

## **How the EU’s product stewardship regulations affect global supply chains**

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### **The EU’s approach to product stewardship**

While the European Union (EU) does not have any legal principle specific to product stewardship, it has applied the full range of EU environmental law principles to create a comprehensive framework for product stewardship. These principles include the prevention and precautionary principles, sustainability, extended producer responsibility, supply chain responsibility, and corporate social responsibility. In addition, product stewardship is a key instrument in the EU’s latest strategic environmental focus areas: the circular economy and the toxic-free environment, two main themes of current EU environmental policy making.

### **“Self-enforcing” regulation**

Product-based environmental regulation often is regulation that does not require as much government enforcement as traditional command-and-control regulation, because it is enforced through the marketplace. This is particularly true for consumer goods; retailers tend to be concerned about the reputational fall-out if products on their shelves appear to be non-compliant. So, they demand compliance, and proof of compliance, from their suppliers, which in turn demand the same from their suppliers, and so on.

### **Products subject to EU product stewardship regulations**

The first product subjected to EU product stewardship regulation was packaging. Thereafter, electronics were regulated through several EU laws, including the Restriction of Hazardous Substances (RoHS) Directive, which restricts chemicals in electronics; the Waste Electrical and Electric Equipment (WEEE) Directive, which requires take-back and recycling of waste electronics; the end-of-life vehicle Directive, which imposes both chemical restrictions and requires recycling of automobiles; the ecodesign program, which covers a wide range of electrical and other products and impose requirements to reduce their environmental impact; and the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) regulation.

REACH is the most “ambitious” chemical regulatory program in the world. It is aimed at managing chemical risk from cradle to grave, and uses a series of tools to achieve that objective—testing and registration of chemical substances; restriction, including prohibition, of some substances; and a user- and use-specific permitting program for hazardous chemicals, so-called substances of very high concern (SVHCs).

## **Types of requirements that affect supply chains**

Product-based environmental regulations may include several types of regulations, which differ in terms of their effects on supply chains. Not all such regulations have the same effect on supply chains; for instance, those that require end-of-life management do not always result in demands on the supply chain. This may be different, however, where recyclability or source reduction needs to be guaranteed or the absence of hazardous substances is required.

The types of requirements that implicate product stewardship are diverse. First, labeling, reporting, and other informational requirements often require that suppliers provide information to their customers, or guarantee a particular composition of their product. For instance, to be able to provide nutritional information on a food product, the supplier of an ingredient needs to provide data on the ingredient's nutritional composition.

A second type of common product-based environmental requirement is a chemical restriction or prohibition. Typically, such a requirement imposes a concentration limit (for instance, the sum of concentration levels of lead, cadmium, mercury, and hexavalent chromium present in packaging may not exceed 100 ppm) or a prohibition (for instance, perfluorooctanoic acid may not be used in production of mixtures). Obviously, suppliers must ensure that the restrictions and prohibitions are complied with in relation to the components they provide.

Other types of product-based environmental requirements include performance requirements. An example is an energy efficiency requirement. Biological performance requirements may involve the absence of microbiological contamination.

The bottom line is that these regulations require product stewardship throughout the supply chain. Such product stewardship may be up- or downstream from a particular company in the value chain, or both.

## **REACH's effects on supply chains**

REACH makes references to the supply chain at several points, and imposes requirements on "actors in the supply chain" and "all manufacturers and/or importers and/or downstream users in a supply chain." The regulation contemplates explicitly that regulated entities pass information on hazardous substances up and down the supply chain.

To ensure that products and the information accompanying them placed on the EU market meet the applicable requirements, manufacturers, importers, and distributors use several tools. One such tool involves supplier selection; if suppliers understand the relevant requirements and appreciate the importance of compliance, the customer will likely have to spend much less time on monitoring. Another tool relies on contracting. Through contractual clauses, including representations and warranties, covenants and indemnities, customers can ensure that their

suppliers accept the obligations that are necessary to reduce compliance risks, and respond to any compliance issues that may arise. Analytical testing is another tool, but, for cost reasons, is generally only used to a limited extent, where other tools are deemed not to provide the desired level of comfort.

### **Legal risk management and change management**

REACH presents legal risk management challenges not only with respect to regulatory compliance. It presents a much broader set of legal risks that require management.

Lawyers have a role to play with respect to many REACH-related activities, including registration and regulatory strategies, internal organization and process management, REACH consortia and related agreements, intellectual property protection, and, in particular, data protection and data access, competition law compliance, and, of course, supply chain management (product stewardship).

REACH legal risk management is not a one-time task. Rather, every time there is a relevant change, the consequences need to be evaluated. Relevant changes may involve new regulations issued pursuant to REACH, and changes in the marketplace, but also changes within the supply chain, e.g., a new supplier or a change in sourcing by an existing supplier.

### **Effects on corporate transactions**

Many corporate transactions are affected, directly or indirectly, by EU product stewardship regulations. Any purchasing, supply, or sales agreements, as noted above, should include clauses that facilitate compliance with EU regulations. Relatedly, any time a supplier is replaced or when a supplier makes a relevant change, the issue should be revisited; this requires strong “change management.” Even in mergers and acquisitions, compliance with EU product stewardship regulations comes into play. Adequate representations and warranties, covenants, and indemnities are essential to manage the transaction-related risks.

In short, EU product stewardship regulations present both compliance and transactional issues for practitioners to consider. Legal risk management is therefore critical.