

Demand #6 for REACH reform

Right to require action and compensation from non-compliant chemical operators

REACH – and the decisions adopted to implement it – create two types of obligations for chemical operators:

- *First, **product obligations** – which can either be restrictions on the presence of hazardous substances, or obligations to inform customers and consumers about the presence of such substances.*
- *Second, **industrial process obligations** – restrictions or prohibitions on the manufacture, manipulation, storage, transport or use¹ of hazardous substances in occupational activities².*

The Commission recognised that individuals and NGOs play a crucial role in identifying breaches of EU law by taking cases to court,³ something that is clearly needed for REACH, as non-compliance rates are high. If citizens had effective processes to request action from non-compliant operators, it would have the practical effect of multiplying the resources available to identify and end non-compliance. But today, the weight of enforcement relies solely on the poorly-resourced competent authorities, because neither REACH, nor other EU law, opens such process.

Therefore, the reform needs to ensure effective legal remedies for citizens, by creating a right to compensation for breach of industrial process obligations and by including the breach of product

¹ Article 3.24 of REACH more precisely defines use as “Any processing, formulation, consumption, storage, keeping, treatment, filling into containers, transfer from one container to another, mixing, production of an article or any other utilisation”.

² Using here the term coined by the Environmental Liability Directive, that defines it as “any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character” Directive 2004/35 Article 3.7 and the initiatives to empower citizens for the Green Deal transition.

³ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of Regions, Improving access to justice in environmental matters in the EU and its Member States, COM(2020) 643 final.

*obligations within the scope of the Directive on representative actions for the protection of the collective interests of consumers.*⁴

Reality check: victims suffer long-term impacts as a result of chemical pollution

Illegal exposure to most harmful chemicals⁵ happens all over Europe

CASE 1: PFAS pollution of municipal water in Kallinge (Sweden)

150 residents from Kallinge have claimed compensation from the Swedish municipality of Ronneby, due to the pollution of the municipal water with PFAS caused by the use of firefighting foams on one of the training grounds of the Swedish armed forces.⁶ The levels of PFAS, specifically PFHxS and PFOS, found in residents' blood are among the highest ever measured in the world, in some cases up to 10 000 times above the legal tolerable weekly intake fixed by EFSA for those two types of PFAS, i.e. 4.4 nanograms per kilogram of body weight per week. The Court of first instance, in 2021, acknowledged the reasoning of the victims: the high levels themselves, and the increased risk of future health effects they bring, represented a personal injury under the Swedish product liability law. Nevertheless, in early 2023, the Court of Appeal rejected their claim, considering that the presence of PFAS in people's blood does not mean they would suffer damage to their health – even though many residents are now starting to report various cancers and diseases, likely to be attributed to PFAS. The case is now before Sweden's Supreme Court.

Several cities in Sweden, such as Botkyrka, Båstad, Halmstad, Ängelholm and Östersund, are facing similar pollution issues. However, attempts to secure access to remedies have been unsuccessful in various instances, for example in Uppsala.⁷

CASE 2: Solvay accused of releasing heavy pollutants in the sea, Rosignano (Italy)

In Rosignano, one of Italy's largest chemical plants, producing soda ash and owned by Solvay, has been accused of manufacturing heavy pollutants without implementing proper risk management measures inside its plant, and of discharging its waste directly into the sea. Studies show that tonnes of mercury, lead and arsenic have been dumped onto the seabed, directly exposing people who bathe there. The risks are high: it was found that local residents have elevated incidences of fatal disease, and death rates are raised, as a consequence. Several public investigations are ongoing at the moment.⁸

At the same time, the company faces actions brought by its own workers. In January, after several years of proceedings, one Solvay worker who had fallen ill because of exposure to asbestos, finally obtained

⁴ [Directive 2020/1828](#).

⁵ In the sense of the Chemicals Strategy for Sustainability (p. 19), the most harmful chemicals are those that cause cancers, gene mutations, affect the reproductive or the endocrine system, or are persistent and bioaccumulative.

⁶ For more information: [Detta har hänt i PFAS-fallet | SVT Nyheter](#)

⁷ Swedish Water and Wastewater Association, [PFAS – the poison on everyone's lips](#), April 2022.

⁸ For more information: [Italy Beaches: Tuscany Coast Transformed by Solvay Chemical Plant Dumping \(bloomberg.com\)](#)

compensation, after it was found that Solvay did use asbestos in its plant and exposed all its workers, in breach of the law.⁹

The damage caused by the exposure to hazardous chemicals **goes way beyond impacts on health**.¹⁰ Those chemicals have effects on various aspects of a person's life, including psychological (e.g. the stress of knowing they have been exposed to a very harmful substance without being able to foresee the consequences, as it happens in Case 1 mentioned above), financial (e.g. people may not be able to sell their house if the surrounding environment is heavily polluted), or social (e.g. workers knowing they are illegally exposed to substance may have to quit their job to avoid continued exposure).

CASE 3: Houses built on trichloroethylene polluted soils in Grézieu la Varenne (France)

Following excavation work carried out in 2019, the owners of a plot of land located in the town of Grézieu-la-Varenne discovered significant pollution of water and soil with trichloroethylene (SVHC, listed on Annex XIV), a chlorinated solvent used mainly in dry-cleaners and both classified as carcinogenic, as well as a cocktail of other hazardous substances, including tetrachloroethylene, dioxins and furans. The residents have been exposed to 815 times the legal limit values. The pollution comes from a former industrial laundry - since its closure, around 30 homes have been built on the site. Some residents had to be relocated following these discoveries. Proceedings before the civil and criminal courts are ongoing.¹¹

The cases above show that exposure to hazardous chemicals, in breach of legal obligations, causes **significant impacts on people, sometimes for life**. However, legal remedies are non-existent or excessively difficult to access for the people impacted. For this reason, there should be a **presumption that the mere exposure to the most harmful chemicals, if caused by an activity in breach of chemical law, causes damage**. Victims of chemical pollution should not have to wait for the manifestation of physical or psychological harm to have access to justice with the aim of claiming, and actually receiving, compensation for the impact suffered – the rebuttable presumption that the breach of chemical law causes harm should suffice to claim compensation, or reparation on that basis.

Requiring proof of a direct correlation between a violation of REACH and a personal injury, directly attributable to that violation - a requirement that generally exists in EU national legal systems, as demonstrated in the cases above mentioned - is not appropriate for the type of the damage that violations of REACH can have for people and the environment, as explained below.

REACH violations similarly happen across Europe...

Two main violations of REACH obligations, which lead to damages on the people and the surrounding environment, are observed:

⁹ See also [the end of visit statement](#) by Marcos Orellana, Special Rapporteur on toxics and human rights, on chemical pollution in Italy.

¹⁰ The latest analysis from March 2023 of the European Environment Agency shows the extent of the impact chemicals can have on health: [Chemicals and health — European Environment Agency \(europa.eu\)](#).

¹¹ For more information: [Pollution des sols aux solvants à Grézieu-la-Varenne : le premier dossier d'écocide traité par la justice française - FNE Rhône \(fne-aura.org\)](#).

- **Breaches which relate to obligations affecting the consumer:** for example, a 2018 Swedish investigation¹² found illegal levels of substances of very high concern in Christmas lights. Many restricted hazardous substances, such as a number of phthalates, PFAS or bisphenols, are found in products in daily use, putting consumers' health at risk.¹³
- **Breaches which relate to obligations affecting the workers of industrial plants using hazardous chemicals, or the neighbouring communities of the plant:** the 2023 report¹⁴ from the ECHA Forum says 40% of inspected companies do not comply with their authorisation conditions, exposing workers and neighbouring communities to extremely dangerous chemicals. Additionally, breaches of product-related obligations may hint at breaches linked with toxic production processes.

...exposing people and their environment to similar grave impacts

Similarly to the cases mentioned before (see boxes), breaching REACH obligations has real consequences for people: it exposes them to substances known to be dangerous, in particular for health - whether they are present in a product or occur as an emission into the environment.

That exposure might, in a few cases, cause personal harm - an injury, illness or disability – that is directly attributable to the chemical in question. A recent report from the International Labour Organization¹⁵ shows that workers face hazardous exposures at all stages of the global chemicals value chain (e.g., to asbestos, mercury or lead) with direct and severe effects on their health, including in the EU, despite regulations being in place.

In most instances, the link between the exposure and the damage to health will be difficult to prove or the harm will manifest itself long after the exposure started. That is why REACH should include provisions facilitating, with an adapted burden of proof, access to justice to the victims of illegal pollution against non-compliant behaviours and their right to request and obtain compensation for the damages suffered.

The current gap weakening REACH obligations

No right to compensation and injunctive relief under REACH

At the moment, REACH leaves it to the discretion of the Member States to grant access to justice in relation to non-compliance with REACH, including compensation or the implementation of measures to put an end to a violation.

But evidence from various chemical pollution cases across Europe¹⁶ shows that national judicial systems do not ensure a right of access to an effective compensation system and to injunctive relief measures, for reasons including:

¹² ChemicalWatch, [Swedish investigation finds SVHCs in Christmas lights](#), 29 Nov 2018.

¹³ [Explained: the toxic threat in everyday products, from toys to plastic | Health | The Guardian](#).

¹⁴ ECHA Forum, [REF-9 project report](#) on enforcement of compliance with REACH authorisation obligations, 13 Feb. 2023.

¹⁵ International Labour Organisation (ILO), [Exposure to hazardous chemicals at work and resulting health impacts: A global review](#), 2021.

¹⁶ For example, the Cases 1-3 mentioned above.

- lack of access to justice or excessively costly process;
- asymmetry of information, which makes it hard to establish a breach of law;
- excessive burden of proof related to the establishment of a causal link between the breach and the damage;
- that the evidence of damage might be hard to establish, as many physical effects are multi-causal and hazardous chemicals often have complex modes of action.

This becomes even more difficult because public authorities and judges are, in general, unfamiliar with EU chemicals law, in particular REACH.

The revision of REACH should therefore include provisions regarding the right to request and receive compensation for damages, in a manner that is not practically impossible or excessively difficult, in order to create an effective, and harmonised access to remedies. Such a right exists in other legislation (e.g. the Antitrust Damages Action Directive) and was recently included in the Commission's proposal to revise the IED.¹⁷ The same considerations should apply to violations of REACH.

Other EU laws also do not ensure access to effective remedies for violations of REACH obligations

There are EU laws providing for access to justice in relation to breaches of environmental law, but these are insufficient to cover the diversity and specificity of issues covered by REACH:

Breach of REACH product obligations

The Directive on representative actions for the protection of the collective interests of consumers¹⁸ could have permitted actions led by consumer organisations for infringements of the REACH obligations that are of high relevance for consumers including:

- A violation of the right to know about the presence of substances of concern (Art. 33 REACH);
- Being exposed to restricted substances as such or in products (Annex XVII REACH).

But this Directive does not include REACH in its scope at the moment.

The Directive on product liability¹⁹, currently under revision, also enables consumers to claim compensation for damage caused by defective products. A product is presumed to be defective when it does not provide the safety which a person is entitled to expect (Art. 6 of the directive) – a powerful presumption, even though rebuttable, which could have a preventive effect (incentive) regarding to risks

¹⁷ See here : [EUR-Lex - 52022PC0156R\(02\) - EN - EUR-Lex \(europa.eu\)](#).

¹⁸ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance), OJ L 409, 4.12.2020, p.1.

¹⁹ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

of chemicals in consumer products, since it is in principle applicable even in the absence of special legal regulations - e.g. a specific ban on a chemical.

However, those who have suffered injury must prove damage – connected to safety - and a causal link between a defect and the damage. This can be difficult. Besides, the scope of the Directive (for products over 500 Euros) and time limitation periods for claims (3years) limits the number of cases for which consumers could claim compensation under REACH.²⁰ Finally, it is unclear to what extent the Directive can be used for the protection of collective interests of consumers.

Breach of REACH industrial process obligations (from a restriction or authorisation)

Emissions from industrial activities may be regulated under REACH either by authorisation decisions or by restrictions. Violation of these obligations can lead to exposure of people, including workers and neighbouring communities, to the substances concerned, as a result of emissions into the environment.

Existing laws do not guarantee that the people who suffer damage, fully or partially caused by one or more violations of REACH obligations, can claim and obtain compensation from those liable:

- The Environmental Liability Directive²¹ excludes explicitly any compensation for individuals. It sets a process for some REACH obligations: it covers the manufacture, use, storage, processing, filling, release into the environment and on-site transport of hazardous substances and mixtures²² that meet the criteria for hazardous as defined by the CLP Regulation²³. It also covers the activities performed under the Industrial Emissions Directive, which all involve chemical production, use or presence. But it is not sufficient because:
 - The activities covered by REACH are even broader;²⁴
 - The environmental damage covered by REACH may go beyond the scope of the Directive;²⁵
 - The Environmental Liability Directive does not cover direct²⁶ damage or any threat of damage to health (via exposure), which is a key concern in REACH;
 - It does not give private parties any right to compensation as a consequence of environmental damage or of an imminent threat of such damage (Art. 3.3).

²⁰ See [fifth report](#), covering the period 2011-2015, on the implementation of the Directive.

²¹ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

²² Annex III, section 7.

²³ [Regulation 1272/2008](#).

²⁴ Article 3.24 of REACH defining use as “Any processing, formulation, consumption, storage, keeping, treatment, filling into containers, transfer from one container to another, mixing, production of an article or any other utilisation”, Article 3.12 defines placing on the market as “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” and manufacture Article 3.8 by production or extraction of substances in the natural state.

²⁵ Limited to damage to protected species and natural habitats; water damage or land damage.

²⁶ Land damage however is defined as “any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in on or under land, of substances, preparations, organisms or micro-organisms”.

- The Industrial Emissions Directive ("IED")²⁷ does not include a right to compensation at the moment. It is currently being reformed, and a right to obtain compensation for any damage to human health that occurred from an installation as a result of any violation of national measures adopted in application of the IED (Art. 79a) is in discussion.
 - But even if it is adopted in a satisfactory form²⁸, it will not be sufficient to fill the REACH gap. First, because the REACH obligations, and therefore breaches, are very different to those covered by the IED. In addition, even though the IED has, in its scope, chemical producers, it only targets a few chemical users and only when the human health damage has already occurred. Thus, whatever the outcome of the revised IED, REACH must still have a provision offering a right to compensation to ensure consistency between similar situations (knowing that an IED permit and REACH authorisation have similar goals). Under REACH, that right should indeed cover the period during which the impact of the unlawful exposure is clear (e.g., high PFAS levels demonstrated by blood tests), prior to the manifestation of the actual human health damage (i.e., the actual disease).
- The newly proposed Environmental Crime Directive²⁹ considers a wider range of offences including 'serious' breaches of EU chemicals legislation 'causing substantial damage to the environment or human health'. However, the Environmental Crime Directive only applies to criminal conducts and environmental damages, and it does not cover civil law compensation for victims or any other direct action against chemical operators.
- National rules: in most national legal systems, the procedural requirements as well as the rules on the burden of proof generally applicable make it excessively hard to demonstrate a causal link between the harm suffered and the violation. That is an issue faced by the victims of chemical pollution involved in judicial proceedings across Europe, as demonstrated, for instance, in France in the context of proceedings against Arkema and Elkem silicones³⁰, or else in the region of Veneto (Italy) where around 350 000 people have been drinking water polluted with high levels of PFAS.³¹

What should it look like under REACH?

1. Right to effective remedy in case of violation of REACH industrial processes obligations concerning the most harmful substances

As natural persons and their associations can discover violations that lead to the illegal exposure of people and the environment to the most harmful chemicals, they must have access to an effective remedy to ask the Court to put an end to any such violations and compensate for the damage caused.

This right should include the following aspects:

²⁷ [Directive 2010/75/EU](#).

²⁸ Only a compensation right with an adapted burden of proof in favour of the victims will be a sufficiently effective compensation right under the IED.

²⁹ See proposal here: [1_1_179760_prop_dir_env_en.pdf \(europa.eu\)](#).

³⁰ For more information : [Vallée de la chimie : Notre affaire à tous dépose des recours pour infractions au droit de l'environnement \(actu-environnement.com\)](#).

³¹ For more information: [Contaminazione da Pfas? La compagnia denunciò «solo dopo il luglio 2013» \(padovaoggi.it\)](#).

Who can bring an action

Any individual affected by illegal chemical pollution shall have the right to bring an action against a non-compliant natural or legal person.

Non-governmental organisations promoting the protection of human health or the environment must have the right to represent the individuals affected and bring collective actions for compensation, to give the most vulnerable a chance to obtain compensation. This borrows from best practice in other areas of EU law (see, e.g., Art. 7 of Directive 2000/43 on equal treatment between persons irrespective of racial or ethnic origin³² and Art. 17 of Directive 2006/54 on the equality between men and women in the workplace³³).

What constitutes “damage” triggering liability

Damage can be constituted by:

- a material damage, physical or psychological harm, **or**
- the exposure of people, directly or indirectly through their environment, to the most hazardous substances (i.e. having the following properties: CMRs, PBTs and vPvBs, EDCs, PMTs and vPvMs, STOTs, respiratory sensitisers, and substances affecting the immune and neurological system) which are restricted or subject to the authorisation requirement under REACH.

Exposure to the most harmful chemicals cited above should be presumed to cause damage, even though it has not materialised into harm yet. That is because, by itself, exposure contributes to **elevated risks to health**, and **increases vulnerability** to various illnesses – a reasoning endorsed by the European Court of Human Rights.³⁴

The need for such presumption was best described by the UN Special Rapporteur on Human Rights and Toxics:

“106. The burden placed upon victims to prove a causal link between health impacts that take years or decades to manifest and potential exposure to thousands of different substances with known and unknown hazardous properties, through any number of exposure routes, can be an insurmountable obstacle. This is often because information on intrinsic hazards and exposures is either not available or not accessible, and is complicated by the vast number of potential diffuse sources of exposure, periods of heightened sensitivity during a lifetime, the latency of visible impacts and other factors”.³⁵

³² Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

³³ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

³⁴ See for example from the ECtHR jurisprudence: Pavlov v. Russia, 2022 (§68); Fadeyeva v. Russia, 2005 (§§80, 87-88); Cordella et autres c. Italie, 2019 (§§104,105).

³⁵ See the UN Special Rapporteur on Human Rights and Toxics report - A/HRC/36/41.

Who must establish causality

The burden and/or standard of proof required for the establishment of the causal link between the damage or exposure and a breach of REACH must not render the exercise of the right to judicial protection practically impossible or excessively difficult.

When an individual can provide sufficient information that **the cause for the damage suffered is the activity of a company**, it is for the company to prove that there was no breach of law or that the breach could not have caused the damage or exposure.

For example, a person should be able to request the adoption of injunctive relief and/or compensation if they bring evidence of exposure (on the basis of a water, soil, air, dust or product test results or biomonitoring, delivered by a specialized laboratory), which show a level of excessive pollution for which the most plausible cause is a violation by a specific company of REACH rules on authorisation or restriction. This borrows from best practices in other areas of EU law (see, e.g., Art. 3 of Directive 2014/104³⁶, Art. 8 of Directive 2000/43 and Art. 19 of Directive 2006/54).

The importance of adapting the burden of proof in cases where corporate activity infringes the fundamental rights of individuals protected under the EU Charter is a recommendation from the EU Agency for Fundamental Rights.³⁷

In the context of REACH:

- **The onus should be on the company accused to prove that there was no violation of the law (restriction/authorisation) or, if there is a breach, that it did not cause or contribute to the damage.**
- **For chemical uses under a strict ban, the presumption of harm should be irrebuttable.**

When

It is important to establish a clear and reasonable limitation period so that victims have sufficient time to bring an action. Victims should have **at least 10 years** to bring damage claims. It shall not begin to run before the violation has ceased and the person claiming compensation knows or can reasonably be expected to know that he or she suffered damage from a breach of the REACH Regulation.

What the judges can do

Injunctive relief: in case it is shown that irreparable harm may occur as a result of the continuation of the company's activities or if needed to act quickly against a pollution, the judge may order the responsible operator to restrain from continuing its activities or to act in a certain way to remedy to damage. In the context of REACH, the judge may order a company, for example, temporarily to cease the industrial activities causing the pollution or to implement advanced monitoring which contains a restricted substance.

³⁶ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

³⁷ European Union Agency for Fundamental Rights, Business And Human Rights – Access To Remedy, October 2020.

Compensation: in the field of environmental law, compensation is guided by the polluter pays principle. The judge will order the company responsible for exposing people to the most hazardous substances in breach of REACH to pay a cost to the victims. That price must be proportionate to the present and future, indirect and direct damage caused to the population and, in some cases, include the clean-up costs.

Power to request disclosure: Asymmetry of information in the context of REACH is an important and recognised issue, placing a heavy burden on public authorities, as well as on people potentially suffering from damage to their health or environmental pollution.

For this reason, the relevant court should be able to order the disclosure of evidence where the individual has presented reasonably available facts. Enforceable disclosure obligations already exist in EU law, for example, in Art. 5 and 8 of the Antitrust Damage Directive; or Art. 18 and 10 of the Collective Redress Directive. It is similarly proposed under the revised Product Liability Directive Commission's proposal (Art. 8).

Third-party liability to cover the claims

To ensure that a successful claim leads to reparation, REACH should include **a requirement for companies to have, and to maintain for a prolonged period / indefinitely, insurance to cover their third-party liability** under REACH and thereby ensure that the victims are justly compensated for potential damages (see for example the mandatory liability insurance regime set under the Paris Convention on Third Party Liability in the Field of Nuclear Energy³⁸).

2. Right to an effective remedy against breach of REACH product obligations

REACH product obligations have direct consequences for consumers. There are potential negative impacts, if these obligations are not respected, on the right to know about the presence of hazardous substances, or the right of people to not be exposed to such substances.

There is already a tool in EU law dealing with breaches of obligations related to consumers: Directive (EU) 2020/1828 protects the collective interests of consumers specifically. It gives powers to certain organisations to seek injunctive or redress measures on behalf of groups of consumers. This includes seeking compensation from companies who infringe consumer rights in areas such as financial services, travel and tourism, energy, health, telecommunications and data protection.

The Directive gives certain “qualified entities” the possibility to bring injunctive and redress cases to protect the interests of consumers. It applies when:

- a) there is infringement of a specific Directive/Regulation listed in the Annex;
- b) by a trader (broadly defined, including both publicly and privately owned entities); and
- c) there is harm or may be harm to the interests of a group of consumers.

The Annex includes several pieces of EU chemicals legislation but currently does not cover infringements of REACH.

³⁸ [Nuclear Energy Agency \(NEA\) - Paris Convention on Third Party Liability in the Field of Nuclear Energy: Unofficial consolidated text and exposé des motifs \(oecd-nea.org\)](https://www.oecd-nea.org/iaea/programmes/activities/safety/convention/paris-convention-on-third-party-liability-in-the-field-of-nuclear-energy).

This is an omission that needs to be fixed as REACH embeds currently two types of obligations directly relevant for consumers:

1. Information obligations

Obligation to provide information to consumers, proactively, to enable users to take the necessary measures as regards the protection of human health, safety and the environment, including when applicable by providing access to Safety Data Sheets (Art. 31).

For example, a consumer buying paint has to receive certain information on the chemical composition and hazards of the paint mixture in accordance with this article.

Obligation to provide information to consumers, upon request, on the presence of substances of very high concerns (SVHC) in products (Art. 33(2)).

For example, any consumer buying furniture, has the right to ask and obtain information on the presence above a certain threshold of substances of very high concern in the product they intend to buy according to this provision. A failure to answer properly, precisely and in a timely manner, such a request should be admissible for collective redress actions.

2. Obligation pertaining to the presence of the most hazardous chemicals

Obligations prohibiting the presence of some chemicals in consumer products, limiting their presence over a certain threshold or limiting their migration (leaching of chemicals) from materials or products (listed in Annex XVII of REACH).

For example, childcare products shall not contain phthalates in concentration higher than what is allowed under entry n°51 of REACH Annex XVII. If any such products do breach those concentration limits, such breaches of REACH should be admissible for collective redress actions.

There is no reason to exclude breaches of these obligations from the scope of potential compensation claims by groups of consumers.

Empowering citizens to protect their rights is needed to...

Align REACH with best practices

Rights to compensation can be found in the General Data Protection Regulation (Art. 82 and the "accountability principle"), in the Employment Equality Directive (Art 10 and 17), the Goods and Services Directive (Art. 8, 9 and 14), or in the Antitrust Damages Directive (Art. 3, 5, 13 and 17). These provisions

have already been successfully implemented into national legislation without leading to excessive litigation.³⁹

It has more recently been included in various Commission's proposals related to environmental legislation, e.g. in the context of the revision of the Ambient Air Quality and Cleaner Air for Europe Directive⁴⁰ and the Urban Waste Water Directive.⁴¹

EU law has also long used presumptions and an adapted burden of proof to ensure that the mechanism fits the specificities of the situation at stake. All aforementioned EU laws include various presumptions about violations, beyond the causal link only. Art. 17 of the Antitrust Damages Directive for example introduces the presumption that cartel infringement cause harm – which means that in proceedings relating to an action for damages, it will be for the defendant to rebut that presumption.

The recent proposal of the Commission on product liability⁴² also includes a compensation clause with an alleviated burden of proof (Art. 5). Under the current directive, any natural person could ask for compensation for damages caused by a defective product, i.e. a product “which does not provide the safety which the public at large is entitled to expect”.

The proposal mentions that the defective nature of the product shall be presumed in certain situations, e.g. when ‘a) the defendant has failed to comply with an obligation to disclose relevant evidence at its disposal...’ (Art. 9).

Art. 9(4) further lightens the burden of proof for the claimant:

“Where a national court judges that the claimant faces excessive difficulties, due to technical or scientific complexity, to prove the defectiveness of the product or the causal link between its defectiveness and the damage, or both, the defectiveness of the product or causal link between its defectiveness and the damage, or both, shall be presumed where the claimant has demonstrated, on the basis of sufficiently relevant evidence, that:

- a) the product contributed to the damage; and
- b) it is likely that the product was defective or that its defectiveness is a likely cause of the damage, or both.”

All this shows that introducing such mechanism in REACH is not a big leap – it is simply a much-needed provision required to balance the burden of proof as between the parties involved, when there is no balance.

Bring EU States and institutions in compliance with Human Rights

EU institutions and States have the duty to ensure access to effective remedy

³⁹ British Institute of International and Comparative Law, Study on the implementation of reverse burden of proof into the national legislation of certain Member States connected to the Industrial Emissions Directive, Country reports, September 2022.

⁴⁰ [Proposal](#) for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe, COM(2022) 542 final/2.

⁴¹ [Proposal](#) for a Directive of the European Parliament and of the Council concerning urban wastewater treatment (recast), COM(2022) 541 final.

⁴² Proposal for a Directive of the European Parliament and the Council on liability for defective products, COM(2022) 495 final.

The Right to an Effective Remedy is protected in EU law, by Art. 47 of the Charter of Fundamental Rights, as well as Art. 19(1) TEU that requires Member States to provide, in their national laws, “remedies sufficient to ensure effective legal protection in the fields covered by EU law.”⁴³ In a previous judgment, the Court of Justice of the European Union (CJEU) emphasised that the right to an effective remedy is particularly important where environmental pollution affects and puts human health at risk.⁴⁴ But because of the gap highlighted above, this obligation is not fulfilled.

The absence of an adequate process to require preventive and remedial action from non-compliant operators, including compensation, is of the highest concern.

Indeed, in the words of the UN Special Rapporteur, “the inability to secure justice, even by the victims of the most egregious and clear cases of malicious conduct **adds insult to injury**. The need to establish a causal linkage between exposure to toxics and health impacts **fosters impunity**, making it nearly impossible for many victims to obtain justice and remedy for chronic exposure to a cocktail of toxic substances, whether they are exposed while still in the womb or later in their lifetimes. Most people do not even know that they are victims.”⁴⁵

This is why an adequate system must be created:

“77. The ability of **rights holders to exercise and defend their rights is fundamental** to the enjoyment of human rights and is at the core of rights-based environmental agreements such as the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).”⁴⁶

“101. Victims have a **right to fair compensation for losses suffered**. Compensation can address **material losses and non-material or moral suffering**.

102. States have the primary obligation to ensure timely remedy for victims, but **must also ensure that in time the businesses responsible for rights abuses are held accountable**, including through restitution for all costs incurred in realizing an effective remedy for victims. In the context of transnational business activities, international cooperation is often essential to help ensure that victims have timely access to an effective remedy.”

Deliver direct and indirect economic benefits of better enforcement

Granting civil society with the tools to contribute to the overall effectiveness of REACH will have a multiplier effect on its enforcement and create incentives for greater compliance. Currently, the poor implementation of EU environmental policies and regulation is costing an estimated €55 billion a year. The European Commission’s Communication on 2019 Environmental Implementation Review estimates that 400,000 jobs and additional annual turnover of €42 billion would be created if the EU waste policy alone were fully implemented. Preventing pollution at source and supporting substitution means clean-up costs will be reduced. In the chemicals area, the cost of poor enforcement of EU legislation is equally substantial:

⁴³ C-562/12 Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007-2013 Seirekomitee, ECLI:EU:C:2014:2229.

⁴⁴ C-752/18 Deutsche Umwelthilfe eV v Freistaat Bayern, ECLI:EU:C:2019:1114.

⁴⁵ See Report on “the human right to an effective remedy: the case of lead-contaminated housing in Kosovo” (Sept 2020), [A/HRC/45/CRP.10](#).

⁴⁶ Paragraph 77.

exposure to endocrine disrupting chemicals alone costs approximately €163 billion/year.⁴⁷ UNEP drew similar conclusions, highlighting the significant direct and indirect costs associated with exposure to hazardous chemicals.⁴⁸ The substitution to less harmful chemicals is likely to support the development of a thriving market for safe and sustainable alternatives and therefore support the creation of safe and circular material flows.

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⁴⁷ Trasande L, Zoeller RT, Hass U, Kortenkamp A, Grandjean P, Myers JP, DiGangi J, Hunt PM, Rudel R, Sathyanarayana S, Bellanger M, Hauser R, Legler J, Skakkebaek NE, Heindel JJ. Burden of disease and costs of exposure to endocrine disrupting chemicals in the European Union: an updated analysis. *Andrology*. 2016 Jul;4(4):565-72. doi: 10.1111/andr.12178. Epub 2016 Mar 22. PMID: 27003928; PMCID: PMC5244983.

⁴⁸ Economic benefits of action and costs of inaction, Foundational paper for GCO-II, January 2019.