



RSD Internal Guidance

RIG-2014-01

The REACH Enforcement Regulations 2008 (as amended) Asbestos Exemption for Placing on the Market Railway Vehicles and Components Containing Asbestos

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Summary

Guidance on the REACH Enforcement Regulations 2008 (as amended) which make ORR an enforcing authority for the restrictions on the placing on the market of articles containing asbestos in a railway context and give ORR the authority to issue exemption certificates. REACH stands for the Registration, Evaluation, Authorisation and Restriction of Chemicals.

Changes made in 2023:

- The guidance material has been updated and there are small changes to some paragraphs to further clarify suppliers' existing duties in relation to risk assessment (under Condition ii of the exemption certificate) and providing sufficient details to the person receiving the item to enable them to properly manage the asbestos-related risks they are inheriting (under Condition v of the exemption certificate).
- This edition updates references to legislation.

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(reviews only)

Introduction

1. This RIG provides guidance on the REACH Enforcement Regulations 2008 (as amended), (the 'Enforcement Regulations'), which came into force on 16 December 2013. These Regulations concern the enforcement arrangements for a Regulation known as 'REACH' (Registration, Evaluation, Authorisation and Restriction of Chemicals)¹. It also provides guidance on the Exemption Certificate No3 of 2024 concerning railway vehicles and components for use in railway vehicles at **Annex A**.
2. As well as making ORR an enforcing authority under REACH with enforcement powers, the Enforcement Regulations also grant ORR the power to issue exemption certificates. These enforcement powers only relate to the manufacture, placing on the market and use of asbestos containing articles in so far as it relates to the operation of a railway. We cannot enforce any other part of the REACH regulation.
3. The Enforcement Regulations are intended to give ORR powers to protect the health, safety and welfare of persons at work by the control of asbestos. They enable ORR to regulate the supply of second-hand railway vehicles containing asbestos, through conditions in the exemption certificate. **Note** - these enforcement powers are separate from the S.20 powers given to Inspectors under the Health and Safety at Work Act 1974 (HSWA).

Criminal Offences

4. The following relevant criminal offences will be prosecutable by ORR under the Enforcement Regulations. References in this paragraph are to the Enforcement Regulations, unless otherwise stated:
 - Regulation 11(2) – making it an offence to breach Article 67 of REACH, namely to manufacture, use or place asbestos containing articles onto the market;
 - Regulation 13 – making it an offence, amongst other matters, to obstruct an authorised person from investigating a REACH offence etc.
5. Both offences are subject to the following penalties:
 - Magistrates' Court – a fine not exceeding the statutory maximum and/or imprisonment not exceeding three months;
 - Crown Court – an unlimited fine and/or imprisonment not exceeding two years.

¹ the full title of this Regulation is: "Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)". Under the European Union (Withdrawal) Act 2018, REACH was brought into UK law on 1 January 2021.

6. Regulation 18 grants ORR the power to prosecute the above offences as an enforcing authority. **Note** – Inspectors do not have the power to prosecute before a court for REACH offences. This power has been reserved to persons authorised only by the Health and Safety Executive (HSE). Therefore, only a solicitor or counsel could present a case to the court on behalf of ORR.

Authorised persons

7. Under Regulation 10 and Schedule 7, Inspectors appointed under S.19 of HSWA are considered to be authorised persons for REACH purposes.

Power to investigate

8. Unlike the Control of Asbestos Regulations (CAR) 2012 and the Control of Substances Hazardous to Health Regulations 2002 (as amended), the Enforcement Regulations are not enacted under S.15 of HSWA. Therefore an Inspector's powers, normally given to them by S.20 of HSWA, will also not apply. The Enforcement Regulations instead sets out the powers to investigate.

9. Part 2 of Schedule 6 to the Enforcement Regulations sets out the enforcement powers of HSE and ORR. Authorised persons can do the following (akin to an Inspector's S.20 HSWA powers):

- At a reasonable time, enter non-domestic premises if they deem it necessary;
- Be accompanied by a constable if they apprehend serious obstruction;
- Be accompanied by any other person authorised by an enforcing authority and take any equipment or materials required;
- To examine and investigate as necessary;
- To direct that the premises or any part therein be left undisturbed;
- Take measurements, photographs and recordings;
- To take samples of things found in premises, and of the atmosphere;
- If any item contravenes REACH, to cause it to be dismantled or subjected to testing (not damage or destroy), and to also take possession for as long as necessary in order to examine it, ensure it is not tampered with or for purposes of prosecution;
- To require any person whom it is believed could give relevant information, to answer questions and sign a declaration of truth;
- To require the production of, inspect and take copies of any entry in books or documents; and
- To require any person to provide facilities and assistance with respect to any matters or things to enable investigation.

ORR is excluded from using the following powers set out in the Enforcement Regulations:

- To seize and cause to be rendered harmless an article, which is a cause of imminent danger of serious personal injury;
- To use any other power which is necessary for the purpose of carrying out the enforcing duty;
- To use their powers in a domestic premises; or
- To issue a prohibition notice or an improvement notice.

Exemption Certificate

10. ORR is an exempting authority with the power to grant an exemption certificate to a person, or class of persons, from the prohibition of placing asbestos articles onto the market. All certificates must contain conditions ensuring a high level of protection of human health.
11. ORR has granted a general exemption for placing on the market asbestos containing railway vehicles and components of railway vehicles in so far as they relate to the operation of a railway. For any other type of asbestos containing article, a separate application for an exemption certificate would have to be made.
12. The first general exemption came into effect on 17 February 2014 and was replaced by a second general exemption which took effect from December 2018. The current, third, general exemption came into effect on 1st January 2024 and retains all the conditions of the previous two exemptions unchanged. ORR will be monitoring compliance with Exemption Certificate No. 3 from the date it comes into effect.

Breaching conditions of an Exemption Certificate

13. Under Regulation 8A of the Enforcement Regulations a person who places an asbestos containing article onto the market will not be committing an offence if it is done in accordance with an exemption certificate; and the asbestos containing article was installed or in service **before** 1st January 2005.
14. Therefore, a person who supplies an asbestos article will not have the protection of an exemption certificate if they have breached the conditions therein or if the article was installed or first brought into service on or after 1st January 2005.
15. Inspectors will need to establish if a person has supplied any asbestos containing articles and if so, if there is an exemption certificate in place, whether conditions have been met and if the article was either first installed or in service prior to 1st January 2005.

16. A breach of an exemption certificate is not an offence in itself, but a person may be prosecuted for supplying an asbestos containing article without the cover of an exemption.

17. Where the breach gives rise to health and safety concerns Inspectors should consider whether there has been a breach of the CAR 2012. Inspectors should refer to ORR's Enforcement Policy and the Code for Crown Prosecutors before any decision is made.

Annex A

The REACH Enforcement Regulations 2008 (as amended) ASBESTOS EXEMPTION CERTIFICATE NO 3 OF 2024 CONCERNING RAILWAY VEHICLES AND COMPONENTS FOR USE IN RAILWAY VEHICLES

1. In pursuance of its powers conferred upon it by Schedule 5A of the REACH Enforcement Regulations 2008 (as amended) and being satisfied as required by paragraph (4) of that Schedule, ORR exempts any person who places on the market a railway vehicle or component for use in a railway vehicle containing asbestos from the prohibition on the placing on the market of any asbestos containing article provided for by Article 67(1) of REACH, subject to the conditions referred to in paragraph 3.

Interpretation

2. In this certificate:

“asbestos” means asbestos fibres listed at entry 6 of Annex XVII to REACH as follows:

Asbestos fibres (a) Crocidolite (b) Amosite (c) Anthophyllite (d) Actinolite (e) Tremolite (f) Chrysotile

“ORR” means Office of Rail and Road;

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

“railway” means any system of transport the operation of which is specified in regulation 3(2) of the Health and Safety (Enforcing Authority for Railways and Other Guided Transport Systems) Regulations 2006;

“REACH” means Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH). Under the European Union (Withdrawal) Act 2018, REACH was brought into UK law on 1 January 2021.

“vehicle” means any vehicle, which for some or all of the time when it is in operation is guided by means of –

- a) Rails, beams, slots, guides or other apparatus, structures or devices which are fixed and not part of the vehicle; or
- b) A guidance system which is automatic;

and includes a mobile traction unit.

Conditions

3. The conditions referred to in paragraph 1 are that:

i) the railway vehicle and/or any component for use in a railway vehicle was in service or installed before 1 January 2005;

ii) the person is able to demonstrate that any risks to human health arising from the placing on the market of the railway vehicle or component for use in a railway vehicle containing asbestos, have been properly assessed and are adequately controlled;

iii) the person takes any reasonable opportunity to remove asbestos from railway vehicles to be placed on the market, unless it can be demonstrated that the removal of asbestos would increase the risk to human health;

iv) the person replaces asbestos-containing components for use in railway vehicles with non-asbestos equivalent parts, when such parts exist and when reasonable opportunity arises, unless it can be demonstrated that the risks to human health are adequately controlled and the functionality of the railway vehicle would be compromised by replacement of the part with a non-asbestos equivalent.

v) the person makes a record of the location, type and condition of asbestos in the railway vehicle or any component for use in a railway vehicle, before placing it on the market. The record produced for this purpose must be made available to any person to whom the railway vehicle, or component of a railway vehicle, is supplied, or who will be a user of the railway vehicle or component of a railway vehicle. This record must be of sufficient clarity to allow another person to take appropriate precautions to control the risk of any exposure to asbestos.

vi) the person must keep a record of the number of railway vehicles and/or components for use in railway vehicles which are believed to contain asbestos indicating those which are on loan or lease to others and the names and addresses of those persons. These records must be provided to ORR when requested.

vii) all other relevant obligations under The Control of Asbestos Regulations 2012 and REACH, as appropriate, are complied with.

Duration, variation and revocation

4. This certificate is valid from 1st January 2024 and shall continue in force until 31 December 2028 unless ORR varies or revokes this certificate by notice in writing.

Signed by authority of ORR.....Ian Prosser *{signature redacted}*...

Dated.....29/11/23.....

Guidance on the Asbestos Exemption Certificate No 3 of 2024 Concerning Railway Vehicles And Components For Use In Railway Vehicles

1. The exemption is issued by the ORR and will allow railway vehicles and/or their components which contain asbestos to be sold, loaned, leased or imported so long as the conditions in the exemption are met. The conditions are designed to ensure the protection of human health and apply in addition to more general health and safety controls which require the management of risks arising from asbestos (CAR 2012).
2. The exemption covers rolling stock and components on the mainline, light rail systems, tramways, underground, heritage systems and other people movers within ORR's enforcement remit. Static exhibits in museums are not covered as they are regulated by the HSE.
3. Anyone who wishes to take advantage of this exemption must be able to demonstrate to ORR that the conditions are met.
4. Anyone who wishes to place on the market an article containing asbestos which is used in connection with the operation of a railway, but which is not a railway vehicle or a component of a railway vehicle, will need to apply to ORR for a specific exemption.

Guidance on the exemption conditions

5. **Condition i)** means that a railway vehicle, or component, containing asbestos that was not in service or installed prior to 2005 cannot be supplied under this exemption. In fact, REACH prohibits the use of an article containing asbestos unless it was already installed and/or in service before January 2005, in which case its use is permitted until it is disposed of or reaches the end of its service life.
6. **Condition ii)** requires the person to identify any particular risks arising from the process of supplying an asbestos-containing vehicle or component. For example, the vehicle or component may be physically transferred to a different operating environment. The person supplying the vehicle or component is expected to assess the additional risks of transfer and to highlight details of the asbestos risk to the person receiving the vehicle or component.
7. The first step in identifying whether there are any particular risks arising would be for the person supplying the vehicle or component to determine if there is asbestos present, or likely to be present. We would not expect the person to carry out an intrusive physical investigation (e.g they are not expected to dismantle a vehicle to determine the presence of asbestos). Instead, a presumption should be made that the vehicle or component

contains asbestos unless there is strong evidence that it does not. Any particular risks arising from the process of supplying the vehicle or component which is either confirmed, or presumed to contain asbestos, should then be identified.

8. Only vehicles that were brought into service, or components that were installed, prior to 1st January 2005 can be supplied under this exemption. (To note: vehicles and components first brought into service or installed *on or after* 1 January 2005 should not be assumed to be free from asbestos. One example to illustrate this: persons should be mindful of the risk that asbestos-containing parts may have been installed during the maintenance or refurbishment of modern vehicles).

9. The person who carries out the assessment under Condition ii) should be competent to do so. They should:

- have adequate knowledge, training and expertise in understanding the risks from asbestos and be able to make informed and appropriate decisions about the risks and precautions needed;
- know how the process of supplying the vehicle or component may risk exposing a person to asbestos;
- have the ability to collate all the necessary and relevant information;
- know the limitations of their competence and if/when they require competent assistance. For example, the person carrying out the risk assessment may require competent assistance to identify the location of asbestos / presumed asbestos in a railway vehicle or component for use in a railway vehicle, and/or competent assistance to accurately describe the type and condition of the asbestos.

10. **Conditions iii) and iv)** require a person to consider every reasonable opportunity to remove asbestos and to replace asbestos-containing parts with non-asbestos alternatives where they are available. Wherever possible we would encourage the removal of asbestos before a transfer of ownership takes place. However, in many cases the best opportunity for removal will arise during maintenance of the vehicle. Consideration should be given to the location of the asbestos relative to the modification or maintenance work. In some cases it may be safer to leave it in situ, so long as it is properly managed and there is no increase in risk to anyone maintaining or using the vehicle. The process of removal incorporates a degree of risk because it may potentially disturb asbestos fibres; in many cases it would need to be removed by a licensed contractor.

11. If a vehicle requires a major modification or a maintenance overhaul prior to sale or lease it may be reasonable to remove asbestos at the same time e.g. it would be reasonable to replace an arc chute on a contactor whilst

it was removed from a vehicle for overhaul. Whereas, if the asbestos is embedded in the structure of a traction motor it may not be reasonable to remove the asbestos during a light overhaul, and the motor may be refitted so long as any risks from the asbestos continue to be properly managed and there is no increase in the risk to health. In other circumstances where a major overhaul of the motor is required then the opportunity should be taken to remove the asbestos.

12. For heritage rolling stock there will be other considerations such as the authenticity of the part given the age of the vehicle. But this should not override the principle that, for heritage rolling stock which is in use, when a reasonable opportunity arises to replace an asbestos part with a non-asbestos equivalent then this should be done. For example, there is no justification for continuing the use of asbestos fibre gaskets or asbestos rope seals when an opportunity arises to replace them and there are suitable non-asbestos equivalents available.

13. **Condition v** is intended to ensure that a person receiving a vehicle or component is given sufficient details of the presence of asbestos to enable them to properly manage the risk they are inheriting. The condition specifically requires the location, type and condition of asbestos to be identified. In the case of a ROSCO this information may be recorded for fleets of vehicles rather than on an individual vehicle basis, but it must be sufficiently clear to alert the person receiving the vehicle, and anyone likely to carry out maintenance on the vehicle, to the presence of asbestos and where it may be found. In situations where asbestos is presumed, but not confirmed, this should be made clear to anyone receiving the vehicle or component. We would not expect the person to carry out an intrusive physical investigation (e.g. they are not expected to dismantle a vehicle to determine the presence of asbestos). Instead, the person should make a presumption that the vehicle or component does contain asbestos unless there is strong evidence that it does not, and they should alert the next user of the vehicle or component to the location of the presumed asbestos, in addition to the location of any confirmed asbestos.

14. **Condition vi** requires the person to keep records of vehicles and/or components containing asbestos and to indicate which are on loan or lease under the terms of this exemption. ORR may ask for this information to be provided to inform its understanding of the on-going extent to which asbestos remains in situ in current rolling stock.