

Version: 5 May 2009

Joint guidance document for CONCAWE and Cefic member companies:

REACH registration and the importer Guidance on Treatment and Processing in free zones

The aim of this paper is to assist industry in determining the role and obligations of importers under REACH Regulation ("REACH"), in particular when products undergo Treatment and Processing in areas under customs supervision (free zones).

This paper is intended to serve as guidance for ConcaWE & Cefic members. It does not express any preference from Cefic or ConcaWE for any of the presented examples. This paper contains a sample of examples gathered from companies. Each company should decide individually the organisation it may adopt. This may be according to one of the presented examples, adopted in full, partly or according to another scheme.

This paper cannot serve as substitute for legal advice. The arrangements between individual sellers and individual buyers may be either more complex than the cases considered in this guidance or may differ from these. Companies are therefore advised to check individual cases with their company lawyers. Companies need also to check compliance of their contemplated scheme with competition law rules. For example, any exchange of information regarding actual volumes need to comply with competition law rules. For more information, please refer to [ECHA Guidance on Data Sharing](#) and [Cefic REACH Compliance leaflet](#). It may be the case that there is a need to use a Third Independent Party or modify an example.

The information contained in this paper is intended for guidance only and whilst the information is provided in utmost good faith and has been based on the best information currently available, is to be relied upon at the user's own risk. No representations or warranties are made with regards to its completeness or accuracy and no liability will be accepted for damages of any nature whatsoever resulting from the use of or reliance on the information.

1. Definition of the importer under REACH

REACH requires manufacturers and importers of a substance, either on its own or in one or more preparation(s), in quantities of 1 tonne or more per year to register with the European Chemical Agency (ECHA).

It should be noted that one legal entity could have various roles (e.g. importer and manufacturer or downstream user) depending on its activities, even for the same substance. Therefore, it is very important that companies correctly identify their roles in the supply chain for each substance they handle and this will be decisive in determining their registration obligations.

In this respect, Article 3 of REACH provides more detailed definitions of the actors under REACH, including the definition of the importer:

Article 3.11: "Importer: means any natural or legal person established within the Community¹ who is responsible for import"

Article 3.10: "Import: means the physical introduction into the customs territory of the Community"

Article 3.12.: "Import shall be deemed to be placing on the market"

I.e. the legal definition of the REACH importer consists of only two elements:

- a) he is a natural or legal person established within the Community (legal entity) AND
- b) he is responsible for physical introduction into the customs territory of the Community.

The first element relating to the status of legal entity should be determined in accordance with the national law of the country where the legal entity is established. European law does not provide for complete harmonisation of civil and company law.²

The second element relating to responsibility for physical introduction into the customs territory of the Community is not further defined in REACH. According to Technical Guidance Document on "Registration", it could depend "*on many factors such as who orders, who pays, who is dealing with the customs formalities, but this might not be conclusive on its own*". Other factors could be considered as: who has the ownership and title to goods, who bears risk and liability in case of damage to people or the environment, who pays the carriage and transportation of goods.

There is no provision in REACH nor in the Technical Guidance Documents suggesting a link between any concept of "importer" for customs purposes and the concept of importer for REACH purposes. The lack of alignment between REACH and customs regulation is illustrated by

1. REACH Article 2(b) which makes REACH applicable to certain substances undergoing Treatment or Processing in customs free or transit zones,
2. the Guidance on Registration which states that customs clearance alone is not a sufficient criterion to determine the REACH importer, and
3. the EU customs code itself which does not recognise the concept of "the importer".

Companies themselves will, therefore, need to assess their obligations under REACH on a case-by-case basis. Commercial obligations as allocated according to INCOTERMS may to some extent contribute to this, see section 3 of this paper.

Companies should make necessary judgements on who should register and should document the reasons for their decisions in order to ensure that the substances placed on the Community market are compliant with regulatory requirements.

It is up to companies to determine which legal entity will bear the REACH importer's responsibility, provided the legal entity so identified has sufficient knowledge and capacity to cope with REACH requirements, and is able to take its REACH responsibilities resulting from introduction of the substances into the EEA. Parties involved, i.e the legal entity defined as REACH-importer, and the seller, carrier, buyer and potentially other actors, should consider mutual agreements or written contractual arrangements in order to clearly assign, determine and document who is/will be the REACH importer.

¹ REACH is with EEA relevance since EEA EFTA-States Norway, Iceland and Liechtenstein have implemented REACH. Imports from those states are considered as intra-Community trade for the purpose of REACH. For a list of affected and non-affected countries and territories see Appendix 2.

² The Technical Guidance Document on Registration on the ECHA website provides more detailed guidance on legal entity: http://guidance.echa.europa.eu/public-2/getdoc.php?file=registration_en.

This approach is supported by the Guidance on Registration which states in section 1.5.3.1: *"International companies sometimes have several daughters in the EU acting as importers, often spread over several Member States. Each of those daughters, if it has legal personality, is a legal person within the meaning of REACH. Depending on the distribution of work within the group, each of them can be an "importer" responsible for import. It is for the group or the individual companies to assign the tasks and the responsibilities to companies in the group."*

On the other hand, no provision exists in REACH that would prevent a company from allocating responsibility of a REACH importer to any company involved in the import, e.g. for customs purposes, or through AEO³ responsibilities.

2. Importer vs. Only Representative

The roles and obligations of legal entities established in the Community, and responsible for physical introduction of a substance into the Community customs territory, depend on the decision of the exporter established outside the Community whether or not to appoint an Only Representative (OR) pursuant to Article 8 of REACH. The non-EEA supplier has no responsibilities under REACH. However, instead of letting his importers register, the natural or legal person established outside the Community who manufactures a substance on its own, in preparations or in articles, formulates a preparation or produces an article that is imported into the Community, may appoint an Only Representative established within the Community to carry out the registration and to comply with obligations of importers under REACH. As a consequence, his importers of the substance are covered by the OR's registration, and are relieved from their obligation to register, and are regarded as Downstream Users for the purpose of the Regulation.

The REACH Technical Guidance Document "Registration" further specifies in its section 1.5.3.4 that *"it is essential that there is a clear identification of:*

- *who in the supply chain of a substance is the manufacturer, formulator or producer of an article;*
- *who has appointed the only representative;*
- *which imports the OR has responsibility for.*

As long as the above conditions are met, it does not matter what are the steps or supply chain outside the EU between the manufacturer, formulator or producer of an article and the importer in the EU." It further specifies that if the OR *"acts on behalf of several non-Community manufacturers it must submit a separate registration for each of these substance manufacturers."*

In principle, the designation of the Only Representative has no impact on commercial relations within the supply chain, i.e. an Only Representative must only fulfil all obligations of importers under REACH (Article 8). The Only Representative will, therefore, be responsible for registering the substance and for updating the registration file, but will not be liable for complying with other, not REACH related obligations of importers, like customs clearance, invoicing etc., unless decided otherwise in mutual agreement.

3. Who should register based on the INCOTERMS agreed between buyer and seller ?

The purpose of INCOTERMS is to provide a set of international rules for the interpretation of most commonly used trade terms in foreign trade. INCOTERMS are elements of sale contracts but have no bearing on carriage contracts. They do not provide for all duties that parties may wish to include in a contract of sale. They only deal with the relation between buyer and seller under the contract of sale in some distinct aspects of international trade. They do not encompass local or regional law. It

³ AEO = Authorized Economic Operator. Definition: *"A party involved in the international movement of goods in whatever function that has been approved by or on behalf of a national Customs administration as complying with WCO or equivalent supply chain security standards. Authorized Economic Operators include inter alia manufacturers, importers, exporters, brokers, carriers, consolidators, intermediaries, ports, airports, terminal operators, integrated operators, warehouses, distributors."*

is, therefore, not possible to conclude from INCOTERMS on any responsibilities with regard to REACH.

Still, commercial obligations as allocated according to INCOTERMS may to some extent be helpful in the determination of the REACH importer, as they define three actors in a supply chain: the seller → the carrier → the buyer, and their respective obligations, in particular regarding customs clearance and payment for goods. These definitions could be used if nothing more specific has been agreed between parties involved regarding REACH importer responsibility allocation.

The seller, being a non-EEA manufacturer / distributor, can by definition not take the role of the REACH importer.

The carrier would normally act on behalf of the seller or the buyer, and would normally not be considered either as the importer under REACH.

Customs clearance would under DDP (Delivered Duty Paid) terms be done by the seller's customs representative, and under all other terms by the buyer's customs representative. Regardless of INCOTERMS, the customs representative, and any direct or indirect representative as defined under customs law, would not normally take the role of the REACH importer.

To illustrate the process of determining the obligations of the actors in the supply chain, the Technical Guidance Document on Registration (section 1.5.3.3) gives an example of a "sales agency": In case of this kind of agency established in the EU but only acting as a kind of facilitator, a letter box transmitting an order from a buyer to a supplier (and being paid for that service) but taking no responsibility whatsoever on the goods or the payment for the goods and not having their ownership at any stage, then, the sales agency is not to be considered as the "importer" for purposes of REACH. The sales agency is not responsible for the physical introduction of the goods.

It should be noted that there is no direct link or interdependence between INCOTERMS and REACH roles. INCOTERMS deal with the transfer of ownership, cost, freight/transport, insurance and customs duties, but not with other legal obligations that may exist, such as obligations under REACH.

4. How may the obligation to register be affected by Treatment or Processing in free zones ?

Article 2(b) of REACH under certain circumstances exempts substances from registration:

Article 2(b)

Substances, on their own, in a preparation or in an article, which are subject to customs supervision, provided that they do not undergo any treatment or processing, and which are in temporary storage, or in a free zone or free warehouse with a view to re-exportation, or in transit

The following cases serve as an illustration. In reality, situations can, or rather will be more complex. Consultation with company lawyers is therefore strongly recommended.

The cases involve four hypothetical companies (legal entities):

- Company A is established outside the "REACH Area", i.e. the territory of the member states of the European Economic Area (EEA)⁴. Company A is in most cases what under INCOTERMS would be a "seller".
- Company B is established outside the "REACH Area". It is what under INCOTERMS would be a "buyer".
- Company C is established within the "REACH area". It is what under INCOTERMS would be a "buyer".

⁴ See also appendix 2.

- The “carrier” under INCOTERMS has not been included as he will not have obligations under REACH (see section 3 above).
- Instead Company D has been introduced which owns temporary storage under customs supervision and, in certain circumstances, might become an operator under REACH.

The following rules apply:

- For IMPORT:
 - If a substance that has been previously (pre-)registered by an importer, and is placed in customs area with view to import by that same importer, then Treatment and Processing (T/P) would have no relevance in terms of REACH obligations. REACH compliant import has taken place before the substance entered the customs area. REACH Technical Guidance Document “Registration” specifies in its section 1.6.3.2. “...a free zone or a free warehouse on the EU territory is regarded as being part of the EU”. The T/P should be included in the registrant’s dossier as an identified use. The operator who treats / processes the substance in the customs area will be considered as a Downstream User of the REACH importer.
 - If the substance has not been previously (pre)registered, the operator in the area under customs supervision should refuse to treat/process, as he would otherwise, together with the EEA importer, be liable for REACH infringement
- For RE-EXPORT:
 - If the substance is placed in an area under customs supervision with view to re-exportation, any operator that treats/processes in that area would be liable under REACH in the same way as a REACH importer
- Toll manufacturing

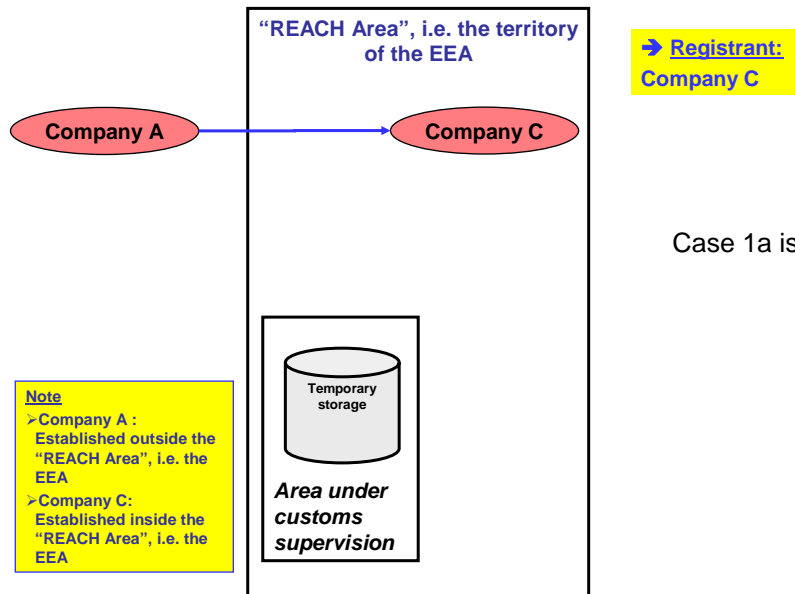
In those a.m. scenarios that include T/P, the T/P operation may be executed in the frame of a toll contract, on behalf of a principal. In a situation where T/P would be relevant for REACH obligations, it would generally be the operator, not the principal, who would be liable under REACH. This is concluded by analogy to an ECHA answer to a Frequently Asked Question regarding “Toll Manufacturing”, see http://echa.europa.eu/reach/faq_en.asp.
- Industry interpretation of “Treatment and Processing”: three criteria
 1. Storage would not be considered as T/P
 2. Manufacturing and chemical reactions should be considered as T/P
 3. Other operations could be T/P. It is assumed that the legislator’s intention would be to have substances in transit, with view to re-exportation, exempted from REACH obligations when human exposure and impact on the environment would be minimised. In case of operations for which it would not be obvious if they need to be considered as T/P, one way to warrant minimisation of risk to humans and to the environment, could be the demonstration by the operator that Strictly Controlled Conditions are fulfilled.

Please note that at the date of publication of this paper, questions raised by members states regarding the interpretation of “Treatment and Processing” were still being debated in ECHA’s REACH Helpdesk network (REHCORN). It is therefore recommended to consult Questions and Answers on the ECHA web site <http://echa.europa.eu/> for relevant updates.

- Operations aboard a ship in an area under customs control

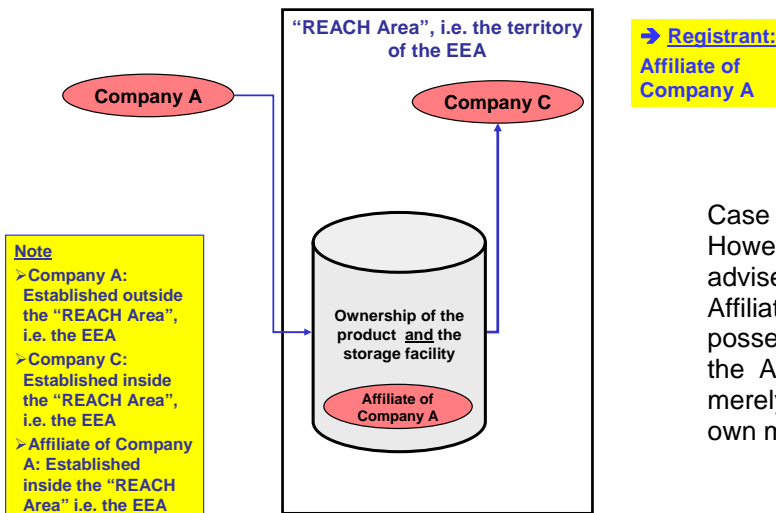
These would not fall under REACH, as pursuant to REACH Article 2(d), REACH does not apply to the carriage of dangerous substances(...). Permanent Floating Storage would, however, be an exception to this rule.

Case 1a: direct import without transit through an area under customs supervision



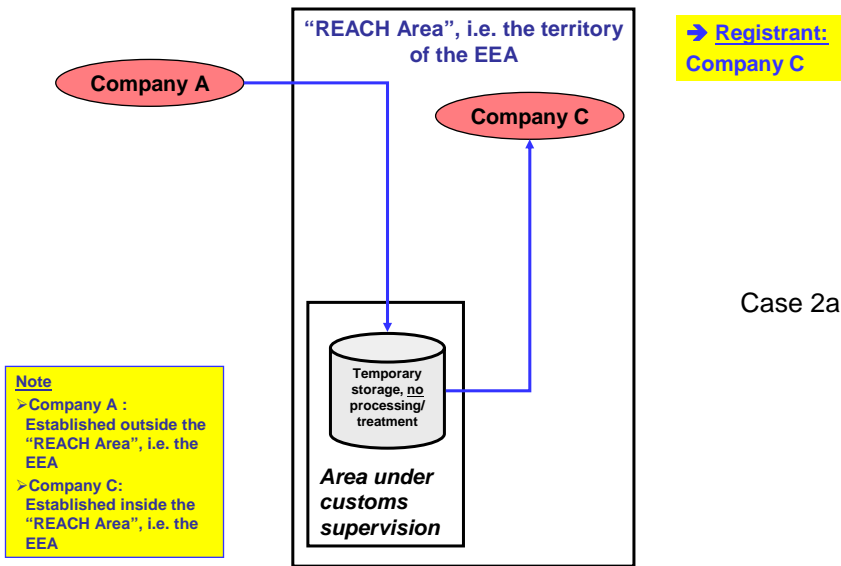
Case 1a is straightforward

Case 1b: Import through a storage facility; no transit through an area under custom supervision



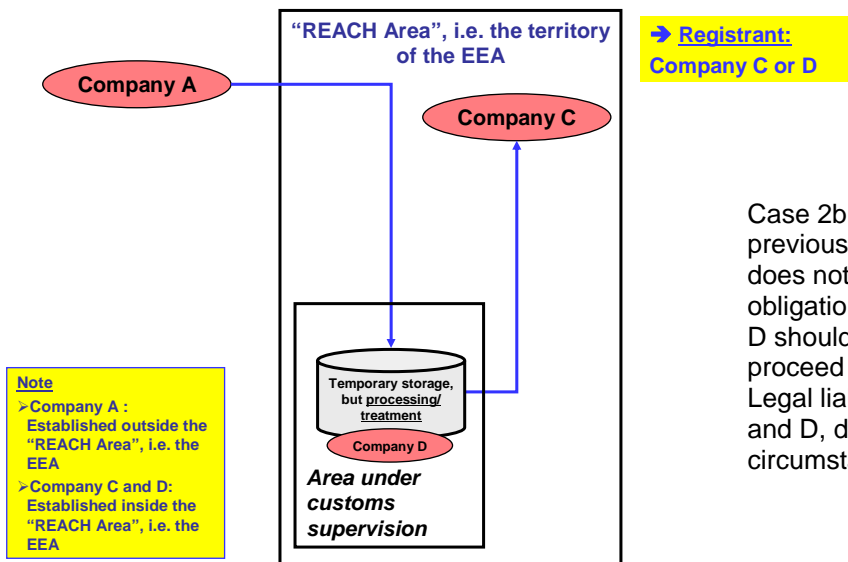
Case 1b is straight forward. However, Company C is advised to ascertain that the Affiliate of Company A is in the possession of a registration if the Affiliate of Company A is merely an importer without own manufacturing.

Case 2a: import with transit through an area under customs supervision



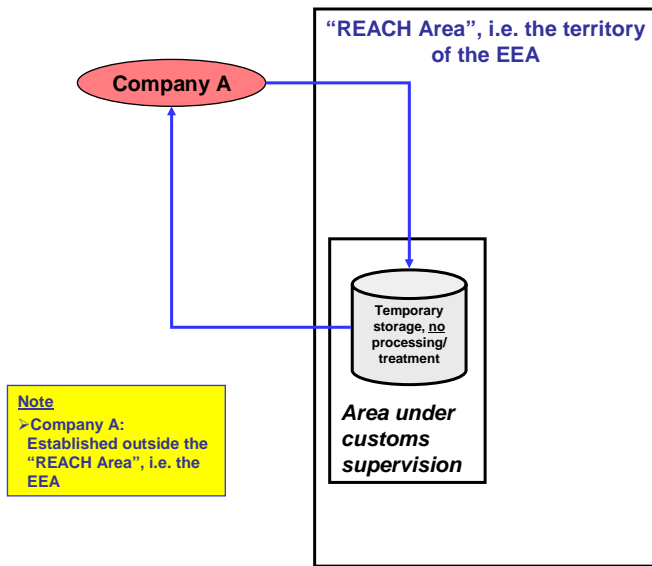
Case 2a is straight forward

Case 2b: import with processing/ treatment in an area under customs supervision



Case 2b: if company C has previously (pre-)registered, T&P does not trigger registration obligations. If not, then company D should refuse to do T&P or proceed with (pre)registration. Legal liability would be for both C and D, depending on circumstances (e.g. contract)

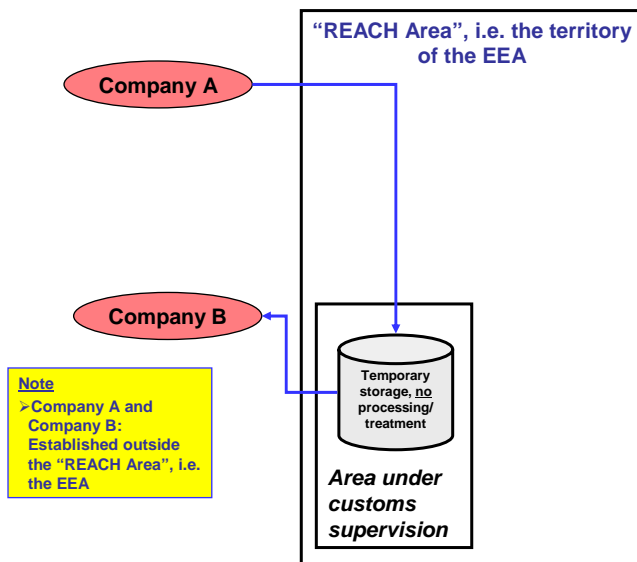
Case 3a: re-exportation/transit



→ Registrant:
none

Case 3a is straight forward

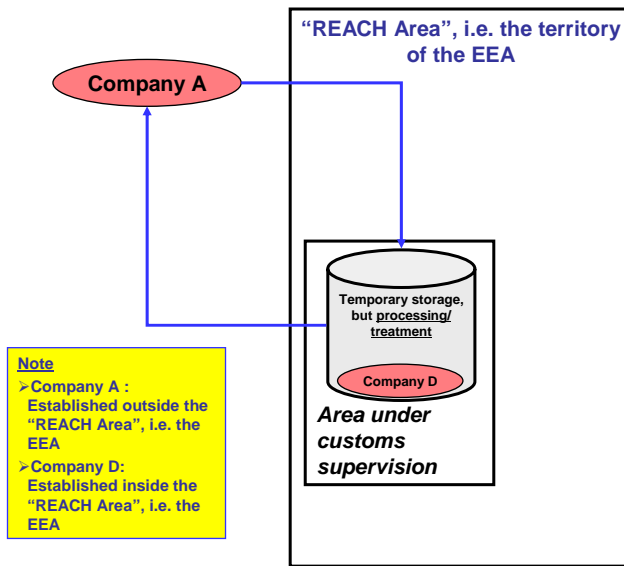
Case 3b: re-exportation/transit



→ Registrant:
none

Case 3b is straight forward

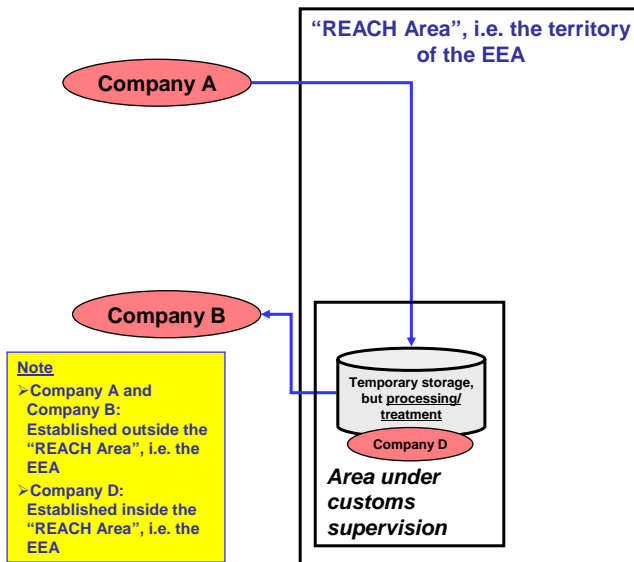
Case 3c: re-exportation/transit with processing



→ Registrant: Company D

Cases 3c and 3d: company D should (pre-) register (regardless of the ownership of the product), or would otherwise be liable in the same way as a REACH importer.

Case 3d: re-exportation/transit with processing



→ Registrant: Company D

Company A and company B are not established in the EEA. Company D, the terminal operator, is regarded under REACH as having the same obligations as a REACH importer, and will have to pre-register and to register and become participant of the relevant SIEF.

Appendix 1

Territories where REACH applies

The following information was provided by the Commission's REACH Helpdesk (Reply to question A18704):

Quote

Any introduction of substances in the EU customs territory from outside the EU customs territory is considered an "import". Trade inside the EU customs territory is not considered as "import". In addition, trade to and from the EEA countries is being assimilated to intra-community trade, since REACH has been adopted in these countries.

REACH is applicable in the EEA since it has been adopted by Norway, Iceland and Liechtenstein on 1 June 2008.

Article 299 of the EC Treaty specifies the territories in which the Treaty applies.

According to paragraph 4, only Part 4 of the Treaty, foreseeing an association relation, applies to the French overseas territories, Saint Pierre and Miquelon and Mayotte. This implies that REACH does not apply there.

According to paragraph 2, the provisions of the Treaty apply to the Départements d'Outre Mers (DOMs) which implies that REACH applies in the DOMs.

REACH applies to the Channel Islands and the Isle of Man.

REACH does not apply to Gibraltar, to Ceuta and Melilla, as they are not part of the Community custom territory. Consequently, provisions on the free movement of goods do not apply.

Unquote

Country		EU Member State	Territory of	EFTA States	European Economic Area (EEA)	Subject to REACH ⁵
Austria	the Republic of Austria	x			x	Yes
Belgium	the Kingdom of Belgium	x			x	Yes
Bulgaria		x			x	Yes
Cyprus	the REPUBLIC of Cyprus	x			x	Yes
Czech Republic	the Czech Republic	x			x	Yes
Denmark	the Kingdom of DENMARK	x			x	Yes
Estonia	the Republic of ESTONIA	x			x	Yes

⁵ Yes means: Imports from these countries or territories are not imports under REACH, i.e. the importer does not have to register.

Country		EU Member State	Territory of	EFTA States	European Economic Area (EEA)	Subject to REACH ⁵
Finland	the Republic of FINLAND	x			x	Yes
France	the French REPUBLIC	x			x	Yes
Germany	the Federal Republic of Germany	x			x	Yes
Greece	the Hellenic REPUBLIC	x			x	Yes
Hungary	the Republic of Hungary	x			x	Yes
Ireland	Ireland	x			x	Yes
Italy	the ITALIAN Republic	x			x	Yes
Latvia	the REPUBLIC of Latvia	x			x	Yes
Lithuania	the REPUBLIC of Lithuania	x			x	Yes
Luxembourg	the Grand DUCHY of Luxembourg	x			x	Yes
Malta	the Republic of Malta	x			x	Yes
Netherlands	the KINGDOM of the Netherlands	x			x	Yes
Poland	the Republic of Poland	x			x	Yes
Portugal	the PORTUGUESE Republic	x			x	Yes
Romania		x			x	Yes
Slovakia	the Slovak REPUBLIC	x			x	Yes
Slovenia	the Republic of Slovenia	x			x	Yes
Spain	the Kingdom of SPAIN	x			x	Yes
Sweden	the Kingdom of Sweden	x			x	Yes
UK	the United Kingdom of Great Britain and Northern Ireland	x			x	Yes
Iceland	the Republic of Iceland			x	x	Yes
Liechtenstein	the Principality of Liechtenstein			x	x	Yes
Norway	the Kingdom of			x	x	Yes

Country		EU Member State	Territory of	EFTA States	European Economic Area (EEA)	Subject to REACH ⁵
	Norway					
Switzerland				x		No
French Guiana			France			Yes
French Polynesia			France			No
French Southern and Antarctic Lands			France			No
Guadeloupe			France			Yes
Martinique			France			Yes
Mayotte			France			No
Miquelon			France			No
Reunion			France			Yes
Saint Pierre			France			No
Aruba			Netherlands			See below
Bonaire			Netherlands			See below
Curacao			Netherlands			See below
Saba			Netherlands			See below
St. Maarten			Netherlands			See below
St. Eustatius			Netherlands			See below
Ceuta			Spain			No
Melilla			Spain			No
Anguilla			UK			No
Bermuda			UK			No
British Virgin Islands			UK			No
Cayman Islands			UK			No
Channel Islands			UK			Yes
Falkland Islands			UK			No
Gibraltar			UK			No
Isle of Man			UK			Yes
Montserrat			UK			No
St. Helena			UK			No
Turks and Caicos Islands			UK			No

CONCAWE had requested clarification of the status of the Dutch Antilles, Aruba, Bonaire, Curacao, St. Maarten, Saba and St. Eustatius. The ECHA response (INC000000007028 Enquiry to ECHA [Overseas territories subject to REACH]) was:

Quote

Please be advised that this question has been addressed in section 3.1 of the Frequently Asked Questions on REACH by Industry available on the ECHA website (http://echa.europa.eu/reach/faq_en.asp). As explained there

“Member States are best placed to explain how REACH applies to their territories (autonomic areas or overseas territories). We therefore recommend contact with the national helpdesk of the relevant country to clarify specific requirements.”

Unquote

Oral advice from the Dutch authorities was received on 11 July 2008. According to this advice REACH does not apply to

- Aruba
- Bonaire
- Curacao
- Saba
- St. Maarten
- St. Eustatius

These territories are exempted from REACH.

Consequently shipments of substances from these territories to the EEA have to be treated as imports.