

MMTA TRADE AND LOBBY COMMITTEE'S NEWSLETTER

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IS YOUR COMPANY IN COMPLIANCE WITH EU REACH REGULATIONS WHILE REMAINING COMPETITIVE?

1. REACH enforcement rests with Member States

The European Union's (EU) regulation for Registration, Evaluation, Authorization and Restriction of Chemical Substances ("REACH") entered into force in 2007. The aim of this legislation is to improve the protection of human health through improved management of risks related to chemical substances, and provide enhanced information to downstream users of these substances.

Although REACH is directly applicable in EU Member States, it entrusts Member States with the responsibility of ensuring compliance with its provisions. REACH does not impose any specific enforcement mechanisms on Member States beyond the requirement that penalties imposed be effective, proportionate and dissuasive. As a result, divergences have arisen in Member States' mechanisms for enforcement and in the level of penalties applied.

2. Divergent enforcement mechanisms create an uneven playing field within the EU

Differences in legal cultures between EU Member States may lead to very divergent outcomes with respect to enforcement of REACH provisions. In particular, they may lead to:

- **Differences in priorities for enforcement.** While some Member States will emphasize one particular aspect of REACH which they find particularly important, others may disregard those issues to the benefit of others. For example, some have introduced 'catch-all' provisions whereby all violations of REACH are actionable under EU law, while others seek to focus only on certain of its provisions. Concretely, while most Member States have national provisions to enforce provisions relating to registration of substances, the Czech Republic seems to be a notable exception. Similarly, while most countries enforce the "no data, no market" rule, Italy has not adopted national provisions for its enforcement.
- **Differences in mechanisms for enforcement.** Depending on their legal culture, Member States may choose between introducing criminal sanctions or administrative sanctions. Some, such as the United Kingdom and Ireland, privilege a nuanced approach, providing economic operators with an opportunity to bring their activities into compliance with REACH before imposing a hefty fine if adequate steps are not taken (the UK for example provides for unlimited fines for non-compliance).

These differences in methods of enforcement may carry different consequences. For example, depending on whether criminal or administrative sanctions are applied, companies registered for REACH ("economic operators") may be given more opportunities to appeal infringement decisions, as well as similar procedural guarantees.

- **Differences in levels of penalties.** Member States have introduced very different levels of penalties for violations of REACH. For example, in Belgium, major violations of its provisions may be punished by eight years' imprisonment for directors of the company and a maximum of 55 million EUR in fines. In Latvia or Lithuania, on the contrary, the maximum fine imposed is below 5 000 EUR. These stark differences in the level of enforcement lead to great divergences in the costs of compliance.

A recent report published by the European Commission estimates for example that penalties imposed in Ireland or Portugal represent approximately 30 000% of the costs of compliance. In France, on the other hand, criminal sanctions imposed for breaches of registration amount to 736% of the cost of compliance at the 1 to 10 tonnes level, but drop down to 34,5% of the cost of compliance at the 1000 and over tonnes level.

These differences in the methods of enforcement and level of penalties applied lead to very different treatment of companies for violations of REACH provisions, depending on the Member State in which they operate.

3. Recommended action

In light of the above considerations, we recommend that MMTA members:

- undertake an audit and compliance review in order to ensure they have correctly implemented their obligations under REACH; and
- conduct an in-depth review of their operations' structure with a view to decreasing REACH compliance costs and increasing their competitiveness.

Please contact the [MMTA](#) or [Arnoud Willems](#) at Sidley Austin for more information.

