

European Parliament Joint Hearing on “The New REACH Legislation”: Not Delivering Upon Expectations

On January 19, 2005, the European Parliament (“EP”) hosted a Joint Hearing with the Commission and Council on the REACH (**R**egistration, **E**valuation and **A**uthorization of **C**hemicals) proposal. REACH was proposed by the Commission in October 2003 and is currently being discussed by the EP and the Council in First Reading. Concurrently, about 40 regulatory impact assessment (“RIA”) studies, launched by the Commission, are being conducted. These studies, which should be finished by March 2005, aim to clarify the costs and benefits of REACH.

The Joint Hearing provided an opportunity to listen to many stakeholders’ opinions on REACH. Views were expressed not only by the Commission, EP and Council, but also by panel discussion speakers representing manufacturers, downstream users, retailers, Small and Medium-Sized Enterprises (“SMEs”), Member States, NGOs, researchers and independent experts.

In sum, the hearing did not contribute much to the current debate, with the themes of discussion covering known ground and the participants not delivering the expected clarifications. In fact, it can be said that the hearing ended with more questions and un-clarities than answers.

The themes of discussion included:

- How the Commission will incorporate suggestions to the proposal on REACH (by amending the proposal or withdrawing the initial proposal and submitting a new one);
- The OSOR system;
- SMEs concerns;
- Incorporation of a risk-based approach rather than or combined with a quantitative approach for determining the prioritization and necessity of specific substance registration;
- Data and cost sharing;
- Finished articles;
- The role of the European Chemicals Agency; and
- WTO issues.

■ Contact Info

If you would like more information, please contact any McKenna Long & Aldridge attorney. You may also contact our Brussels attorneys or brussels@mckennalong.com:

Claudio Mereu

32.2.278.1265

Koen Van Maldegem

32.2.278.1215

Ursula Schliessner

32.2.278.1224

Robert Matthews

202.496.7737

Ruxandra Cana

32.2.278.1263

Iratxe Gurpegui Ballesteros

32.2.278.1233

**Dial the prefix "011" from North America; dial "00" from European countries outside of Belgium.*

▶ **Commission's Intervention**

During the Joint Hearing, the Environment Commissioner, Mr. Stavros Dimas, and the Vice President of the Commission and Commissioner for Enterprise and Industry, Mr. Günter Verheugen, were pleased with the work being conducted through the RIA studies. Both stressed the benefits of REACH for human health, the environment and competitiveness of the industry and stated that they were willing to work on the reduction of costs for registration of substances. In this respect, Mr. Dimas and Mr. Verheugen stated that the "One Substance One Registration" ("OSOR") system proposed by Hungary and the UK could serve as an appropriate tool to reduce registration costs but expressed concern about OSOR's workability due to its compulsory consortia requirement. Finally, Mr. Dimas said that the Commission was open to incorporating new suggestions from stakeholders and/or the RIA studies into its proposal.

▶ **Amendment or Withdrawal of the Commission Proposal?**

This was one of the major concerns expressed by the Members of the EP ("MEPs") present at the hearing, who asked the Commission representatives repeatedly whether they intended to amend the proposal or withdraw it and submit a new one. Mr. Jos Delbeke, Director General from DG Environment, clarified that the Commission will amend the initial proposal after the First Reading of the EP. One of the MEPs present at the hearing expressed doubts about whether the EC Treaty allowed the Commission to amend its proposal after First Reading at the EP. According to him, the Commission could only withdraw the proposal and submit a new one.¹

It is still not clear whether the Commission will intervene before the second reading and, if so, in what form and with what comments.

▶ **OSOR**

Mr. Dimas stated that the Commission was positive about this proposal, but he identified two workability problems: mandatory data sharing and cost sharing. Overall, the industry and the MEPs seemed to support the OSOR paper. UK and Hungary have been asked to carry out an impact assessment study on OSOR to provide additional information on its technical aspects.

It remains to be seen when the actual drafting of OSOR provisions would occur and who would take the lead (Commission, EP or Council).

▶ **SMEs**

The industry expressed general fears of the possible gradual disappearance of SMEs due to the new legislation and, in particular, due to the huge costs to be borne for the registration. Some of the industry representatives identified OSOR as a system which could tackle these problems. Others were more reluctant and expressed their concern that SMEs would be unfairly excluded from negotiations and not taken into account in the consortia due to their small size.

▶ **Finished Articles**

The industry representing downstream users stated that Article 6 of the REACH proposal (in its current form) was unworkable. According to the industry, the

obligation to notify substances, which may be unintentionally released, is difficult to implement because of its vague terms ("may be unintentionally released"). The industry asked for a better definition of "articles" and "product-types" focusing on more vulnerable consumers (e.g., children) and the development of guidelines for the implementation of Article 6. One of the proposals was to focus on very hazardous substances, as was recently done for electrical and electronic equipment through the RoHS Directive.

It is unclear whether MEPs/Council members are open to clarifying the articles' provisions.

▶ **The European Chemicals Agency**

There was a general agreement that the Agency is urgently needed and should play an important role in the implementation of REACH. There were differing opinions regarding whether the Agency should have full management powers or share those powers with national competent authorities.

▶ **International Issues**

The questions regarding international trade focused on the competitive advantages for non-EU companies importing products into the EU, which contain substances that are not registered under REACH unless intentionally released, in comparison to EU companies, which must use registered substances. Mr. Lucien Lux, Minister of Environment of Luxembourg, recognized that competitive issues may appear in the first stage of the REACH implementation. The Commission insisted on the fact that WTO rules had to be respected.

▶ **Risk- v. Quantity-Based Registration**

Finally, there were numerous questions regarding a risk-based approach to registration, whereby the most hazardous substances would be considered first, as compared to the quantity-based approach to registration currently included in the proposed legislation. The industry was in favor of the risk-based approach either alone or combined with the quantitative approach. The MEPs, however expressed their concerns as to the difficulty of knowing which substances will pose a risk to human health or the environment as there is no data for more than 80% of the active substances currently on the EU market.

It remains to be seen when the actual drafting of new provisions on risk-based registration would occur and who would take the lead (Commission, EP or Council).

▶ **What's Next?**

The next step in the process is the presentation of the draft report by the Rapporteur in the main committee, i.e., Mr. Guido Sacconi of the Environment Committee; the draft report is expected for completion in mid-March. The adoption of the EP First Reading Position would follow by September or October 2005. In the meantime, the Council may reach a Political Agreement on the proposal. Once the EP First Reading Position is formalized, the Political Agreement reached by the Council takes the form of a Common Position (expected by November at the earliest). Within four months of transmission of the Common Position, the EP must adopt their Second Reading Position. Subsequently, the Council will have up to four months to either approve the Second Reading Position, thus adopting the legislation, or convene a Conciliation Committee to approve a joint text. Based on these predictions, the estimated

timeline for final adoption and subsequent publication and entry into force of the Regulation would be the end of 2006 or the beginning of 2007.

Endnotes

1. McKenna Long & Aldridge's analysis of the applicable provisions is as follows: First, the Commission may withdraw its proposal at any stage during the procedure preceding the Conciliation Committee. Once the Conciliation Committee is convened, this is no longer possible. Second, the Commission may also amend its proposal as long as the Council has not acted (Article 250(2) EC Treaty), i.e., during the first reading in the EP and before the Council adopts its Common Position. Accordingly, during and while the proposal is being discussed at the Council, the Commission can amend its proposal in order to make it easier to reconcile the EP and Council positions. Irrespective of this, the Commission will present an amended proposal during the second reading in the EP and the Council, which takes into account the amendments proposed during the first reading.

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