueous medium:

3209 90 00 – Other

→ Targeted paints fall under basket headings. How to control ?

# II. CUSTOMS CONTROLS & PROCEDURES



## EXAMPLE 4 – EU NICKEL RESTRICTION: BACKGROUND & ISSUE

- **Background:** Adopted in 1994, now under REACH (Annex XVII, Entry 27)

*Nickel shall not be used:*

- (a) in **body piercing** unless the **Ni release** [...] is less than **0,2 µg/cm<sup>2</sup>/week**
  - (b) in **articles intended to come into *direct and prolonged contact with the skin*** such as: earrings, necklaces, bracelets, rings, wrist-watch cases, watch straps [...], **if Ni release rate from the parts of these articles *coming into direct and prolonged contact with the skin* is greater than **0,5 µg/cm<sup>2</sup>/week**.**
- **Aim:** to prevent all people from becoming sensitized to nickel and prevent Ni allergic contact dermatitis in most Ni-allergic individuals
  - Prevalence of Ni allergy has decreased but it is still common
  - 2017/18: ECHA is developing a new guideline list of articles to be considered in “direct and prolonged skin contact” (hence in the scope of the restriction)

**ECHA draft guideline list of articles is very long and would extend the scope of the restriction to articles that are not significant causes of nickel dermatitis (e.g. pencil sharpeners, mugs)**

## II. CUSTOMS CONTROLS & PROCEDURES



### EXAMPLE 4 – EU NICKEL RESTRICTION

- Potential unintended consequences: divert enforcement focus away from items which are the primary causes of Ni allergy, when non-compliant, and are already listed in the restriction (e.g. earrings, other jewellery)
- **Instead of broadening the scope of the restriction, the priority should be on improving enforcement and compliance of the articles that are the main causes of nickel sensitization and are already covered by the restriction**
- Non-compliant products are still on the EU market:
  - 2018 ECHA Enforcement project showed that 8% of tested jewellery and 11% of buttons and zips on clothing were non-compliant with Ni restriction
  - 2016 Danish EPA Report “An investigation of causes of Ni allergy” noted that 15-20% of investigated earrings do not seem to be compliant
  - EU RAPEX notifications show that most products non-compliant with Ni restriction were low cost, costume jewellery items, imported from non-EU countries

**To protect public health, better compliance and enforcement of existing restriction would be more effective than extending the scope to articles that are not relevant**

## II. CUSTOMS CONTROLS & PROCEDURES

### EXAMPLE 4 – INCLUSION IN ANNEX XIV – AUTHORISATION LIST\*

*Pitch, coal tar, high-temp. (HTCTP)*

*The residue from the distillation of high temperature coal tar. Composed primarily of a complex mixture of three or more membered condensed ring aromatic hydrocarbons. EC n°266-028-2 & CAS n° 65996-93-2. Sunset day: 04/10/2020*

HTCTP a key component for the functioning of the submerged electric arc furnaces used in metallurgy.

Common Customs Tariffs:

*3801 30 00 – Carbonaceous pastes for electrodes and similar pastes for furnace linings*

*3801 90 00 – Other*

**→ How to properly control the granting of authorization if the imported pastes with HTCTP cannot be distinguished from the pastes without HTCTP**

\* Commission Regulation 2017/999 of 13 June 2017



## II. CUSTOMS CONTROLS & PROCEDURES

### EXAMPLE 5 - AUTHORIZATION

*Diarsenic trioxide (sunset date 21/05/2015)*

Common Customs Tariffs:

2811 29 10 – – – Sulphur trioxide (sulphuric anhydride); diarsenic trioxide

*Diarsenic pentaoxide (sunset date 21/05/2015)*

Common Customs Tariffs:

Not identifiable as such in the customs code. It would therefore fall under basket heading: 2811 29 90 – – – Other

**→ How to control the granting of authorization if the imported substance is not properly identifiable in the Customs Tariffs ?**

## II. CUSTOMS CONTROLS & PROCEDURES

### EXAMPLE 6 - LIST OF SVHC: ARE THEY IDENTIFIABLE IN THE COMMON CUSTOMS TARIFFS ?

#### *Cadmium sulfate* \*

#### Common Customs Tariffs:

2833 29 20 [Sulphates; alums; peroxosulphates (persulphates)] Of cadmium; of chromium; of zinc . . . .

#### *Cadmium fluoride* \*

#### Common Customs Tariffs: falls under “other” basket heading :

2826 Fluorides; fluorosilicates, fluoroaluminates and other complex fluorine salts:

– Fluorides:

2826 12 00 – – Of aluminium

2826 19 – – Other:

2826 19 10 – – – Of ammonium or of sodium

2826 19 90 – – – Other . .

**→ How to control proper classification and related RMM if the imported substance is not properly identifiable in the Customs Tariffs Nomenclature?**

\* MSC Decision of December 2014

## II. CUSTOMS CONTROLS & PROCEDURES

### EUROPEAN CUSTOMS INVENTORY OF CHEMICAL SUBSTANCES (ECICS)

Each product listed in ECICS is identified by the CUS number (Customs Union and Statistics), assigned by DG TAXUD. ECICS is to assist Commission services, economic operators, customs officers etc. dealing with external trade of chemicals.

Public consultation for the Evaluation of ECICS launched beginning 2017.

Objective: to assess the usefulness and the relevance of ECICS, particularly in supporting the harmonisation of the classification of chemicals in the Member States and the facilitation of customs procedures.

Results of consultation and next steps: Not yet available

## II. CUSTOMS CONTROLS & PROCEDURES

### ANALYTICAL METHODS

*In an EU/EEA-wide project of ECHA's Enforcement Forum, inspectors found hundreds of consumer products with illegal amounts of restricted chemicals. Every fifth toy inspected contained high levels of restricted phthalates (ECHA/PR/18/04 - Helsinki, 13.02.2018).*

Customs controls must be quick, effective and based on modern risk management techniques ([https://ec.europa.eu/taxation\\_customs/business/customs-controls/general\\_en](https://ec.europa.eu/taxation_customs/business/customs-controls/general_en))

Previously, Customs controls tended to focus on the fiscal aspects of customs work but in recent years there has been an **increasing emphasis on the importance of customs controls for purposes such as security, safety, protection of the environment.**

**Custom laboratories will have an increasingly important role to play** in helping to ensure the correct and uniform application of Community legislation in a world where product developments occur ever more rapidly.

## II. CUSTOMS CONTROLS & PROCEDURES

### ANALYTICAL METHODS

The ECHA Forum has issued a Compendium of analytical methods to check compliance with Reach annex xvii restrictions in March 2016:

[https://echa.europa.eu/documents/10162/13577/compendium\\_of\\_analytical\\_methods\\_en.pdf/3807683c-5340-4638-b5bc-5554635cdc8a](https://echa.europa.eu/documents/10162/13577/compendium_of_analytical_methods_en.pdf/3807683c-5340-4638-b5bc-5554635cdc8a)

“Some restrictions do not contain a limit value that needs to be checked, the so-called no-limit-value restrictions (NLV) and a case-by-case analysis is appropriate in those cases. To date, according to the experts of the Forum WG on the enforceability of restrictions, it **remains unclear which analytical method should be applied for checking compliance with a NLV-restriction**. As a consequence, those restrictions are currently covered in this compendium with certain limitations. “

As an example, there is no method to control the restriction of B(a)P in tyres.

How is the link between ECHA and Customs Laboratories European Network (CLEN) organized to anticipate changes, to address analytical issues of unusual substance

## II. CUSTOMS CONTROLS & PROCEDURES

### REACH-EN-FORCE-7

In 2019, an EU-wide enforcement project (REF-7) of the ECHA REACH Forum together with customs will examine the extent to which European companies have fulfilled their registration obligations.

Since Customs are now recognized as an official enforcement body for REACH, is the potential role of the European Anti-Fraud Office (OLAF) investigated (registrations, authorisations) ?

**This initiative is welcomed and the outcome eagerly awaited !**

## II. CUSTOMS CONTROLS & PROCEDURES

### CROSS SECTORIAL SURVEY

A short survey among metals/alloys sectors on customs controls has been launched.

- ⇒ In current control practices, still too many differences between countries
- ⇒ Same level playing field for all importers
- ⇒ REACH = Regulation equally applicable in all Member States. Same should be true for enforcement
- ⇒ Harmonized regime for controls at EU borders and harbors is an absolute necessity **to avoid distortion of competition of the internal market.**
- ⇒ Some have experience of control at the borders on SVHC  
Otherwise no controls were reported

***"The same market must have the same rules. This not necessarily calls for stricter rules but for strictly the same rules for all."***

## II. CUSTOMS CONTROLS & PROCEDURES

### CROSS SECTORIAL SURVEY

- ⇒ Immediate controls at the borders prevent the risks of disappearance of the material through complex supply chain paths (dispersion via multiple locations)
- ⇒ Need of a fine balance between holding back the transported goods in customs for compliance checking, and ensuing quick release of the goods to the recipient without undue delay: first a sampling and in case of positive control, inspection at the factory gate
- ⇒ Controls at end-user's place:  
Find the right balance between the costly exercise in terms of travelling costs (in case of supplier's mandatory presence) and  
The opportunity to have home clearance: the carrier reports the shipment to the customs before entering EU, the plant report the shipment content to the customs, permission to unload given when declaration are matching. Physical control at the factory.



# III. ENFORCEMENT: OTHER TOPICS

## ENFORCEMENT OF ECHA'S DECISIONS

An Euroalliances' member launched as Lead Registrant a BoA case in 2015 related to the breach of the OSOR principle.

A long series of events took place since September 2015. An ECHA decision was issued on 29/6/17 to revoke the registration numbers of the defrauding companies.

Revocation decision could not be issued before the expiry of the deadline to appeal the data sharing decision, which is 3 months (Article 92(2) of REACH). The deadline passed mid-October 2017.

Since then, nothing has happened and the defrauders are still on the Website as registrants with their parallel dossiers !

# III. ENFORCEMENT: OTHER TOPICS

## REVISION OF REGISTRATION DOSSIERS

Making update of the registration dossier mandatory ? How to enforce ?

Many co-registrants (and subsequently free-riders) become inaccessible once the registration number granted. In our consortium, we launched a revision of > 320 LoAs, without cost implications. Replies: less than 40 % ! **What if new requirements ?**

**Letters of Access and IP rights are not part of the enforcement** and costs are prohibitive for taking legal actions.

The liability is mainly for the Lead Registrant, as the updates for co-registrants are on administrative aspects, related costs will be very difficult to recover from other co-registrants  
→ **Lead Registrants may want to step out of this responsibility !**

Commission Staff Working Document accompanying the COM(2018) 116 Communication on Commission General Report on the operation of REACH:

***ECHA notes that penalising breaches of data sharing obligations is difficult due to the different organisation of enforcement authorities in the Member States !***

## IV. ENFORCEMENT: OTHER TOPICS

**Some ECHA decisions against defrauders are not enforced !**

**What is the incentive for the Lead Registrant to further take the responsibility for the joint submission and for all-co-registrants to remain committed to update their dossier ?**

**Who is the right target ?**



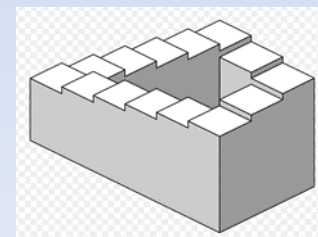
**Concerns that more and more requirements are imposed on yet compliant companies with sometimes additional heavy testing on the one hand, and a current permissive system for free-riders/defrauders on the other hand !**

## IV. CONCLUSIONS

- ❑ Enforcement means “the act of compelling observance of or compliance with a law, rule, or obligation” . This implies controls and, if need be, corrective measure, fines or sanctions. Implementation of the law is to put laws into effect.

**The law shall be Implemented AND Enforced!**

- ❑ REACH is well implemented but not well enforced.
- ❑ “No data no market” provision remains a weak message to the external world as long as its enforcement is weak.
- ❑ Even if a full harmonization of enforcement procedures might not be feasible across all member states, commonly-based methods/procedures should be adopted so as to ensure a proper EHS control of movements of goods entering the EU territory, to avoid distortion of competition between importers and EU manufacturers subject to multiple inspections (because operating on the EU territory).
- ❑ Does the lack of fraud records/statistics reflect an efficient respect of the Regulation or does it reflect a lack of efficient procedures to identify the frauds ?



## IV. CONCLUSIONS

- ❑ Yet compliant companies should not be discouraged, the target is the defrauders !
- ❑ It should be avoided that goods are flooding the EU market without proper controls (quality, traceability) at the entry of the EU territory with hence impact on the health and the environment.
- ❑ The unregulated hazard content of imported articles should be addressed.
- ❑ Controls need to be implemented at the earliest stages possible ( i.e. at the borders)
- ❑ How can a Non-Toxic Environment (NTE) for Europe be achieved without a robust control system ?
- ❑ **An efficient NTE implies the focus on exposure control & safe use instead of focusing on substitution of hazard content with a weak control system.**



**THANK YOU FOR YOUR ATTENTION!**

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