



The applicable EU legislation on transport of dangerous goods by road, rail and inland waterway includes Council Directive 94/55/EC of 21 November 1994 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road<sup>1</sup>, Council Directive 96/49/EC of 23 July 1996 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail<sup>2</sup>, and Proposal for a Directive of the European Parliament and of the Council on the inland transport of dangerous goods<sup>3</sup>.

The regulation of transport of goods by sea is more complex. For our analysis we refer for guidance to the revised Recommendations on the Safe transport of Dangerous Cargoes and related Activities in Port Areas of the International Maritime Organisation (IMO) published on 26 February 2007 under number MSC.1/Circ.1216.<sup>4</sup> Since all EU Member States are members of IMO and adhere to its standards we could reasonably rely that these recommendations are implemented by all EU Member States.

## 1.1 Transport of dangerous goods by road

Article 2 of Directive 94/55/EC defines transport of dangerous goods by road as follows:

*‘transport’ shall mean any road transport operation performed by a vehicle wholly or partly on public roads within the territory of a Member State, including the activity of loading and unloading, covered by Annexes A and B...*

*It shall not include transport wholly performed within the perimeter of an enclosed area.*

This definition covers the activities related to loading and unloading. Due to the fact that a transport contract is normally based on the obligation to deliver goods to and from a company’s site, the definition of transport provided in the Directive would also cover loading and unloading at a company’s site. This is confirmed by the definition of transport above which includes transport activities performed wholly or partially on public roads. However, the definition of transport in the Directive covers neither movements of the dangerous goods wholly within the company’s site, nor the permanent storage at such a site.

Temporary storage is not explicitly mentioned. However, the Annexes referred to in the definition of transport refer to the European Agreement concerning the International Carriage of Dangerous Goods by Road.<sup>5</sup> Annex A section 1.10.1.3 of this Agreement reads as follows: “

*“Areas within temporary storage terminals, temporary storage sites, vehicle depots, berthing areas and marshalling yards used for the temporary storage during carriage of dangerous goods shall be properly secured, well lit and, where possible and appropriate, not accessible to the general public.”*

Temporary storage as necessary for the transport has therefore been covered by the existing international legislation to which the Directive refers. In addition, according to industry guidelines on the application of this Agreement, “areas for the temporary storage during carriage are areas where interruptions of transport are intended and take place regularly (e.g. stops made necessary by the conditions of carriage as well as periods involved in order to change the mode of transport – transshipment as well as stops necessitated by the circumstances of transport)”.<sup>6</sup> In this regard, interruption is not stopping or parking for example at service areas. The regulatory requirements for parking and supervision are

defined in section 8.4 of the Agreement. It follows from the above that temporary storage, or stops necessitated by the circumstances of the transport are covered by the definition of transport in Directive 94/55/EC.

## 1.2 Transport of dangerous goods by rail

Article 2 of Directive 96/49/EC defines transport of dangerous goods by rail as follows:

*'transport' shall mean any operation for the transport of dangerous goods by rail, conducted wholly or partially within the territory of a Member State, including the activities of loading, unloading and transfer to or from another mode of transport and the stops necessitated by the circumstances of the transport, covered by the Annex to this Directive...*

This definition of transport covers loading and unloading. The definition of transport would also cover loading and unloading at a company's site, if there is a railway station at such a site. This definition also covers any stops which are necessary during the transport of the dangerous goods. We were unable to find a definition of the term "stops necessitated by the circumstances of the transport". It could be reasonably argued that the term "stops" should be interpreted in a way which includes temporary storage. This is consistent with its usage in the legislation on transport of dangerous goods by road. The definition of transport would not cover the permanent storage at a company's site.

## 1.3 Transport of dangerous goods by inland waterway

We could not identify any EU legislation that provides for a definition of transport of dangerous goods by inland waterways. Therefore, currently whether the term transport of dangerous goods by inland waterways would cover loading, unloading and temporary storage would depend of the national law of the EU Member State, in which the transport is performed. We believe, however, that there are reasonable grounds to argue that the term transport of dangerous goods by inland waterway includes loading, unloading and temporary storage. This is based on the analogue interpretation of the provisions concerning transport by rail and road and the language of the proposed Directive as explained below.

Once adopted, the Proposal for a Directive of the European Parliament and of the Council on the inland transport of dangerous goods will remove any doubt that this is the case. The proposed Directive covers all three modes of transport. The Commission has already agreed on the amendments proposed by the European Parliament at first reading. Pursuant to its Article 1:

*This Directive shall apply to the transport of dangerous goods by road, by rail or by inland waterway within or between Member States, including the activities of loading and unloading, transfer to or from another mode of transport and the stops necessitated by the circumstances of the transport.*

This definition covers loading and unloading. This definition also covers any stops which are necessary during the transport. We were unable to find a definition of the term "stops necessitated by the circumstances of the transport", however, it can reasonably be argued that the stops also cover any temporary storage as necessary for the transport as discussed above.

The definition of transport in the Directive would also cover loading and unloading at a company's site, if there is a port, but would not cover the permanent storage at such a site.

#### 1.4 **Transport of dangerous goods by sea**

The transport of dangerous goods by sea is regulated primarily by international agreements. Recital 10 of the REACH Regulation refer to legislation in general, therefore, it also covers obligations arising from international agreements. The most important regulations covering transport of dangerous goods by sea are developed under the auspices of the International Maritime Organisation (IMO) of which all EU Member States are members.

The Recommendations on the Safe transport of Dangerous Cargoes and related Activities in Port Areas apply to the entry and presence of dangerous cargoes in port areas both on ship and on shore. It is intended that they should be made applicable to any ship visiting a port irrespective of its flag. They should not apply to ships' stores and equipment or to troopships and warships.

The Recommendations define the term handling as follows:

***Handling** means the operation of loading or unloading of a ship, railway wagon, vehicle, freight container or other means of transport, transfer to, from or within a warehouse or terminal area or within a ship or transshipment between ships or other modes of transport and includes intermediate keeping, i.e. the temporary storage of dangerous cargoes in the port area during their transport from the point of origin to their destination for the purpose of changing the modes or means of transport and movement within the port which is part of the transport supply chain for those cargoes.*

The Recommendations include detailed provisions on how dangerous cargoes are to be handled at ports, therefore the transport within the port area as well as loading, unloading and temporary storage are subject to international standards. Although the recommendations are not compulsory for IMO members, they are an international standard to which IMO members align in their national legislation. This demonstrates that transport of dangerous cargoes by sea, including loading, unloading and temporary storage, would be covered by EU Member States' transport legislation and would therefore be excluded from the scope of the REACH Regulation.

#### 1.5 **Conclusion**

The term "carriage of dangerous substances" in the REACH Regulation should be interpreted to have the same meaning as "transport of dangerous goods" as determined in EU and international legislation and which includes loading, unloading and temporary storage. This interpretation reflects the objective of the REACH Regulation to avoid the double regulation of the transport of dangerous goods.

## 2. **Interpretation of placing on the market under Article 3(12) of the REACH regulation with regard to contracts for transportation**

Eurometaux has asked us to advise on the meaning of the term placing on the market defined in Article 3(12) of the REACH Regulation, in particular whether handing-over of dangerous substances for transportation would be regarded as placing these substances on the EU market.

Pursuant to Article 3(12) of the REACH Regulation placing on the market:

*means supplying or making available, whether in return for payment or free of charge, to a third party. Import shall be deemed to be placing on the market.*

The REACH Regulation does not contain further clarification on the terms “supplying” and “making available”.

The term “placing on the market” is however widely used in the EU legislation. The “Guide to the implementation of directives based on the new approach and the global approach” provides for an interpretation of this term<sup>7</sup>. According to this Guide, a product is placed on the EU market when it is made available for the first time. This is considered to take place when a substance is transferred from the stage of manufacture with the intention of distribution or use on the EU market. The transfer of the substance takes place either from the manufacturer to the importer established in the EU or to the person responsible for distributing the product on the EU market. The transfer may also take place directly from the manufacturer to the final customer or user. The substance is considered to be transferred either when the physical hand-over or the transfer of ownership has taken place with the objective to distribute or use the substance on the EU market. This transfer can be for payment or free of charge, and it can be based for example on sale, loan, hire, leasing and gift.

Placing on the market is considered not to take place where a substance is:

- transferred to a manufacturer for further measures (for example assembling, packaging, processing or labelling);
- not (yet) granted release for free circulation by customs, or has been placed under another customs procedure (for example transit, warehousing or temporary importation), or is in a free zone;
- manufactured in a Member State with a view to exporting it to a third country;
- displayed at trade fairs, exhibitions or demonstrations ; or
- in the stocks of the manufacturer, or the authorised representative established in the EU, where the product is not yet made available, unless otherwise provided for in the applicable EU legislation.

The transportation of a substance is not a contract with the objective to distribute or use of the substance on the EU market. The transport company offers a service does not acquire ownership of the transported substances. Although the substances are handed-over physically to the transport company, this company should normally not be able to use, sell, rent, lease or give away for free the entrusted substances. Thus the mere transportation of a substance cannot be considered placing on the market of this substance.

However, if for example a manufacturer sells the substance to a downstream user or distributor and pursuant to the contract the ownership/ legal possession of the substance is transferred to this downstream user or distributor at the moment the substance is handed over to the transport company, that act could be regarded as placing a substance on the market. In these circumstances, it is not the transportation that constitutes placing the substance on the market, but rather the transfer of title/risk to the purchaser.

### **3. Interpretation of recovered substances under Article 2(7)(d) of the REACH Regulation**

Eurometaux has asked us to identify and explain the criteria that a substance must satisfy in order to be exempt from registration under Article 2(7)(d) of the REACH Regulation, in particular when a substance is the “same” as a registered substance. Eurometaux has asked two additional questions: (i) whether recyclers should pre-register and (ii) whether secondary raw materials are regulated by EU legislation. Article 2(7)(d) is vague and as such no precise legal answer is yet possible. The interpretation below is based on our understanding of the text based on our assessment of its underlying purpose, the related legislation and case-law.

#### **3.1 Criteria under Article 2(7)(d) of the REACH Regulation**

Pursuant to Article 2(7)(d) of the REACH Regulation substances which are registered under REACH and which are recovered in the EU are exempt from registration, evaluation and obligations of downstream users, if (i) the substance that results from the recovery process is the same as the registered substance and (ii) the establishment undertaking the recovery has all required risk management information.

Each criterion is analysed separately below.

##### **3.1.1 Recovery process**

The substance must be obtained from recovery process. The REACH Regulation does not define the term recovery process. A list of recovery operations can be found in Annex II B of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste only<sup>8</sup>. However, Article 2(7)(d) of the REACH Regulation does not limit the recovery process to recovery of waste only. Non-waste materials can also be recovered and will be covered by the exemption.

This understanding is supported by the current case-law on the definition of waste. In case of *Palin Granit*<sup>9</sup> the European Court of Justice (ECJ) ruled as follows:

*“... it may not be inferred from the fact that a substance undergoes an operation referred to in Annex II B to Directive 75/442 [old Directive on waste] that that substance has been discarded and may therefore be regarded as waste (the judgment in ARCO Chemie Nederland, paragraph 82). The application of an operation listed in Annex II A or II B to Directive 75/442 therefore does not, of itself, justify the classification of that substance as waste.”*

The substance will be considered recovered when the reprocessing is concluded. This may be process comprising several stages. For example, in case *Antonio Niselli*<sup>10</sup>, the ECJ ruled that ferrous materials from dismantling of machines and vehicles (scrap metal) are waste until they have actually been recycled into steel. The exemption under the REACH Regulation should therefore apply to the final recovered substance only.

##### **3.1.2 Location of the recovery process**

The exemption applies only if the recovery process takes place within the EU. It may potentially apply to the whole EEA if the REACH Regulation is adopted by EEA countries as expected.

### 3.1.3 Same substance

The substance resulting from the recovery process must be the “same” as the substance registered under the REACH Regulation. The REACH Regulation does not define what a “same” substance is. The RIP 3.1 Guidance on Registration clarifies on page 31 that the same substance should be a substance that has the same identity and properties. No further guidance has been provided.

A substance would therefore be the “same” as a registered substance if the substance has the same identity and physico-chemical, human health and environmental properties as the registered substance.

Recovered substances may contain certain impurities, the composition of which is not always known. Since the recovered substances do not have to be registered, no information on the impurities needs to be provided. As long as their presence does not affect the properties of the recovered substance and the impurities are in the concentrations as listed in RIP 3.10 on identification of substances<sup>11</sup> this will not affect the status of the recovered substance as “same” to a registered substance.

### 3.1.4 Availability of risk management information

The last requirement is that the establishment undertaking the recovery has the information provided by suppliers to downstream users under Article 31 and 32 of the REACH Regulation for the registered substance. This information refers to the availability of a safety data sheet (SDS), any other information necessary to enable appropriate risk management measures to be identified and applied and any information on authorisations and restrictions concerning the substance.

The requirement to be in possession of such risk management information suggests that the recovered substance should be used for the uses covered by the chemical safety assessment or the exposure information of the registered substance. The objective for excluding recovered substances from registration under the REACH Regulation is that the registration dossier of a “same” substance contains sufficient information on the effects of the substance on human health and the environment and that there are risk management measures in place, whenever necessary. If the uses of a recovered substance are not covered in the registration dossier for the “same” substance, the establishment undertaking the recovery cannot be in possession of information on appropriate risk management measures. Consequently, the exemption would not apply.

### 3.1.5 Who can benefit from the exemption?

The exemption under Article 2(7)(d) refers to a substance that has been registered by a physical or legal person and that is recovered in the EU by an establishment. The REACH Regulation refers to an “establishment” undertaking the recovery rather than to a “person”, a “company” or a “recycler”. The use of the word establishment suggests that such establishment may be part of the business of a registrant of the same substance. This wording is not sufficiently clear as to whether the person that has registered the substance is the person that recovers the same substance in the EU or whether the substance can be recovered by any recycler. However, only an establishment that has a SDS and any other information necessary to enable appropriate risk management measures to be identified and applied can benefit from the exemption. Given the fact that such risk management information is provided together with a registration number (see Annex II and Article 32(1)(a) of the REACH Regulation), the establishment undertaking the recovery must have access to a registration number for the registered substance. This access can only be granted by a person

that registered the same substance. Since independent recyclers would not have access to the registration number of the manufacturers and importers, in practice only a recycler that forms part of the group of a manufacturer or importer may be able to benefit from the exemption.

It follows that only recyclers integrated with a registrant of the same substance can likely benefit from the exemption under Article 2(7)(d) of the REACH Regulation.

### 3.2 Do recyclers need to pre-register and register?

With regard to the analysis under point 3.1.5 we consider that under the present wording independent recyclers likely cannot benefit from the exemption under Article 2(7)(d) of the REACH Regulation. Since the provision is not sufficiently clear, it is advisable that an independent recycler pre-registers and (unless clarified in the interim) registers its recovered substance.

### 3.3 Is there EU legislation that regulates secondary raw materials?

*“In EU waste law, notions such as by-product or secondary raw material have no legal meaning – materials are simply waste or not”.*<sup>12</sup> We could not identify other EU legislation that defines or refers specifically to secondary raw materials.

## 4. Interpretation of “any available existing information” for the registration of intermediates under Articles 17(2)(d) and 18(2)(d) of the REACH Regulation

Eurometaux has asked us to interpret the words “any available existing information on physicochemical, human health or environmental properties of the intermediate” pursuant to Articles 17(2)(d) and 18(2)(d) of the REACH Regulation.

The main question is whether the term “available existing information” refers to the information currently in the legal possession of the registrant only or whether the term “available existing information” refers to all information on the properties of the intermediate that may be obtained from third parties by license or other legal means.

Articles 17(2) of the REACH Regulation reads:

*A registration for an on-site isolated intermediate shall include all the following information, to the extent that the manufacturer is able to submit it without any additional testing:*

*... (d) any available existing information on physicochemical, human health or environmental properties of the intermediate. Where a full study report is available, a study summary shall be submitted;*

*... Except in cases covered under Article 25(3), Article 27(6) or Article 30(3), the registrant shall be in legitimate possession of or have permission to refer to the full study report summarized under (d) for the purpose of registration...*

Article 18(2) of the REACH Regulation has a similar wording:

*A registration for a transported isolated intermediate shall include all the following information:*

*... (d) any available existing information on physicochemical, human health or environmental*

*properties of the intermediate. Where a full study report is available, a study summary shall be submitted;  
... Except in cases covered under Article 25(3), Article 27(6) or Article 30(3), the registrant shall be in legitimate possession of or have permission to refer to the full study report summarized under (d) for the purpose of registration...*

The text of Articles 17(2)(d) and 18(2)(d) does not expressly limit the information to be provided by the registrant to the information that is available to this registrant only. Therefore, the term “any available existing information” has to be interpreted in the light of the whole paragraph. The text that seems to clarify item (d) in both Articles, states that, except as provided in the REACH Regulation, the registrant must have legal rights on the full study report on the physicochemical, human health or environmental properties of the intermediate, if such a report is available. This requirement means only that a registrant cannot submit information owned by a third party, unless it is empowered to do so. However, the text does not exclude that a registrant should obtain information on the properties of the intermediate from third parties.

The text furthermore states that the registrant does not have to obtain permission or be in a legal possession of the information, if: (i) 12 years have expired from the submission of the information to the relevant authority (Article 25(3)); (ii) the European Chemicals Agency (“Agency”) permits the registrant to refer to the studies of a previous registrant (Article 27(6)); and (iii) the Agency permits the SIEF participants to refer to another registrant’s study (Article 30(3)).

This text seems to indicate that the registrant should take action to obtain the available existing studies from third parties. It means that if the registrant cannot obtain the necessary studies by agreement with the “data holders”, it can use the mechanisms available under the REACH Regulation to obtain the studies without the agreement of such “data holders”. The inclusion of such text is sensible only if the registrant is obliged to provide any available existing information, including information that it does not hold.

Consequently, the term “available existing information” should be interpreted to mean information on physicochemical, human health or environmental properties of the intermediate that is generally available to any identified “data holder”.

This is supported by RIP 3.1 on Intermediates which states on pages 6, 8 and 10 that for intermediates “the information requirements on physicochemical, human health and environmental properties are limited to the data that is available to the manufacturer (e.g. information he holds himself or that he can obtain from other sources) without any additional testing”.

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<sup>1</sup> *Official Journal of the European Union* L 319, 12.12.1994, p. 7 as amended  
<http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1994/L/01994L0055-20061124-en.pdf>

<sup>2</sup> *Official Journal of the European Union* L 235, 17.9.1996, p. 25 as amended  
<http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1996/L/01996L0049-20061124-en.pdf>

<sup>3</sup> COM(2006) 852 final, 2006/0278 (COD) of 22 December 2006, not yet published in the Official Journal of the European Union  
[http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006\\_0852en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0852en01.pdf)

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5 [http://www.unece.org/trans/danger/publi/adr/adr\\_e.html](http://www.unece.org/trans/danger/publi/adr/adr_e.html)  
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8 *Official Journal of the European Union* L 114, 27.4.2006, p. 9  
9 [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l\\_114/l\\_11420060427en00090021.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_114/l_11420060427en00090021.pdf)  
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Korkein hallinto-oikeus): *Palin Granit Oy v Vehmassalon kansanterveystyön kuntayhtymän hallitus*,  
*European Court reports 2002* Page I-03533, paragraph 27  
10 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0009:EN:HTML>  
*European Court reports 2004* Page I-10853, *Case C-457/02* Criminal proceedings against Antonio  
Niselli – Reference for a preliminary ruling from the Tribunale di Terni, paragraph 52  
11 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0457:EN:HTML>  
Guidance for identification and naming of substances under REACH, p. 22 – 26  
12 [http://ecb.jrc.it/documents/REACH/RIP\\_FINAL\\_REPORTS/RIP\\_3.10\\_SUBSTANCE\\_IDENTITY/substance\\_id\\_en.pdf](http://ecb.jrc.it/documents/REACH/RIP_FINAL_REPORTS/RIP_3.10_SUBSTANCE_IDENTITY/substance_id_en.pdf)  
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