

REACH Update series No. 7

IMPORTERS SUPPLEMENT

May 2008

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Please note:

The text in the index is hyperlinked to each of the headings for ease of navigation to the specific topics covered in this document.

Disclaimer

This document is issued using information and knowledge that is correct at time of publication. It is designed to guide the reader through specific aspects of REACH but note the regulation provides the definitive text and readers cannot rely solely on this interpretation.

Introduction

The REACH Regulation **(EC) 1907/2006**, which entered into force across Europe on 1st June 2007, requires that chemical substances on their own, in preparations or in articles manufactured or 'placed on the market' in quantities of over one tonne per annum within the European Union (EU) be registered.

The timescales and data requirements for pre-registration and registration under the REACH regulations have already been explained within the other CBA supplements, available from the [CBA website](#):

- REACH update series No. 1 - General overview
- REACH update series No. 2 - Intermediates
- REACH update series No. 3 - Agency and Enforcement
- REACH update series No. 4 - Pre-registration

Therefore they will not be repeated in this supplement.

There are many actors within the REACH regulations and all have differing roles to perform and varying levels of obligations.

Companies will need to determine which role best suits each substance that they supply so that they can determine the obligations that they attract.

Be aware:

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.

This supplement will specifically discuss the role of an importer and highlights some of the general issues that face such companies. The REACH regulations are very sparse with actual details in this area so it will be necessary for company's within the supply chain to enter into dialogue when the actual role each undertakes is unclear.

The European Commission and national regulatory authorities have prompted Industry Trade Associations to intervene within these specific areas of REACH where they have more in-depth knowledge to impart. Importation is one of these specific areas due to the complexity.

What is an Importer?

Article 3 of REACH provides detailed definitions of the actors within REACH, including the definition of the importer:

- **Importer:**

Article 3.11 defines an importer as *“any natural or legal person established within the Community who is responsible for import”*;

- **Import:**

Article 3.10 defines import as *“the physical introduction into the customs territory of the Community”*.

A EU based company can only be classified as an “importer” within the REACH sphere when the substance, preparation or article originates from “outside” European Community” (EC) ¹. Intra-community trade between member states within the EC does not attract the importer’s obligations.

The status of a legal entity should be determined in accordance with the national law of the country where the entity is established (European law does not provide for a complete harmonisation of national civil and company law).

The responsibility for the physical introduction into the customs territory of the Community depends on many factors such as:

- who places the order,
- who pays for the goods,
- who actions the customs clearance,

however, this might not be conclusive on its own. Companies will need to assess their obligations under REACH on a case-by-case basis.

Commercial obligations as identified in the “INCOTERMS” ² may be a beneficial source of information as they define the seller, the buyer and their respective obligations, in particular regarding customs clearance and payment for goods.

It needs to be stressed at this point that there are no direct links or interdependence between the INCOTERMS and REACH roles.

INCOTERMs only deal with the commercial transfer of ownership, cost, freight/transport, insurance and customs duty, not with any other legal obligations that may exist, such as obligations under REACH.

More information regarding INCOTERMs can be found at:

<http://www.iccwbo.org/incoterms/id3045/index.html>

¹ 27 **European Community** (EC) Member States:

Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom

Iceland, Lichtenstein and Norway, which are part of the **European Economic Area (EEA)**, are planning to transpose REACH to their national legislation. When this has taken place the same requirements apply to exports to these countries.

² Incoterms are standard trade definitions most commonly used in international sales contracts. Devised and published by the International Chamber of Commerce.

What are the roles and the obligations of an Importer?

The role and obligations of the EU based importers, responsible for the physical introduction of the substance into the Community customs territory (EEA), depend on the decision of the non-EU manufacturer or formulator, on whether or not to appoint an Only Representative (OR) as per Article 8 of Regulation (EC) 1907/2006 "REACH".

The appointment of the Only Representative has no impact on the commercial relations within the supply chain, as an Only Representative will be regarded as an importer **only for the purpose** of REACH and should comply with all obligations of importers under REACH (article 8).

The Only Representative will therefore be responsible for registering the substance and updating the registration file, but will not be liable for complying with other, non-REACH related, obligations of importers (e.g. customs clearance, invoicing etc.) **unless** decided otherwise in the mutual agreement.

The CBA supplement No. 5 covers the specific area regarding OR in more detail so the subject will not be reiterated in this section. http://www.chemical.org.uk/legislation_reach.asp

When an OR is not involved, then each importer must assume overall responsibility to (pre-) register the overall tonnage for each substance imported to continue to market the substance in the EU. For example:

A company has three (3) legal entities based in separate member states within the EU (UK, Holland and Spain). Each entity imports the same substance into Europe from three different non-EU manufacturers,

	<u>Tonnage</u> Manufacturer A	<u>Tonnage</u> Manufacturer B	<u>Tonnage</u> Manufacturer C	<u>Overall</u> <u>Tonnage</u>
UK	100	250	750	1100
Holland	100	25	150	275
Spain	60	25	10	95

All of the substances are "phase-in" substances so each legal entity assumes the importer roles and obligations as follows:

- Pre register
- Participate within the Substance Information Exchange Forum (SIEFs) to share data for registration as follows:

UK Legal entity's imports

- Overall tonnage obligation is 1100 tonnes with the registration dossier required before December 2010.

Holland Legal entity's imports

- Overall tonnage obligation is 275 tonnes with the registration dossier required before June 2013.

Spain Legal entity's imports

- Overall tonnage obligation is 95 tonnes with the registration dossier required before June 2018.

As each organisation is classified as separate "legal entities" under the laws of their respective countries, each would need to (pre-) register separately against their imported tonnages.

Importation of preparations

The importation of preparations from outside the EU under REACH is similar to those for substances but complicated by the fact that they involve more than one substance.

The point is illustrated below with a basic example as follows:

A company has one (1) legal entity based in within the EU (UK). The entity imports the same preparation blend into Europe from three different non-EU manufacturers:

<u>Substance</u>	<u>Percentage</u>
Solvent 1	60
Solvent 2	20
Solvent 3	15
Detergent	5

The UK legal entity imports the following tonnages of preparation:

- **Non-EU manufacturer A:** Overall tonnage is 1100 tonnes.
- **Non-EU manufacturer B:** Overall tonnage is 275 tonnes.
- **Non-EU manufacturer C:** Overall tonnage is 95 tonnes.

The tonnage is combined with the percentage breakdown to determine the overall tonnage of each substance, within the preparation, is imported and therefore what the obligations are:

<u>Substance</u>	<u>Tonnage</u> Manufacturer A	<u>Tonnage</u> Manufacturer B	<u>Tonnage</u> Manufacturer C	<u>Overall Tonnage</u>
Solvent 1	660	165	57	882
Solvent 2	220	55	19	294
Solvent 3	165	41	14	220
Detergent	55	14	5	74

All of the substances are "phase-in" substances so the UK legal entity assumes the importer roles and obligations as follows:

- Pre register each of the four (4) ingredients
- Participate within the Substance Information Exchange Forum (SIEFs) to share data for registration as follows:
 - o Solvent 1: Dossier required before June 2013
 - o Solvent 2: Dossier required before June 2013
 - o Solvent 3: Dossier required before June 2013
 - o Detergent: Dossier required before June 2018

Who should register based on the INCOTERMs?

INCOTERMs define three actors in supply chain:

1. Seller;

This could be the manufacturer, a trader or distributor.

2. Carrier;

3. Buyer.

This could be a formulator of preparations and articles, a manufacturer of substances, a trader or distributor.

The carrier generally has a very limited knowledge of the substance(s) they are transporting and as per Article 2(1)(d) of Regulation (EC) 1907/2006, "REACH", should not be considered as the importer.

With regards to the seller and the buyer, it is dependant whether or not the seller has appointed an Only Representative:

1. If the seller has appointed an Only Representative (OR) then the OR will be regarded as the importer (i.e. responsible for registering the substances) regardless of which INCOTERMs are used or the identity of the buyer and the buyer will be considered as a downstream user.
2. If the seller has **not** appointed an Only Representative (OR) then it is useful to refer to the allocation of responsibilities according to INCOTERMs to identify the importer under REACH.

The table on the next page identifies the actors under INCOTERMs and the corresponding actor under REACH and then illustrates the assignment of the obligations against the 13 standard terms used by INCOTERMs.

In all cases, ***when an only representative is not appointed by the "seller"***, it is the EU-based "buyer" who will attract the role of the 'importer' for the purposes of fulfilling the obligation to register the substance under REACH.

Even under "DDP" (Delivered Duty Paid), where the customs duties has been taken on by the non-EU based seller, it is the EU-based buyer who should in principle register the substance under REACH.

This is due to the fact that the buyer is established in the EU, and therefore they will be classified as the legal entity:

- Requesting introduction of the substance and
- Receiving and handles the substance once it arrives at its destination.

Actors according to INCOTERMS			Seller	Carrier	Buyer
Actors according to REACH			Non-EU manufacturer or Non-EU trader		Importer
1	EXW	EX WORKS (Named place)	Not the registrant	Not the registrant	Registrant
2	FCA	FREE CARRIER (Named place)	Not the registrant	Not the registrant	Registrant
3	FAS	FREE ALONGSIDE SHIP (Named port of shipment)	Not the registrant	Not the registrant	Registrant
4	FOB	FREE ON BOARD (Named port of shipment)	Not the registrant	Not the registrant	Registrant
5	CFR	COST AND FREIGHT (Named port of destination)	Not the registrant	Not the registrant	Registrant
6	CIF	COST, INSURANCE AND FREIGHT (Named port of destination)	Not the registrant	Not the registrant	Registrant
7	CPT	CARRIAGE PAID TO (Named place of destination)	Not the registrant	Not the registrant	Registrant
8	CIP	CARRIAGE AND INSURANCE PAID TO (Named place of destination)	Not the registrant	Not the registrant	Registrant
9	DAF	DELIVERED AT FRONTIER (Named place)	Not the registrant	Not the registrant	Registrant
10	DES	DELIVERED EX SHIP (Named port of destination)	Not the registrant	Not the registrant	Registrant
11	DEQ	DELIVERED EX QUAY (Named port of destination)	Not the registrant	Not the registrant	Registrant
12	DDU	DELIVERED DUTY UNPAID (Named place of destination)	Not the registrant	Not the registrant	Registrant
13	DDP	DELIVERED DUTY PAID (Named place of destination)	Not the registrant *	Not the registrant	Registrant

* Even though the "seller" pays the customs duty, transport and insurance, they cannot assume any obligation under REACH as they are not an EU based legal entity.

Treatment or processing in free zones?

Article 2 (1) (b) of REACH exempts some substances from registration under certain circumstances:

*“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**”;*

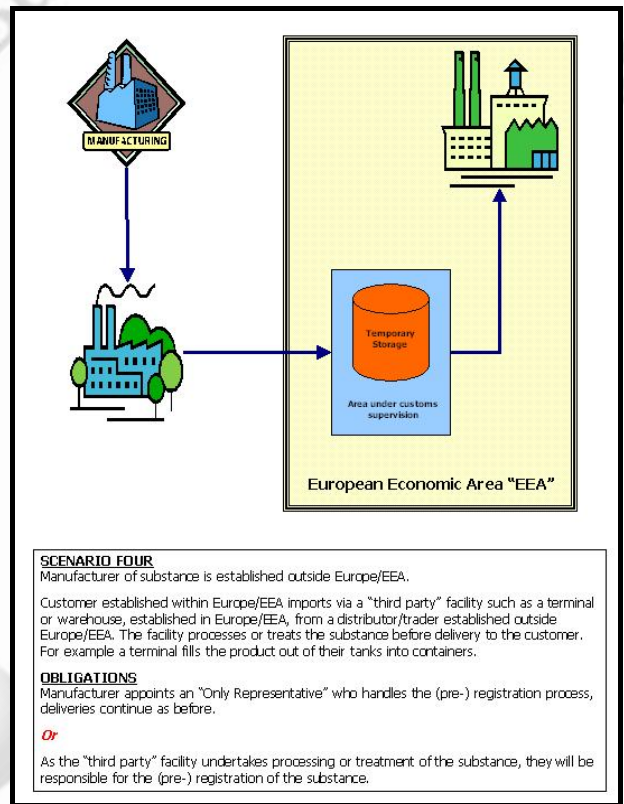
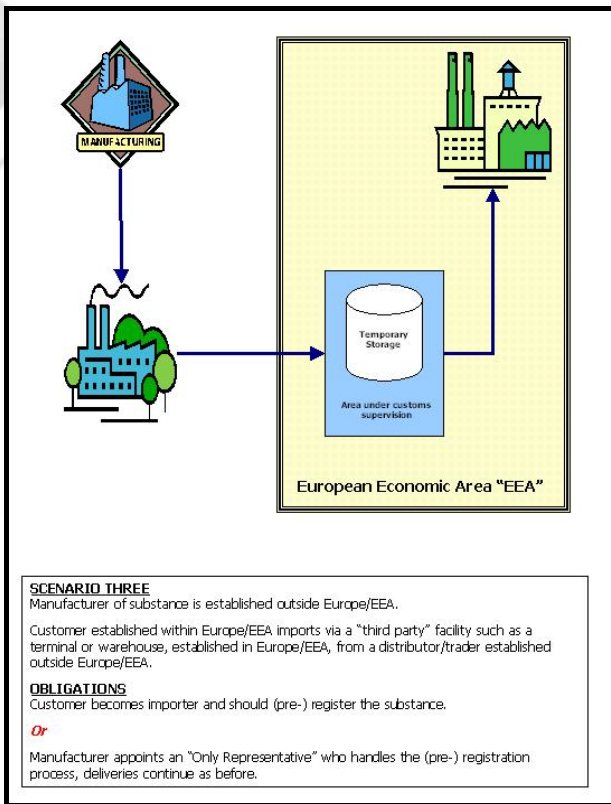
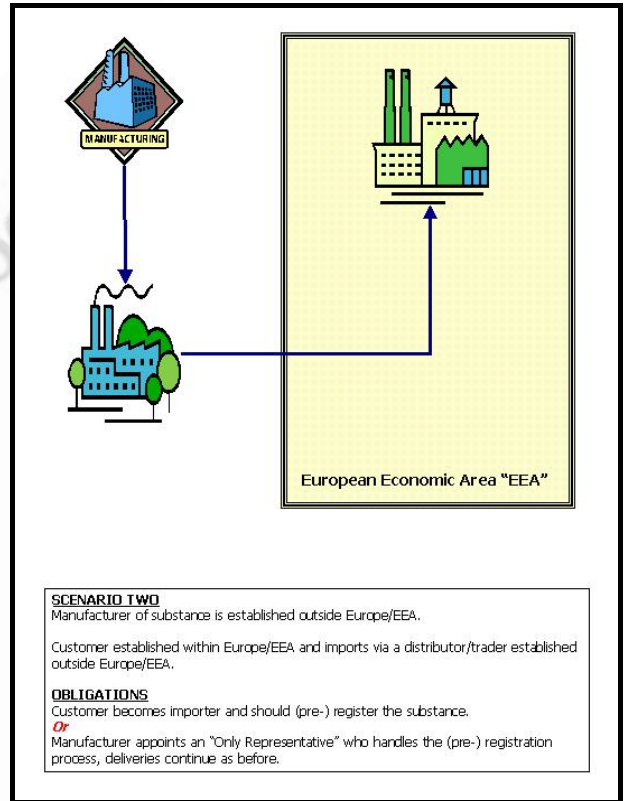
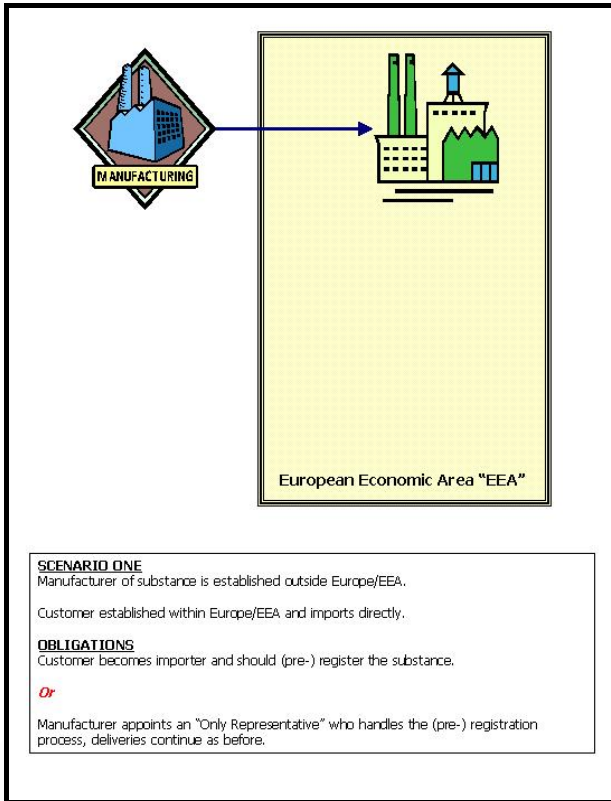
The main provisions of this text have been underlined, as they will impact or affect the assignment of obligations under REACH. To illustrate the issues eight basic scenarios have been included in this section, the list is not exhaustive, and it must be stressed that in reality the scenarios could be more complex.

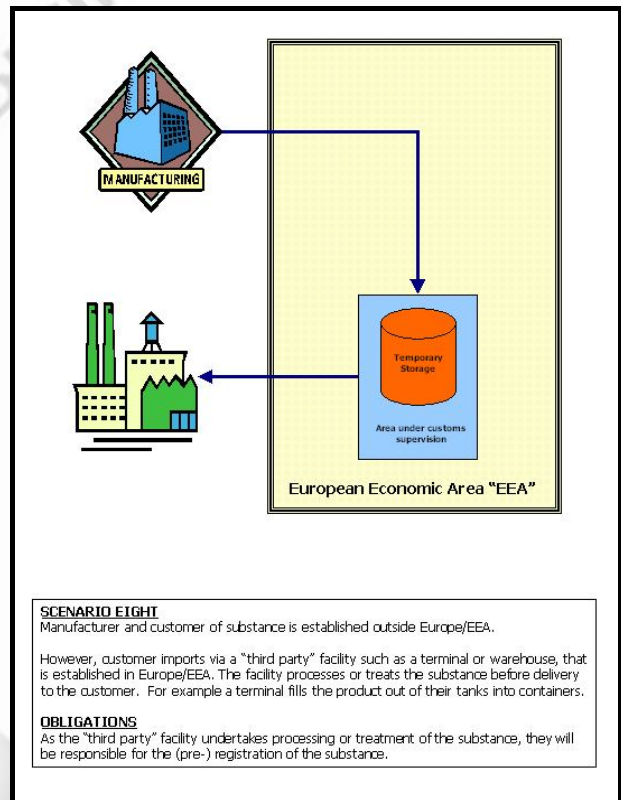
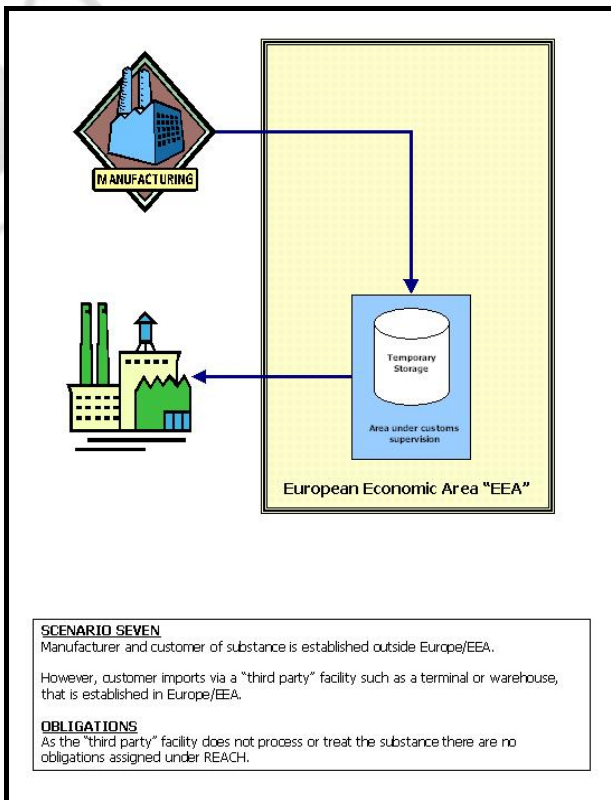
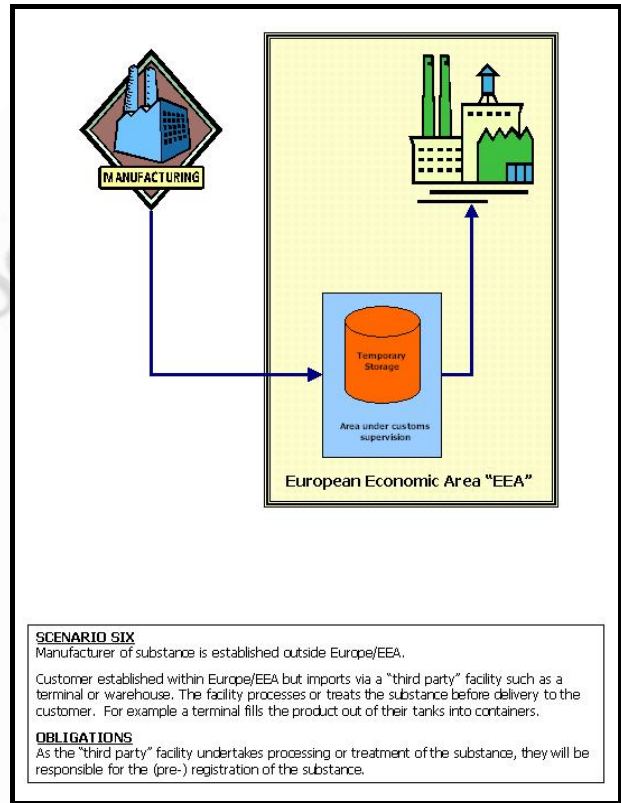
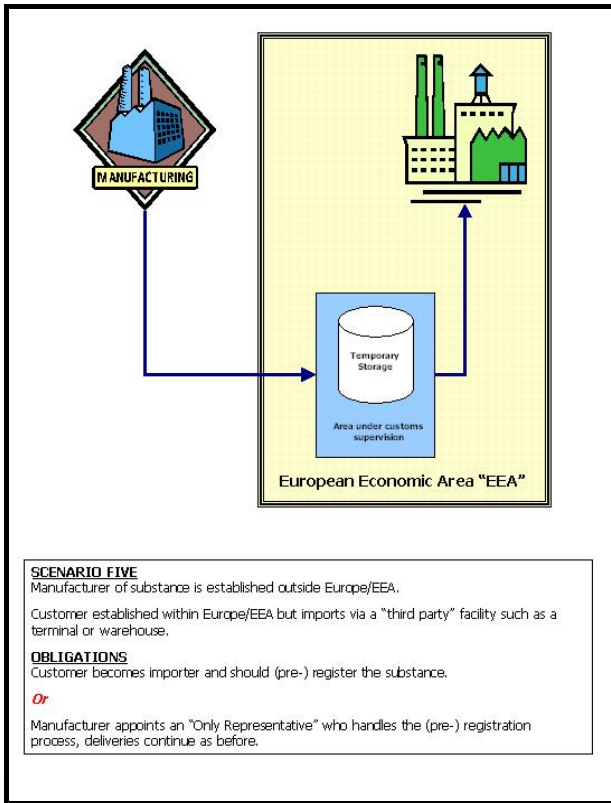
The scenarios involve hypothetical companies (legal entities) as follows:

- A Manufacturer:
Who is established outside the territory of the member states of the European Economic Area (EEA);
- Two Customers:
Which under INCOTERMS would be a “buyer”:
 - One established outside the “EEA”.
 - The other is established within the “EEA”;
- A distributor or trader:
Who is established outside the territory of the member states of the European Economic Area (EEA);
- A temporary storage facility, which is under customs supervision.
The facility could be a warehouse or a storage terminal and is not affiliated to either of the other organisations

The scenarios are:

1. Direct import into EU from non-EU manufacturer
2. Indirect import into EU from non-EU distributor or trader
3. Direct import into EU from non-EU distributor or trader via a EU based storage facility
4. Direct import into EU from non-EU distributor or trader via a EU based storage facility who process or treat the substance prior to onward delivery
5. Direct import into EU from non-EU manufacturer via a EU based storage facility
6. Direct import into EU from non-EU manufacturer via a EU based storage facility who process or treat the substance prior to onward delivery
7. Transit through the EU from non-EU manufacturer to non-EU customer via a EU based storage facility
8. Transit through the EU from non-EU manufacturer to non-EU customer via a EU based storage facility who process or treat the substance prior to onward delivery





Indirect importation

Whilst most of the previous scenarios involve direct contact between customer and supplier, including direct delivery from either the manufacturer or “stock” held in a warehouse, it is not always the case in a supply chain.

“Indirect importation” is a common practice used by many distributors:

- To minimise unnecessary transportation costs;
- To minimise importation taxes.
- Distributors do not always “hold stock” of certain substances; or
- The customer is based in another country within the EU.

In these cases the customer will interface with the distributor directly with regard to paying invoices and place orders but the delivery will be made directly from the manufacturer to the customer.

In these situations the determination of who could be assigned the importer obligation becomes more complex especially when the customer and distributor are in different countries within Europe.

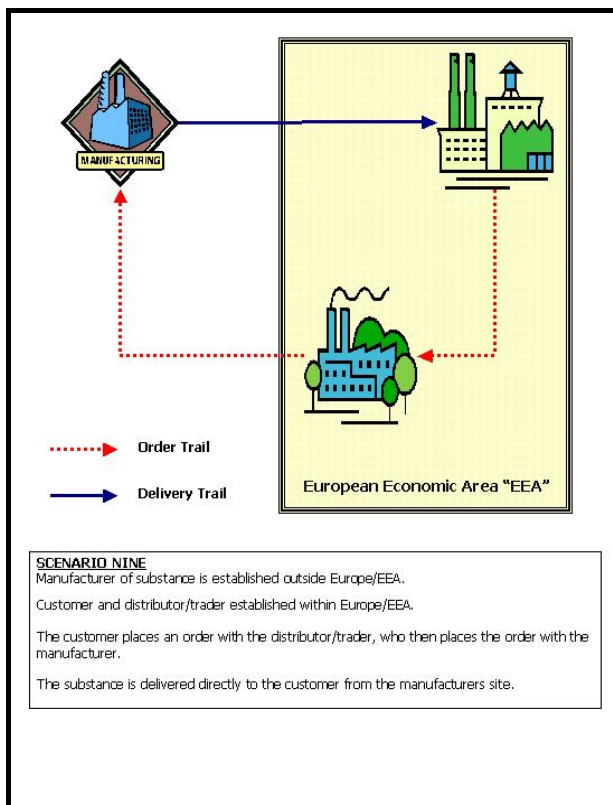
To illustrate the issues some further scenarios have been included in this section, the list is not exhaustive, and it must be stressed that in reality the scenarios could be more complex.

The scenarios involve hypothetical companies (legal entities) as follows:

- A Manufacturer:
Who is established outside the territory of the member states of the European Economic Area (EEA);
- One Customer:
Which under INCOTERMs would be a “buyer”:
 - Established within the “EEA”.
- A distributor or trader:
Who is established within the territory of the member states of the EEA. They may or may not be located within the same country as the customer;
- A temporary storage facility, which is under customs supervision.
The facility could be a warehouse or a storage terminal and is not affiliated to either of the other organisations.

The scenarios are:

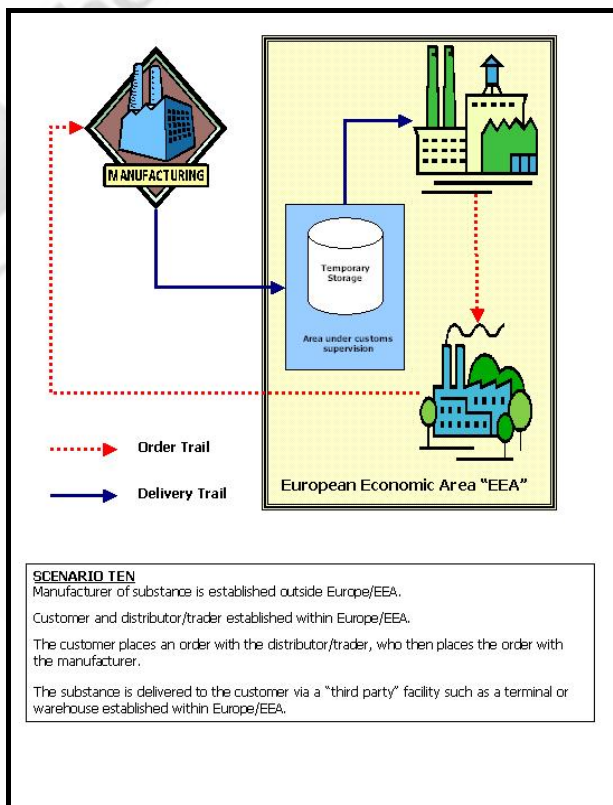
9. Indirect import into EU
10. Indirect import into EU via a EU based storage facility
11. Indirect import into EU via a EU based storage facility who process or treat the substance prior to onward delivery



Scenario nine (9)

Depending on the intentions of the actors within this scenario there could be three registration possibilities as follows:

1. The manufacturer could appoint an OR.
2. The Distributor could assume the role of importer and perform the registration of the substance(s).
3. The Customer could assume the role of importer and perform the registration of the substance(s).

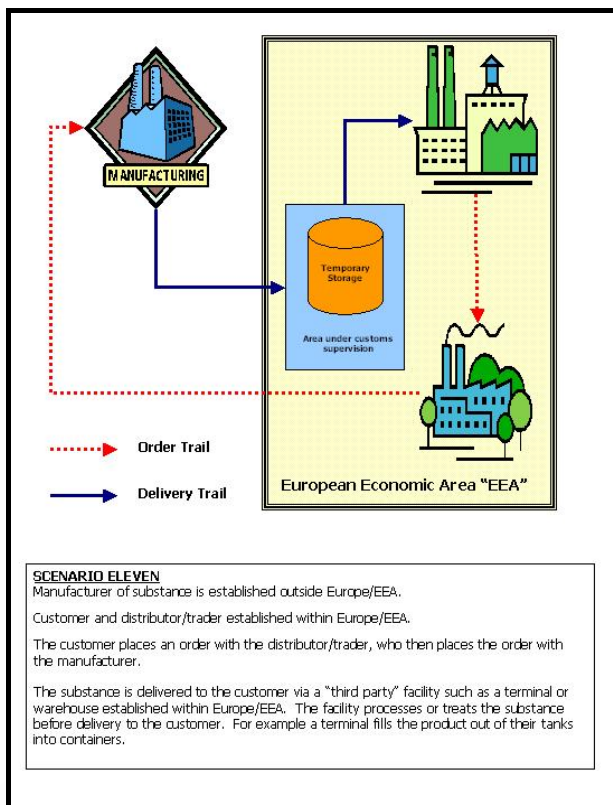


Scenario ten (10)

Depending on the intentions of the actors within this scenario there could be three registration possibilities as follows:

1. The manufacturer could appoint an OR.
2. The Distributor could assume the role of importer and perform the registration of the substance(s).
3. The Customer could assume the role of importer and perform the registration of the substance(s).

As the 'temporary storage' facility does not perform any processing or treatment of the substance(s) they are not liable for any obligations.



Scenario eleven (11)

Depending on the intentions of the actors within this scenario there could be four registration possibilities as follows:

1. The manufacturer could appoint an OR
2. The Distributor could assume the role of importer and perform the registration of the substance(s).
3. The Customer could assume the role of importer and perform the registration of the substance(s).
4. The storage facility could assume the role of importer as they physically handle the materials.

The main complicating factor within this area is the use of the term "*physical introduction*", within the definitions of import and importer, in the REACH regulations.

If the term is taken literally then it is likely that as the customer, in the first two scenarios, or the storage facility in the third scenario are "physically" the first EU legal entities to take control of the substances, then it is they who are liable for the registration obligation.

However, it could also be stated that as the distributor places the order and arranges the transport it is the distributor that is responsible for the physical introduction of the substance into the EEA.

For this reason it is vital that an organisation involved in "indirect" imports to determine their strategy in this area and then communicate the strategy through the supply chain.

Accession states

As part of the European Union's plans for further enlargement of the community there exists a list of "candidate countries", who meet the strict criteria set by the EU.

There are currently three countries within this candidate list for accession into the EU, these are:

- Turkey
- Croatia
- Former Yugoslav Republic of Macedonia

These countries are currently outside the EU and as such cannot legally participate in the REACH process as it stands now. However, it is feasible that any one or all of them could enter into the EU before the 2018 REACH registration deadline.

The advice from the UK competent authority is that any organisation that imports substances into the EU from these three countries must continue with the basic processes within REACH and therefore pre-register these substances with the intention of performing a registration.

It is unclear as to what concessions these countries will be granted during negotiations with regard to REACH in the future.