

Supply chain communications and CBI protection under K-REACH

Hyun Ah Kim and Baek-Lim Whang of Shim & Kim and Jean-Philippe Montfort and Heng Li of Mayer Brown, examine the possible implications for downstream users of CBI protection under South Korea's 'K-REACH' and the draft Presidential and Ministerial Decrees.

There has been much discussion on some key aspects of South Korea's Act on the Registration, Evaluation of Chemicals (K-REACH), such as the reporting scheme, the tonnage threshold and the coverage of intermediates or polymers. Much less has been said about its provisions on supply chain communications and CBI protection. Yet, on these aspects, K-REACH diverges from the EU Regulation and raises concerns that companies, in particular downstream companies, should be aware of as they prepare for the entry into force of the new legislation on 1 January 2015.

As discussed in this article, K-REACH and its sub-regulations do not include provisions, comparable to EU REACH, for downstream users to keep a chemical's use confidential from their suppliers. The K-REACH provisions on the protection of CBI are much more limited than corresponding EU REACH provisions.

K-REACH and its sub-regulations will introduce a new regulatory system that, like EU REACH, includes the registration of existing substances through joint submission (AsiaHub 19 March 2014) and the authorisation of substances of very high concern. However, unlike EU REACH, there is no pre-registration or SIEF under K-REACH, but a system of annual reporting for all substances manufactured, imported or sold in South Korea above one tonne/year per manufacturer, importer or seller (AsiaHub 20 March 2014).

Another difference from EU REACH is that not all existing substances above one tonne will require registration, but only those prioritised by the South Korean authorities. Plus, the regulatory authorities in South Korea have a greater role in conducting hazard and risk assessments for registered chemicals under K-REACH than EU authorities under EU REACH.

Since the adoption of the Regulation in May 2013, two implementing decrees have been drafted that will be needed for the concrete application of K-REACH on 1 January 2015. In spring 2014, various comments were submitted by industry associations and groups, seeking in particular to use the two decrees to clarify or limit some of the requirements of the K-REACH Regulation.

Supply chain communications under K-REACH

EU REACH is known to affect not only chemical manufacturers but also downstream users. Hence, supply chain communications between actors in the chain is an essential element of the EU REACH Regulation. The same is true for K-REACH, which includes many provisions related to or requiring supply chain communications:

Article 8 of K-REACH obliges every manufacturer, importer and seller to report annually new and existing substances (as such or in mixtures) they manufacture, import or sell. The information that must be reported includes identity information (on the reporting entity and the substance identity), but also information on quantities and uses (draft Ministerial Decree Article 6). For sellers, information on chemicals identity and uses can be omitted if unknown.

Article 10 (K-REACH) also obliges manufacturers and importers (but not sellers) to register all new substances they manufacture or import, without tonnage threshold, as well as existing substances that are designated for registration by authorities if manufactured or imported above one tonne/year. The information that must be registered includes "use information", as specified in Article 14 of K-REACH.

In order to allow the necessary communication of information on uses for the purposes of reporting and registration, Article 30 of K-REACH allows manufacturers and importers to request from downstream users (and obliges downstream users to submit on request) the following information (as specified in Article 47.1 of the draft Ministerial Decree):

- » volume of use and sales;
- » detailed uses;
- » exposure information; and
- » information on safe handling.

Manufacturers and importers must also communicate the same information to downstream users upon their request. Of this information, only the details on volume of use and sales can be omitted if considered confidential by the submitter. Detailed uses must be communicated. Failure of downstream users to provide the above information, including information on uses, would subject them to penalties (K-REACH Article. 52.2).

This is very different from EU REACH. Under the EU Regulation, downstream users can identify a use to their supplier in order to have that use considered by manufacturers and importers as part of their registration and so make it a "registered use". But, they can also decide to keep a use confidential, in which case they have to perform the safety assessment of such use themselves and in some cases notify the European Chemicals Agency (ECHA) of such use and assessment (EU REACH Article 37 and 38).

If EU REACH includes this option, it is because some uses of chemical substances are legitimate business secrets that would be lost if disclosed to suppliers. Can these confidential uses also be protected under K-REACH?

Before we address this question, let us note at this point that unlike EU REACH, K-REACH does not include any provision allowing downstream users to assess their confidential uses themselves.

We also note two additional provisions related to supply chain communications, both of which also include "use" information:

Article 29 of K-REACH also requires suppliers of registered substances, and mixtures containing such substances, to provide recipients with information on the supplier and the registered substances via MSDS or otherwise. Information on registered substances include available use or restricted use, classification and labelling, exposure scenarios, information on safety handling, etc. (draft Ministerial Decree Article 44).

Finally, Article 35 (K-REACH) also obliges suppliers of notified "products" ("articles" under EU REACH) containing hazardous substances to provide recipients with information on the hazardous substances contained via a form designed by the Ministry of Environment (MoE). Information to be provided includes the name, contents, use (function) of the hazardous substances etc. (draft Ministerial Decree Article. 56).

The protection of CBI under K-REACH in supply chain communications

We now come to the question as to whether some of the information that requires to be communicated in the supply chain as per the above provisions can be omitted or otherwise be protected if considered confidential.

K-REACH contains several provisions that make reference to the Unfair Competition Prevention and Trade Secret Protection Act 2012, "Trade Secret Protection Act" (see links below), and allows companies to not communicate/disclose certain information that would be considered as "trade secret" under this Act. In particular, Article 44.2 of the draft Ministerial Decree allows Article 29 MSDS communications to not include trade secrets covered by the Trade Secret Protection Act. The same applies for some information considered CBI in Article 30 on downstream user communications (draft Ministerial Decree Article 47.3) as well as in Article 35 regarding communications on products/articles (draft Ministerial Decree Article 55).

However, for such protection to exist, three cumulative conditions must be met in order for such protection to apply:

- » the substance in question cannot be a "hazardous substance", meaning that all classified substances are automatically excluded from the protection;
- » the information that will be recognised as "trade secret" is limited to information on "compositions and contents", meaning that information on uses is not protected; and
- » the information that is sought to be protected must be a "trade secret" under the Trade Secret Protection Act, as described below.

As regards this last condition, in order to qualify as "trade secret" the Trade Secret Protection Act requires that the relevant information:

- » is not public (i.e. not available from sources other than the information holder, e.g. media, publications);
- » has an independent economic value (for example, the information enables economic gain in the market or significant costs/efforts are required for obtaining/developing such information); and
- » has been maintained in secrecy by the information holder with substantial efforts. With regard to the requirement of maintenance in secrecy, the Korean Supreme Court has set high standards in numerous precedents, requiring the trade secret owner to have in place extensive measures such as confidentiality obligations for the employees, internal document retention and security system, access restrictions to R&D facilities.

Thus, unlike EU REACH under which a downstream user can decide not to reveal upstream to its supplier a use that it considers confidential, under K-REACH, there is basically an obligation to communicate precise use information to suppliers without any possible recourse to the Trade Secret Protection Act, since that information would never meet the second condition mentioned above (i.e. it is not information on composition or content).

For example, an electronic or machinery manufacturer using a chemical substance in a specific, novel application, not yet known by its competitors, could not simply decide to treat it as confidential and assess it himself but would have to report such use to its suppliers (K-REACH Article 8.1, 30.1). The manufacturer could decide to provide the information to its supplier under a non-disclosure agreement. However, there would be the risk of leakage given that the supplier has a business relationship with other companies including competitors of the electronic or machinery manufacturer in our example and would have a vested interest in expanding its sales of the substance at stake to these other potential customers. Also, that supplier would have to communicate that information on use to authorities (as part of its reporting and registration obligation), with the risk that this information would simply be made public, as discussed below.

Disclosure obligations by Authorities

Indeed, the MoE is required pursuant to K-REACH (Article 42) and the draft Ministerial Decree (Article 61) to disclose information in its possession on chemical substances. The information to be disclosed include the name, service use, physical and chemical properties, hazards and risks of the substances.

K-REACH does provide some protection of CBI for information held by the MoE. More specifically, according to K-REACH Articles 45 and 8.1, and to the draft Presidential Decree Articles 33 and 34.2, the MoE will not disclose data for a period of 15 years if a person who submitted data according to relevant provisions of K-REACH applies for data protection based on secrecy. In that case, there is no requirement for qualifying as trade secret under the Trade Secret Protection Act and thus maintenance in secrecy requirement will not apply in this case¹.

¹ If CBI protection requested by a person who submitted the CBI is rejected by the MoE, such person has the possibility of filing, within 90 days from the date of rejection by the MoE, for an administrative proceeding with the competent higher authorities and/or an administrative suit before the administrative court, together with an application for injunction proving the urgent need to prevent irreparable harm.

However, the protection does not apply to data that is already public (Article 45.1) or in other cases as to be stipulated by Presidential Decree. The draft Presidential Decree lists the following as being excluded from the protection:

- » common name or brand name of the chemical substance or product name of the end product;
- » data relevant to the use of the chemical substance and the use of the end product;
- » data relevant to precautions during handling, disposal methods, and the safe use of chemical substance;
- » data relevant to the safety of the end product;
- » data relevant to accident response measures;
- » data relevant to the physical and chemical properties of the chemical substance;
- » summarised data relevant to the toxic nature of the chemical substance;
- » summarised data relevant to the risks of the chemical substance; and
- » other data notified by the MoE that needs to be disclosed to the public to protect the people's health and the environment.

In particular the second item, concerning the use of the chemical substance, again raises much concern. EU REACH also provides for some information to be publicized by the European Chemical Agency (ECHA), including the guidance on safe use. However, disclosure of "precise use, function or application" of substances or mixtures is deemed to undermine the protection of commercial interests of the concerned person (Article 118.2) and is thus not disclosed by ECHA . By contrast, there is no such protection under K-REACH and its sub-regulations, where disclosure of all information on uses would appear to be mandatory for the MoE.

Conclusion

Companies possibly affected by the obligation of providing information as described in this article should closely review to what extent K-REACH and the planned sub-regulations to K-REACH will affect them and constitute a risk to their CBI. In some cases, companies may be able to set up appropriate internal measures to maintain or qualify their CBI as trade secrets under the Trade Secret Protection Act. However, that may not always be possible or useful.

In particular, most companies active in South Korea and using chemicals in applications that are confidential should be worried and assess the extent to which K-REACH requirements would imply disclosing their CBI. They may organise to communicate information to their suppliers under non-disclosure agreements, but that too will not necessarily suffice

In our view, only an amendment to the K-REACH sub-regulations could resolve the problem. Could this still be done? In principle, yes, since the two decrees and the Ministerial Notice are not yet finalised.

We therefore advise affected companies to use the remaining time until enactment of these sub-regulations, around September 2014, for working towards relevant changes in the drafts either by direct contact with local authorities or through their respective trade associations. In particular, they should consider requesting an expansion of the scope of the exemptions from reporting under the draft Ministerial Decree by adding specific kinds of information other than composition and content that could be exempted as trade secrets under the Trade Secret Protection Act and restriction on the exclusion of certain CBI from non-disclosure by the MoE under the draft Presidential Decree.

Links:

Unfair Competition Prevention and Trade Secret Protection Act (2012)
http://elaw.klri.re.kr/kor_service/lawView.do?hseq=25452&lang=ENG

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