

# The Legal Risks of Reach

■ Since the adoption of Reach in December 2006, the focus has been almost exclusively on its regulatory aspects. However, the legal framework is no less important, and attention should especially be paid to the legal risks that implementation of the regulation may bring about.

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Indeed the “no data, no market” principle puts a lot of pressure on the different actors along the supply chain. Failure to comply with Reach requirements, even in good faith, may lead to dramatic economic consequences for companies.

Moreover, violation of the regulation implies criminal proceedings and penalties. The first step with Reach was thus clarification. Even if a number of points are still obscure, we must assume that a lot has been achieved at this level, in particular through the various guidance documents released by the ECHA that have already been amended a few times.

Now, however, the process is accelerating, especially since the 1st of June 2008, and different types of contracts are signed every day that make progress towards implementation of Reach. It is thus more than time to remember that as ambitious as it may be, the Reach regulation does not install a finite and autonomous legal system. Reach exists within European Union Law and the national laws of States.

Thus, the implementation of Reach requires use of almost all areas of law and in particular tort law, penal law, intellectual property law, corporate law, competition law and of course contract law.

## Liability and contracts

For example, the extent of the obligations incumbent on industry lead to a correspondingly heightened risk of vicarious liability actions. The drafting of contracts binding the different actors, such as manufacturers, importers, suppliers, down-

stream users, ORs, and service providers, is one of the key means for providing a clear allocation of responsibility.

Indeed, this allocation is not always very clear in the regulation itself, and it allows a wide margin of freedom to the contractual wishes of each party. Registration dossiers must be sent and be compliant, but the way to reach this compliance does not matter that much.

Thus, in contracts, stress must be put on the clauses about respective obligations, as well as about liability and termination of the contract. Who precisely must do what? To what extent is a disclaimer of liability valid? In which cases? What are the consequences of a breach of contract? In which circumstances is a contract terminated, and what procedures are followed when doing so?

It is interesting to note that where Reach gives some basic elements about the allocation of responsibility of actors, it says nothing about the regime of liability (eg. torts and liability for defective products) to apply, nor does it provide any model of the main type of contracts needed in the process of implementation.

For example, Reach and its guidance documents say very little about the actual status and liability of an OR towards its client, towards the supply chain, towards a victim, and towards the ECHA, even though the OR is one of the key players in Reach. Its regime must be found in the contract and tort laws of each country, i.e. the national law picked by the parties to govern their contract or the national law of the country in which the damage has occurred.



## Criminal prosecutions

The Reach regulation says almost nothing about criminal penalties. Indeed it is not within the scope of competence of the European Union to set criminal penalties, but the regulation binds the States to establish, before the 1st of December 2008, a set of provisions applicable to infringement of the regulation.

These penalties have to be “effective, proportionate and dissuasive” and member States are currently adopting the texts necessary to comply with Reach. Basically, penalties will be divided into several groups according to their



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**According to the writer, more attention should be paid to the legal risks Reach regulation may bring about.**

### Intellectual property

Another very important aspect of Reach is linked to the protection of the intellectual property of manufacturers of substances, formulators of preparations and downstream users.

The Reach regulation encourages companies to share a certain amount of data, even going as far as imposing such sharing in the case of studies involving tests on vertebrate animals, and tends to set up a system of free circulation of information.

Even if certain safeguards are set up, the implementation of the Reach regulation may potentially be problematic. Indeed, in relation to the participation in SIEFs and to the process of joint submission of registration dossiers, companies will have to disclose sensitive data that may let their competitors discover through sharp analysis some critical trade secrets.

There is little that intellectual property law can do to protect such data when they must become public or at least be shared with other companies.

Nevertheless, through the optimal use of the safeguards contained in the regulation, as well as through the preparation of adapted confidentiality clauses for the different types of contracts that it may be necessary to sign, it is possible to minimise the risk represented by this transparency of information.

### Competition law

Finally, there is a less evident legal risk but one which can lead to the harshest economic penalties: prohibited agreements between companies and infringement of competition law.

In this regard, the chemical industry may be vulnerable and the implementation of Reach may lead, within the next few years, to enormous new fines—hundreds of millions of euros for each big cartel—being levied by the European Commission.

Indeed, through the data and cost

sharing process that it imposes, Reach obliges competitors to meet, collaborate and finally have a consistent relationship.

The risk of prohibited agreements, which is present in the SIEF, is even more important within consortia. These contractual structures for collaboration are not explicitly evoked in the Reach regulation, but their creation is clearly encouraged by ECHA and the guiding documents published by ECHA propose a basic set of rules concerning their creation and management.

Their free contractual form, flexible structure and the fact that they are independent from any institution and may welcome as a member any interested company or data holder make consortia a very useful and efficient tool, as well as a potentially very big challenge to competition law.

There are some fundamental rules to respect both in the redaction of the clauses of the contracts of consortium and of course in the relations between members. Basically, there should be no subjective restriction to membership, a fair sharing of costs related to size and needs and a clear understanding by members of the information that cannot be disclosed and exchanged.

By itself, the obligation to fairly share the costs according to tonnage is in contradiction with the interdiction to disclosing to other members its tonnage. This kind of legal contradiction can be resolved, in this case through the appointment of an independent third party, but is symbolic of the tensions that exist between Reach as a little system of law and the big system of law that is the European Union Law.



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gravity. For example, manufacturing without registration or authorisation, or transmission of false information and studies may lead to incarceration.

Nevertheless, this specific regime of criminal penalties linked to violation of the regulation does not prevent other types of criminal prosecutions.

Indeed, all countries of Europe provide criminal sanctions for the violation, intentionally or through negligence, of an obligation of security and care that leads to damage. These general criminal dispositions may of course apply to the conduct of any service provider or actor in the supply chain.