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***To the participants of the
Joint meeting of the Waste and CARACAL Expert Groups - 9 July 2020***

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Applicability of SCIP notification to ‘import’ for own (final) use

Action requested: Meeting participants are invited to take note of this paper and comment on the question raised (Open Session point 4, Q&A)

Background

REACHLaw Ltd. has been invited as observer to the Joint meeting of the Waste and CARACAL Expert Groups on 9 July 2020 (Open Session) in our capacity as contractor of a study for the European Defence Agency (EDA) on “the impact of (other than REACH/CLP) European Chemical/Waste Regulations on the Defence Sector” due to be delivered in December 2020 (see EDA news of 4 June 2020¹ and enclosed request for support of 25 May 2020).

A distinct component of the EDA study is to analyse the implementation of the new Article 9 of the revised Waste Framework Directive (WFD) (i.e. Substances of Concern In articles as such or in Products (SCIP) notification and SCIP database), assess the potential impacts on defence sector stakeholders and provide recommendations to mitigate these impacts.

The study includes consultations with competent stakeholders, such as: European Commission, ECHA, Member States’ MoDs, Member States’ Competent Authorities and defence industry stakeholders.

¹ <https://www.eda.europa.eu/info-hub/press-centre/latest-news/2020/06/04/eda-to-assess-impact-of-eu-chemical-waste-regulations-on-defence>.

Question

During the contractor's preliminary analysis and preparation of questionnaires to stakeholders the question of applicability of SCIP notification to 'import' for own (final) use has been identified as one of the potential key issues for MoDs and defence industry. However, the question is not specific to the defence sector, but of general relevance for potential SCIP duty holders.

'Import' for own (final) use means that there is no onward supply of the imported product in the EU, as such or as component of a more complex assembly. This may be the case for example for analytical equipment or any other products sourced from outside EU that potential duty holders use in their internal operations.

Following its Safer Chemicals Conference 2020 on 2 June 2020,² where this question was also raised, ECHA has made clear, that in its opinion **any imported article into the EU is covered by the obligation of SCIP notification**. ECHA argues that "import shall be deemed to be placing on the market" (REACH Article 3 point 12, 2nd sentence). For definitive guidance, ECHA refers to Q&As 1607³ and 1609⁴ on its website.

Impacts of the ECHA opinion

In the contractor's view the ECHA opinion raises a number of concerns:

- It creates new SCIP duty holders beyond the scope of REACH Art. 33(1), because there is no EU supply chain in such cases - REACH Art. 33(1) does not apply.
- It raises legal concerns with regard to the definition of "supplier of an article" in REACH Art. 3 point 33 and the coherence between SCIP and REACH Article 33(1).
- The SCIP notification deadline would kick in earlier, that is at the time of 'import' rather than the later 'onward supply' (if any).
- It may also lead to different national interpretations of "placing on the market" and hence different SCIP duty holder definitions, thus challenging the EU level playing field for industry. As an example, the current draft national provision in Sweden transposing SCIP notification seems to restrict placing on the market to supply to someone else, thus deviating from REACH Article 3 point 12, 2nd sentence.⁵

Criticality and urgency of a clarification

Given the possible impacts of the ECHA opinion, we believe that a consistent view of Member States, the European Commission and ECHA on this question would be important.

² <https://echa.europa.eu/-/safer-chemicals-conference-2020>.

³ <https://echa.europa.eu/support/qas-support/browse/-/qa/70Qx/view/ids/1607>

⁴ <https://echa.europa.eu/support/qas-support/browse/-/qa/70Qx/view/ids/1609>

⁵ "Släppa ut på marknaden: tillhandahålla eller göra tillgänglig för någon annan", see

<https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/forordning-2008245-om-kemiska-produkter-och-sfs-2008-245>.

Additional notes

Note 1: At the Safer Chemicals Conference 2020 ECHA had also advised to contact the Commission for further clarification of this question. Therefore, the question has also been raised with the European Commission (DG ENV) as part of the stakeholder consultation for the EDA study (launched on 19 June 2020; answer pending).

Note 2: A legal analysis addressing this question has recently been performed for the Finnish MoD, as part of a broader study on SCIP implementation. The Final Report suggesting a legal clarification has been provided to the Commission and ECHA on 26 June 2020.

Kind regards,

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