Compliance in Complex Supply Chains: A Unique Solution for Multi-Stage Supply Chains Under REACH, Turkey-REACH (KKDIK), UK REACH and Korean REACH (K-REACH)

*Dieter Drohmann, Thomas Schaefer and Christopher Cohrs**

*According to the European **REACH** regulation[1] and its counterparts **KKDIK**[2] in Turkey, **UK REACH**[3] in Great Britain and **K-REACH**[4] in Korea, importers are subject to the obligation to register all imported chemical substances, unless substances are exempted from this obligation. To enable importers to be exempted from these registration obligations, the respective regulations provide that non-domestic manufacturers and formulators can appoint a so-called **Only Representative** (OR), who registers the respective substances on behalf of the manufacturer/formulator and thus makes the respective importers so-called **Downstream Users** (DU). For this purpose, the OR must keep records of the respective importers as well as their annual imported substance quantities, which leads to problems in complex and multi-stage non-domestic supply chains, since indirect customers and suppliers as well as compositions of formulations are not known in many cases. Compliance with the OR's record keeping obligation would therefore only be possible by disclosing **Confidential Business Information** (CBI) in the supply chains, which may even be contrary to competition law rules if the OR is a related legal entity of the manufacturer/formulator. Therefore, in these cases, neither the manufacturers/formulators (represented by ORs) nor the importers can fulfil their obligations without disclosing such CBI and also risking loss of business. In the following article, a solution to this problem is presented using the **example of EU REACH**, which is also used in Turkey and Great Britain and works very well there. In Korea, the system is used in a slightly modified form.*

I. Introduction

In multi-stage non-EU supply chains, substance manufacturers usually do not know through which channels and in which products their substances are imported into the EU. Thus, the non-EU manufacturers usually do not know the importers and their individual imported substance quantities. In most cases, the EU importers also do not know the exact product compositions or the respective substance manufacturers.

In addition, exact product compositions as well as information about suppliers and customers are a major trade secret of formulators and distributors. On top of that, competition/antitrust law must be respected. As a result, neither the non-EU manufacturer (represented by its OR) can exempt the importers from their obligations, nor can the EU importers comply with their registration and compliance duties without communication of CBI within the supply chains, which in turn may lead to loss of business and violation of competition and antitrust regulations.

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1 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH).

2 Turkish Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals, 23 June 2017.

3 UK Registration, Evaluation, Authorisation & Restriction of Chemicals (REACH).

4 K-REACH: Act on Registration, Evaluation, etc. of Chemicals (Act No. 17326).

II. The Role of the Only Representative

All substances placed on the EU market in quantities of one tonne or more are subject to registration unless they are considered exempt under REACH. Since REACH is an EU regulation, it does not impose compliance obligations on non-EU manufacturers. Therefore, REACH shifts the registration obligation to the EU importers[5] who place the substances on the EU market. This can lead to a very large cost burden for importers, as each importer must register all imported substances himself. For this reason, importers will predominantly purchase only registered chemicals. If there is no registration, the non-EU manufacturer is at an enormous competitive disadvantage, as he can only export his substances to the EU through those importers who have their own substance registrations, which in turn makes him dependent on these importers. For this reason, REACH provides that any non-EU manufacturer or non-EU formulator can appoint a so-called Only Representative[6] (OR). The OR must be an EU-based natural or legal person who legally represents the non-EU manufacturer in the EU (or more precisely in the European Economic Area (EEA)). The aim is to relieve EU importers of their obligation to register substances and to allow non-EU manufacturers to supply any EU importer with only one substance registration. However, the appointment of an OR does not automatically mean that the OR must register certain substances. This obligation remains with the EU importers, unless they obtain written confirmation from one or possibly even more ORs that their imported quantities of certain products are 100% covered by registrations or exemptions from ORs of non-EU manufacturers. It is therefore up to the non-EU manufacturer to decide which EU importers in his supply chain he wants to exempt from their registration obligations by informing them of the appointment of the OR and having the OR confirm to them in writing that their imports are indeed covered. These confirmations allow the EU importers to maintain clear documentation, as they would otherwise remain responsible for non-confirmed imports and therefore cannot be considered as so-called Downstream Users[7] (DU). By issuing such confirmations to importers, the OR assumes the obligation to maintain up-to-date records of covered and supplied importers and their imported substances. Figures 1 and 2 show a simple example of the material flow and the difficulties associated with the required information flow.

The black/white arrows in Figure 2 represent a dead end for the respective actors, as they do not know whom to contact for appropriate REACH support due to confidentiality. Even in the case of direct communication (black arrows), it is often impossible to get help because the respective supplier either does not want to disclose his product composition or cannot do so because he does not know it himself in detail.

III. Problems and Possible Solutions

Which possibilities does the EU importer have to ensure his REACH compliance and to prove this to the enforcement authorities? To this end, supply chain actors are adopting various approaches that lead many EU importers to believe that they are indeed REACH compliant and do not need to take any action. However, most approaches are associated with several problems that make watertight compliance impossible.

1. Simple Communication of Registration Numbers

A common approach is the simple communication of registration numbers, in the form of general REACH compliance statements or in the Safety Data Sheet (SDS), issued by non-EU manufacturers and further communicated to the EU importers. First of all, this approach is very dependent on the successful communication between several downstream suppliers (formulators, distributors, etc.). This is very error-prone as registration numbers can be altered or even be lost on their way to importers. Even if this transmission takes place successfully, the registration numbers received cannot necessarily be checked for validity, even though registration numbers allow substances to be identified via the ECHA website. In addition, there is no control of the actual supply chains and quantities of substances supplied, which allows so-called "free-riding" on registrations of third

5 Importer - ECHA (europa.eu).

6 Only Representative - ECHA (europa.eu). See REACH Article 8.

7 Downstream User - ECHA (europa.eu).

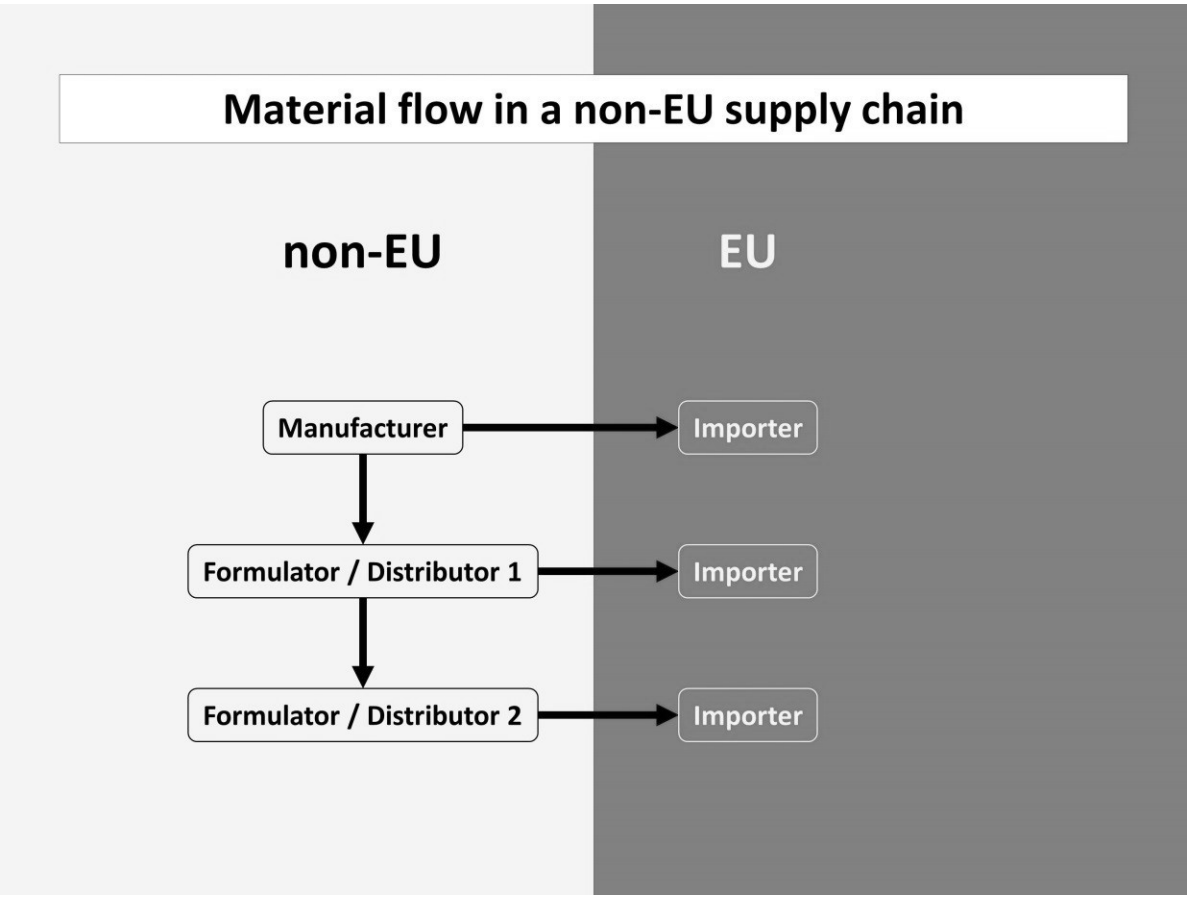


Figure 1: Material flow in a non-EU supply chain (Source: Chemservice, 2021)

parties. No registration numbers are assigned to substances that are exempt from registration, but they can still be contained in imported products. Importers have no chance of checking whether they have actually received all the registration numbers of the substances contained in their products with unidentified compositions. The main problem, however, is that there is no communication between ORs and EU importers regarding the imported substances and quantities. Thus, the ORs cannot fulfil their tracking obligations regarding the importers and their imported substance quantities. Consequently, EU importers are not covered by the registrations of the ORs and are therefore still subject to the registration obligations for their imported substances.

Furthermore, the full disclosure of all registration numbers of a product allows the downstream supplier/user to identify detailed product compositions. The presence of a registration number does not automatically mean that an imported substance is REACH compliant (e.g. if the total annual quantity imported exceeds the registered tonnage band). Relying solely on the communication of registration numbers via Safety Data Sheets (SDS) makes the situation even worse, as SDSs only need to be provided for hazardous products and just the hazardous ingredients need to be disclosed. Moreover, a hazardous substance might not have a registration number yet (because it is included in the supplied formulation <1 tonne/year, for example), but still be REACH compliant. Even wrong registration numbers (copied from others) have occurred frequently. The importer has no chance of verifying this, nor can he submit reliable information to the authorities.

However, the main problem remains that in these cases there is no communication between ORs and EU importers regarding imported substances and quantities.

– The ORs cannot fulfil their tracking obligations on importers and substance quantities.

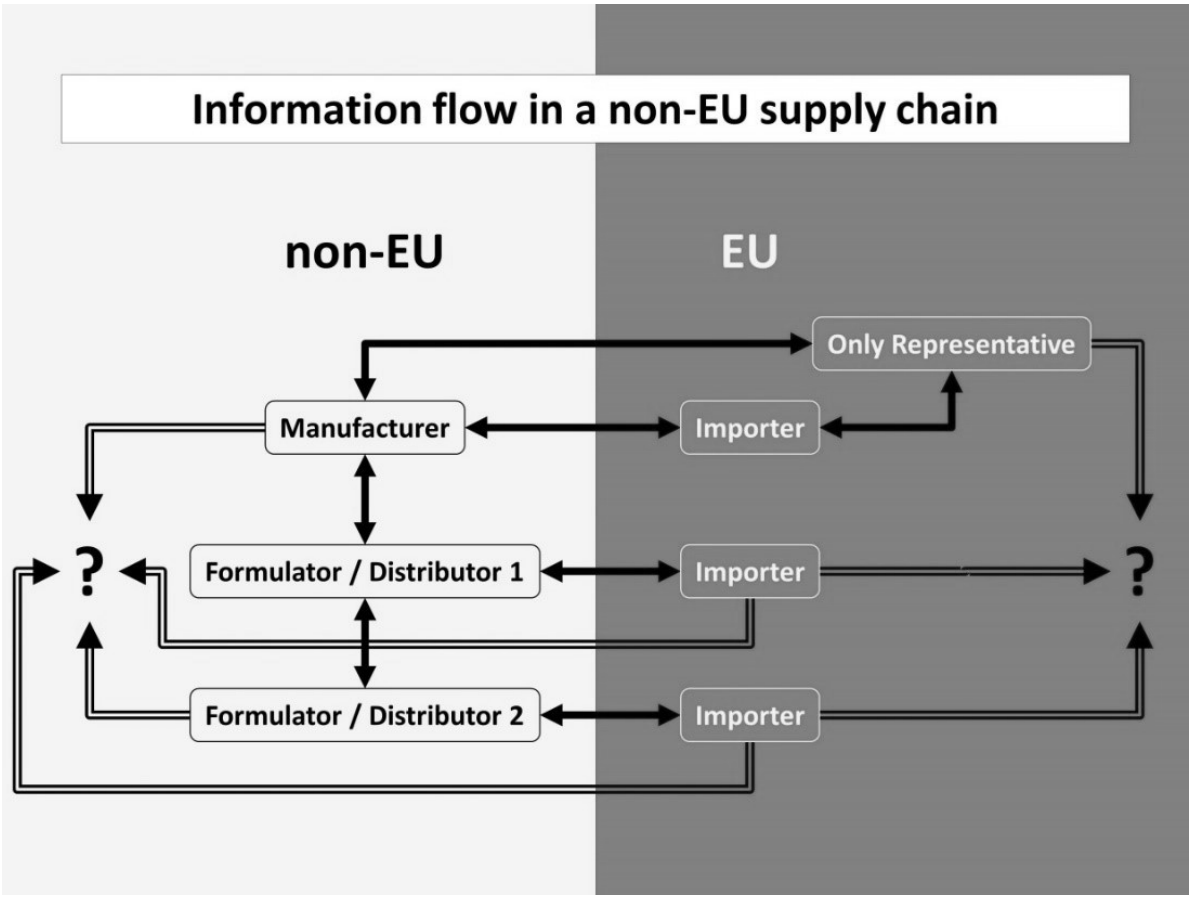


Figure 2: Information flow in a non-EU supply chain (Source: Chemservice, 2021).

- Consequently, EU importers are not covered by registrations of the ORs.
- Thus, EU importers remain responsible for their registration obligations.
- Finally, EU importers without their own registrations are importing illegally.

2. Bi-directional Distribution of REACH Compliance Declarations Within the Different Supply Chains

A well-considered approach to exempt importers from their registration obligations is the bi-directional distribution of REACH compliance declarations within the different supply chains. In this case, non-EU manufacturers issue REACH compliance declarations (including information on the OR(s)) confirming REACH compliance of the products supplied to direct non-EU customers. In the next step, the respective customer is expected to prepare his own compliance declarations for his own products (which may include additional substances) and to add additional OR information, if necessary. These new compliance declarations are based on all declarations received and must then be processed and forwarded by all downstream customers according to the same system until finally the EU import takes place. Subsequently, EU importers are expected to report their annual imported product quantities back to their direct suppliers in the supply chain. These suppliers then have to "split" the received volume information into the respective tonnages of the product components and subsequently pass on this new information (including information about the importers!) to the corresponding suppliers of their own product components. This continues up the supply chains until the relevant information reaches the corresponding non-EU manufacturers, so that the ORs of the non-EU manufacturers can record the information

about EU importers and their imported substance quantities. In this model, the ORs of the non-EU manufacturers can only ensure that all substances are in the correct tonnage bands once all EU imported substance quantities have been reported back through all supply chains. But this is a problem for the OR, as he cannot know if there will be further responses. Importers are not able to prove to the REACH enforcement authorities that their imports are indeed 100% REACH compliant until all relevant ORs have finally confirmed this in writing, which – for the aforementioned reasons – is very difficult.

This system relies completely on all actors in the respective supply chains to correctly calculate all component quantities and to communicate this information completely and correctly down and up all supply chains involved. Due to the complexity of supply chains as well as product compositions, it is highly probable that the final reported product quantities are incorrect or incomplete. Even if all calculations are accurate, importers do not know if and when they have legally compliant documentation. Another problem is that there is no control of the product quantities supplied. Thus, formulators or distributors may be able to obtain the same product, for which they have received a valid REACH compliance declaration from other non-REACH compliant sources, and use the existing declarations for "free-riding" to supply such non-compliant material into the EU.

In the end, it may even happen that a higher product volume is reported back to the non-EU manufacturer than the latter ever delivered to its customers. In such a case, the supply chains would have to be fully checked again. It must be noted that this system requires passing information about EU importers openly through the supply chain. This may result in loss of business and/or competition law issues for some actors in the supply chain. In addition, the system is very labour-intensive and therefore costly.

IV. The Trustee System

The web-based Chemservice OR-Trustee system[8] replaces the previous REACH-Code-Model system[9], which was developed back in 2008 as a unique solution for REACH and has since been used by leading companies in the chemical industry worldwide, including their downstream supply chains with several hundred participants.

1. Objective

The model aims to address all of the aforementioned problems and weaknesses of the various approaches and to provide the EU importer with immediate legally compliant documentation that places him in the status of a DU under REACH. In the Trustee system, for example, an independent OR acts as a trustee for non-EU manufacturers, formulators, distributors and importers, and their respective substances and formulations, to ensure confidentiality at all stages of the supply chains. To exchange the relevant supplier, customer, product and volume information between the supply chain participants and the trustee, a database-driven system is applied, which follows the supply chains in terms of information flow. The system generates unique time and quantity limited confirmations for all supply chain participants and makes them available to the respective actors in the supply chain. This is done for all product supplies that contain material from a non-EU manufacturer and which are intended to be imported in whole or in part into the EU. Using a database, the trustee tracks, among other things, all information on suppliers, customers and importers, as well as the relevant product information and quantities, and ultimately issues Import Certificates (Figure 3) to EU importers regarding the covered imported products and quantities.

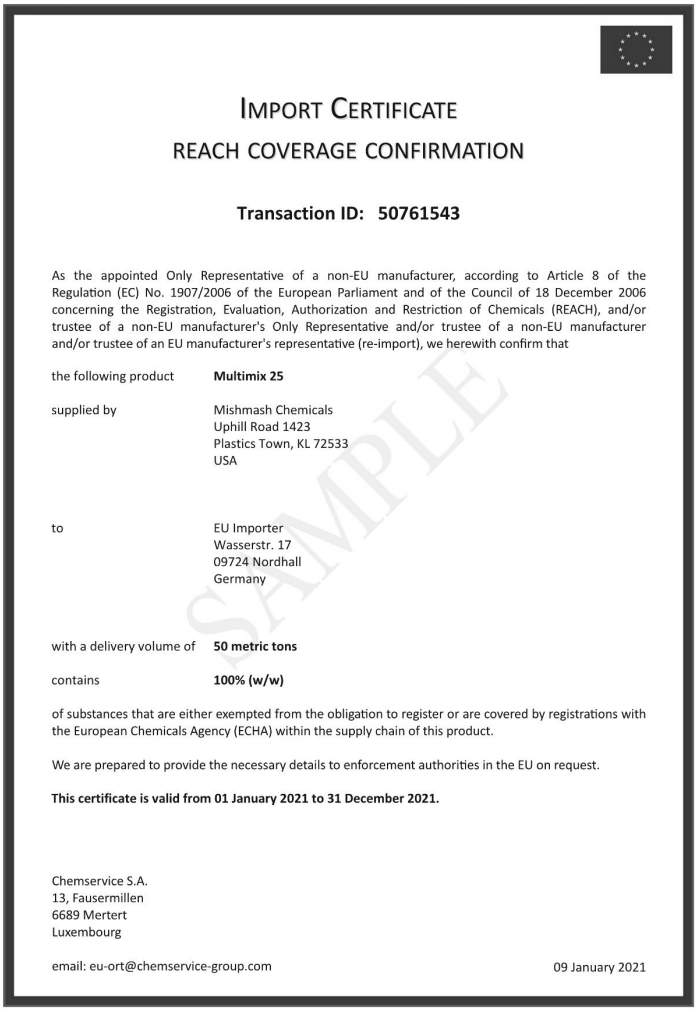
This ensures that all parties involved can continue their business without having to exchange CBI with each other and enables all stakeholders to fulfil their REACH obligations.

2. Benefits

The benefits of the Trustee system are as follows:
- The system is a self-service portal, eliminating unnecessary waiting time by filling out Word forms, email communications, etc.
- Information on the exact composition of raw materials is stored exclusively in a separate offline

8 OR-Trustee – Chemservice (chemservice-group.com).

9 REACH-Code-Model – Chemservice (chemservice-group.com).



IMPORT CERTIFICATE

REACH COVERAGE CONFIRMATION

Transaction ID: 50761543

As the appointed Only Representative of a non-EU manufacturer, according to Article 8 of the Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), and/or trustee of a non-EU manufacturer's Only Representative and/or trustee of a non-EU manufacturer and/or trustee of an EU manufacturer's representative (re-import), we herewith confirm that

the following product	**Multimix 25**
supplied by	Mishmash Chemicals Uphill Road 1423 Plastics Town, KL 72533 USA
to	EU Importer Wasserstr. 17 09724 Nordhall Germany
with a delivery volume of	**50 metric tons**
contains	**100% (w/w)**

of substances that are either exempted from the obligation to register or are covered by registrations with the European Chemicals Agency (ECHA) within the supply chain of this product.

We are prepared to provide the necessary details to enforcement authorities in the EU on request.

This certificate is valid from 01 January 2021 to 31 December 2021.

Chemservice S.A.
13, Fausermillen
6689 Mertert
Luxembourg

email: eu-ort@chemservice-group.com 09 January 2021

This document was issued electronically and is therefore valid without a signature.

Figure 3: Sample of a coverage confirmation resp. EU Import Certificate (Source: Chemservice, 2021).

system to which only the respective ORs have access.
- Only information that is already known is exchanged between suppliers and customers. The trustee uses the data exclusively in communication with the enforcement authorities; it is not passed on to participants in the supply chain.
- The certification process follows the supply chains step by step, from manufacturers/formulators to importers, automatically checking all data entered for plausibility and thus preventing unnecessary errors.
- The Trustee system controls the covered product quantities along the supply chain to prevent inadmissible use.
- The ORs of the manufacturers/formulators remain responsible for the accuracy of the information that is submitted and certified by the system.
- All confirmations are valid immediately without having to wait for feedback from importers about their imported substance quantities first.
- The OR-Trustee system allows to provide compliance information to authorities in a simple, quick and safe manner.

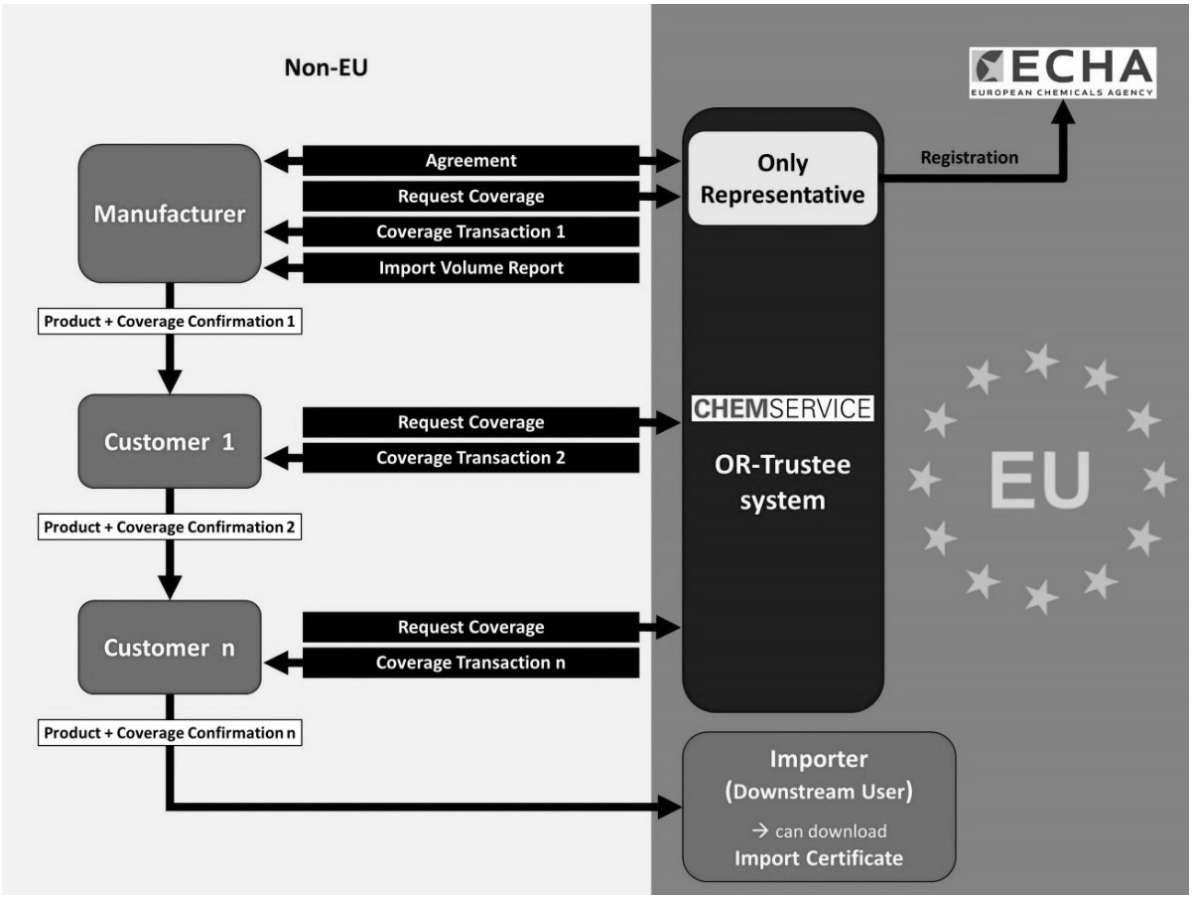


Figure 4: Flow chart of the Trustee system (Source: Chemservice, 2020).

– No need for individual contracts between DUs and Chemservice.

Figure 4 shows a schematic diagram of the process.

V. Conclusion

The OR-Trustee system is an uncomplicated and simple procedure to ensure REACH compliance along the product flows and avoid double registrations, saving resources and costs. The overall control of the coverage confirmations (e.g. verification of covered product quantities, validity of certificates, etc.) is performed centrally and database-driven, thus preventing accidental or even deliberate manipulations. The system is applicable even in case of re-imported substances, where it is relevant that no more material is re-imported into the EU than was previously exported from the EU. Combinations of the different scenarios and multiple supply chains are also easy to implement. The administrative efforts and costs are very low for all parties involved.

Due to the great demand to cover indirect imports, especially in complex multi-stage supply chains with imports to the UK as well as Turkey and in the course of the registration obligations of chemicals in the respective countries, the system was also introduced in these regions. In Korea, a slightly modified model was implemented due to the legal requirements. The system has been facilitated because the respective REACH-like chemical control legislations established the institution of the OR. Without the "OR function", indirect imports could not be adequately reflected.

Finally, it should be noted that this system will be made available to all ORs in the EU, UK and Turkey so that supply chains can be fully mapped and traced with a unified database-driven system.