

## **To know or not to know?**

**The consumer's right to information under the Regulation concerning Registration, Evaluation, and Authorisation and Restriction of Chemical substances (REACH) and other European Union legislation**

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### ***ABSTRACT***

This article addresses the consumer's right to information against the background of the European 'REACH' legislation, which, amongst other things, obliges companies to supply information to consumers whether certain chemical substances are present in a consumer product. Some other European Directives are also briefly evaluated to the extent that they are relevant in the context of a consumer's right to information. Dilemmas related to a consumer's right to information also emerge in the current political debate in the Netherlands, where the Labour Party is preparing a legislative proposal on a corporate duty to supply information to consumers - motivated by concerns of corporate social responsibility (CSR). This article goes into questions like: (i) What does the consumer's right to information under REACH entail? (ii) Is the consumer's right to product information also regulated in other EU legislation? (iii) Can a consumer obtain information on CSR aspects of the products he intends to buy? (iv) Do companies have the obligation to provide the requested information? (v) How do these rights work out in practice?

Keywords: REACH; consumer's right to information; consumer rights; product information; corporate social responsibility; CSR.

## To know or not to know?

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*'Enable consumers to identify products  
that meet the highest social and environmental standards'*

The Earth Charter, provision 7(d)

### 1. Introduction

A consumer who purchases goods within the EU is entitled to a set of basic consumer rights. The Commission developed these rights in the course of two consumer political programmes (1975 and 1981).<sup>1</sup> The five fundamental rights of consumers set out in these programmes are: (1) the right to the protection of health and safety; (2) the right to the protection of economic interests; (3) the right of redress; (4) the right to information and education; and (5) the right to representation.<sup>2</sup> The right to information – one of these rights – is the focus of this article. The significance of this right was firmly established in 1990 by the decision of the ECJ in the *GB Inno case*.<sup>3</sup> This decision should be understood “as recognition, under Community free movement law, of the consumer right to information at least with regard to measures by Member States restricting the free movement of goods”.<sup>4</sup> The consumer's right “to information and education” was also recognised by the Treaty of Amsterdam.<sup>5</sup> This right has since become an integral part of European Community (EC) consumer policy.<sup>6</sup> The consumer's right to information is especially relevant in the framework of product safety.

The safety of products has become a priority for EU policy makers over the past decade.<sup>7</sup> In 2004, the revised General Product Safety Directive (GPSD) came into force.<sup>8</sup> The GPSD introduces safety requirements for most consumer products. The main emphasis of the GPSD is the consumer's right to know about dangerous products. Later, in 2006, the

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<sup>1</sup> OJ C92, 25 April 1975 and OJ C133, 3 June 1981.

<sup>2</sup> Reich N., Micklitz H., *Understanding EU Consumer Law*, 2009, Intersentia, p.21.

<sup>3</sup> ECJ decision C-362/88 [1990] ECR I-667.

<sup>4</sup> Note 2 *supra* [Reich, Micklitz], p. 21.

<sup>5</sup> The Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1999. Article 129a (1) states that “in order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests”.

<sup>6</sup> ‘The Amsterdam Treaty: A Comprehensive Guide’, EUROPA-the portal site of the European Union. Available at <[http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/amsterdam\\_treaty/a17000\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a17000_en.htm)> accessed on 24 June 2010.

<sup>7</sup> Speech by Robert Madelin, Director General for Health and Consumer Protection (European Commission), 24 June 2004. Available at <[http://ec.europa.eu/dgs/health\\_consumer/library/speeches/speech180\\_en.pdf](http://ec.europa.eu/dgs/health_consumer/library/speeches/speech180_en.pdf)> accessed on 24 June 2010.

<sup>8</sup> Directive (EC) 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (GPSD) [2001] OJ L11/4. See further section 4.1.

landmark chemical legislation ‘REACH’<sup>9</sup> was introduced. As REACH is a Regulation, its provisions have direct effect on companies and consumers and do not have first to be transposed, as is the case with Directives, into national legislation.<sup>10</sup> REACH aimed to increase environmental and consumer protection. One of the key provisions is the right of consumers to information regarding dangerous chemicals. Making risks transparent and providing information on safe use of products that contain dangerous chemicals is considered important to realise the fundamental consumer right pertaining to the protection of health and safety. This article will discuss this focus in particular. The environmental protection goals of REACH will not be elaborated upon.

Traditionally, consumer law was directed at protecting the consumer’s economic interest. Since the last decade, health, environmental concerns and CSR aspects have also been addressed. Specifically, the consumer’s ‘right to know’ has been recognised and emphasised in various legislation. In order to assess how the consumer’s right to information has been implemented in practice and whether it can be regarded as an effective right (*i.e.* how much information can a consumer successfully request from a company?), the right to information under the REACH Regulation.

Section 2 will explain what type of information has to be registered under REACH. Section 3 will provide an analysis of the consumer’s right to information under this Regulation. It is interesting to note that workers also have a right to information under REACH. Furthermore, we note that the consumer’s right to information cannot be analysed in a European setting alone. Non-EU manufacturers play a major role in supplying chemicals to the European market. Consequently, the impact of REACH on non-EU manufacturers will also be discussed. The question whether non-EU consumers can benefit from REACH will also be addressed. Section 4 will offer a comparative analysis of REACH and other EU legislation with respect to consumer protection and product information tracing systems. This analysis will give a broader perspective of the consumer’s ‘right to know’. Section 5 addresses enforcement issues and will present the outcome of an experiment regarding the right to information under REACH. In section 6, a new interesting legislative proposal in the field of consumer information will be discussed. A brief summary concludes this article.

The perspective of this article is European legislation, the implementation of which is in one case illustrated by describing enforcement possibilities under Dutch law. The research method was theoretical. In addition, two practical experiments have been conducted.

## 2. Overview of REACH

When your child plays with an innocent plastic duck in the bathtub, do you ever consider that it might be dangerous to the health of your child? Probably not. The producer of this ‘sweet’ and ‘innocent’ toy probably did not mention that it used a chemical substance called ‘phthalates’ in order to make these types of plastic products softer. This substance is known to be a widespread contaminator of the global environment: it is a toxic chemical which disturbs the reproductive and hormonal systems of animals.<sup>11</sup> Knowing this, you would probably think twice before buying a plastic duck for your child.

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<sup>9</sup> Regulation (EC) 1907/2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396/1.

<sup>10</sup> Craig P., De Burca G., *EU Law: Text, Cases and Materials*, Oxford University Press, Oxford 2008, p. 85.

<sup>11</sup> ‘Chemicals Health Monitor, Diseases and Chemicals’, project of Health and Environment Alliance (NGO) aimed at improving the understanding of REACH by consumers. Available at <<http://www.chemicalshealthmonitor.org/spip.php?rubrique1>> accessed on 24 June 2010.

Consumers have a right to know about any hazardous substances that can affect their health and the environment. Companies have a duty to warn them that a growing number of health problems, such as allergies, lower fertility, cancer and children's underdevelopment, are caused or are influenced by chemicals released into the environment. This right to information has been acknowledged by REACH. 'REACH' stands for: "Registration, Evaluation, Authorisation and Restriction of Chemical substances".

## 2.1 Background

The REACH Regulation was adopted by the European Parliament and the Council on 18 December 2006.<sup>12</sup> REACH entered into force on 1 June 2007. The long awaited Regulation has replaced approximately 40 pieces of previous EU legislation on chemical substances. The main problem with the former EC legislative framework was the lack of a harmonised approach. Moreover, this system did not produce sufficient information regarding the effects of the majority of existing chemicals on human health and the environment.<sup>13</sup> Prior legislation drew a line between 'existing' and 'new' chemicals, *i.e.* all 'new' chemicals had to be tested for potential harmful effects to human health and the environment. However, similar requirements did not apply to the 'existing' 30,000 chemicals on the market.<sup>14</sup> Moreover, risk management measures of the possible hazards of substances and their impact on human beings and the environment were not properly addressed.

REACH is an attempt to improve the legislative framework for chemicals, including 'existing' chemicals. The Regulation aims 'to ensure a high level of protection for human health and the environment'.<sup>15</sup> Overall, REACH requires the registration, over a period of 11 years, of about 30,000 chemical substances.<sup>16</sup> It covers almost all chemicals, with the exception of chemicals in food and medicines, which are excluded because they are covered by other EU laws.<sup>17</sup> 'Natural substances' are also excluded.<sup>18</sup>

From a consumer protection point of view, REACH has important implications. It requires industries to provide consumers with safety information on substances.<sup>19</sup> Consequently, REACH makes industries responsible for assessing, and providing information on potential risks of chemicals. Pursuant to REACH, importers and manufacturers are obliged to collect information on the properties of chemical substances in order to ensure their safe

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<sup>12</sup> Note 9 *supra* [REACH].

<sup>13</sup> Commission, 'REACH in Brief', Environment Directorate-General, October 2007. Available at <[http://ec.europa.eu/environment/chemicals/reach/pdf/2007\\_02\\_reach\\_in\\_brief.pdf](http://ec.europa.eu/environment/chemicals/reach/pdf/2007_02_reach_in_brief.pdf)> accessed on 24 June 2010.

<sup>14</sup> Bormann, P., Kappers, D., 'What impact will REACH have on consumer protection?', *Chimia*, 2006, vol. 60, No.10, p. 651-655.

<sup>15</sup> Note 9 *supra* [REACH] [Art. 1].

<sup>16</sup> REACH Compliance B-lands Consulting, The scope of REACH legislation. Available at <<http://reach.compliance.eu/english/legislation/reach-scope.html>> accessed on 24 June 2010.

<sup>17</sup> ECHA, REACH: the New Chemical Legislation, 2007. Available at <[http://ec.europa.eu/environment/chemicals/reach/pdf/reach\\_me\\_flyer\\_en.pdf](http://ec.europa.eu/environment/chemicals/reach/pdf/reach_me_flyer_en.pdf)> accessed on 24 June 2010.

<sup>18</sup> Exempted from the obligation to register in accordance with article 2(7)(b) REACH are natural substances which are substances that occur in nature and that have not been chemically modified during manufacturing, unless they meet classification dangerous according to Council Directive 67/548/EEC, of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labeling of dangerous substances 1976, OJ L196, note 9 *supra* [REACH] [Annex V]. Examples are: ores, minerals, natural gas, crude oil. note 9 *supra* [REACH] [Annex V].

<sup>19</sup> A substance is "a chemical element and its compounds in the natural state or obtained by any manufacturing process, including any additive necessary to preserve its stability and any impurity deriving from the process used, but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition" Note 9 *supra* [REACH] [Art. 3].

handling.<sup>20</sup> This information must be registered in a central database supervised by the European Chemicals Agency (ECHA)<sup>21</sup> in Helsinki. Permission to continue manufacturing and importing these chemicals in the EU is dependent upon this. Each chemical substance should be registered before expiration of the applicable deadline (*i.e.* the ‘full registration date’).

## 2.2 Registration deadlines

Registration deadlines will be gradually implemented through a phase-by-phase approach that will extend beyond 2020.<sup>22</sup> The obligation to *pre-register* applied from 1 June 2008.<sup>23</sup> Basic information about the substances has to be submitted to ECHA, *i.e.* the ‘pre-registration procedure’.<sup>24</sup> This procedure allows chemicals to be used in the market before they are fully registered, but only until such point in time that registration deadlines will have lapsed. Deadlines vary depending on the type of chemicals and the quantities imported or in use:

- substances *classified* as carcinogenic, mutagenic or toxic to reproduction, or substances that are categorised as very toxic to aquatic organisms and may cause long-term adverse effects in the aquatic environment (as stated in Directive 67/548/EEC), can only be used without full registration until 30 November 2010;
- other substances, *i.e.* not classified, manufactured or imported in quantities starting from *100 tonnes* or more per year, can only be used without full registration until 31 May 2013;
- finally, unclassified substances manufactured or imported in quantities of *1 tonne* or more per year are allowed to be used, if pre-registered, until 31 May 2018.<sup>25</sup>

The full registration procedure requires that the manufacturers and importers of substances submit a registration to ECHA for each substance manufactured or imported in quantities of 1 tonne or more per year.<sup>26</sup> The failure to do so before the applicable deadline will result in a prohibition on manufacturing or importing such substance. The main rule is “no data, no market.”<sup>27</sup>

## 2.3 Registration contents

Registration requires the submission of a ‘registration dossier’ to the ECHA. A specified set of data must be collected or generated for each substance including a technical dossier (‘Technical Dossier’), which contains information such as study summaries, the identity of

<sup>20</sup> Commission, Environment, Chemicals: REACH. Available at <[http://ec.europa.eu/environment/chemicals/reach/reach\\_intro.htm](http://ec.europa.eu/environment/chemicals/reach/reach_intro.htm)> accessed on 24 June 2010.

<sup>21</sup> ECHA was created by the Regulation in order to manage the database necessary to operate the system, to coordinate an in-depth evaluation of suspicious chemicals and to run a public database in which information can be found.

<sup>22</sup> Strategies for enforcement of Regulation (EC) no. 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), 2009, Forum for Exchange of Information on Enforcement, 2-4 December 2008. Available at <[http://echa.europa.eu/doc/about/organisation/forum/strategies\\_enforcement\\_reach.pdf](http://echa.europa.eu/doc/about/organisation/forum/strategies_enforcement_reach.pdf)> accessed on 24 June 2010.

<sup>23</sup> ECHA, Pre-register to Benefit from Extended Deadlines. Available at <[http://echa.europa.eu/sief/pre-registration\\_en.asp](http://echa.europa.eu/sief/pre-registration_en.asp)> accessed on 24 June 2010.

<sup>24</sup> Note 9 *supra* [REACH] [Art. 28].

<sup>25</sup> ECHA, Guidance on Data Sharing, September 2007. Available at <[http://guidance.echa.europa.eu/docs/guidance\\_document/data\\_sharing\\_en.htm](http://guidance.echa.europa.eu/docs/guidance_document/data_sharing_en.htm)> accessed on 24 June 2010.

<sup>26</sup> Note 9 *supra* [REACH] [Art. 28].

<sup>27</sup> Note 9 *supra* [REACH] [Art. 5].

the manufacturer(s) or the importer(s), and the identity of substances.<sup>28</sup> The Technical Dossier has to be provided for any substances manufactured or imported in quantities of 1 tonne or more. For larger quantities (10 tonnes or more), a more detailed ‘Chemical Safety Report’ has to be prepared.<sup>29</sup> This includes providing exposure scenarios for specific uses of dangerous substances, *i.e.* including a description of how those substances are manufactured or used during their life-cycle.<sup>30</sup> All ‘identified uses’, including use by a consumer, have to be recorded. Also, any risks regarding human health and the environment related to the manufacture or import, and the use of a substance, have to be addressed in ‘risk characterisation measures’.

#### 2.4 Communication in the supply chain

A duty to communicate information regarding safety, health and environmental properties related to chemical substances in products, and risk management measures,<sup>31</sup> down the supply chain is an essential part of REACH. Manufacturers and importers are required to exchange information on how the chemicals can be used in a safe way, both for humans and the environment. They have to prepare a ‘Safety Data Sheet’ (SDS), to which the ‘exposure scenarios’ have been annexed.<sup>32</sup> In the opposite direction, new information on hazardous properties and information that may challenge the quality of the risk management measures contained in the relevant SDS have to be passed up the supply chain by downstream-users.<sup>33</sup> It is intended that information be passed as follows: manufacturer/importer  $\leftrightarrow$  downstream user  $\leftrightarrow$  distributor  $\leftrightarrow$  consumer. It is believed that in the longer term “intensive communication in the supply chain in two directions will provide better understanding of the needs of other parties in the supply chain.”<sup>34</sup> Consumers are not entitled to receive SDSs, but they can request information about certain dangerous substances from the producers and retailers. This will be discussed in section 3. For a general overview of obligations under REACH, see Table I *in fine*.

### 3. The right to information

The focus of this article is not to elaborate on the technical provisions regarding how and when to register what type of chemicals, but to address the following question: which rights have consumers gained under the Regulation?

The common principle of REACH is the “duty of care”, which is “based on the principle that the production, import and marketing of substances should be carried out with such responsibility and care as may be required to ensure that neither human health nor the environment is adversely affected”.<sup>35</sup> In this framework, the business actors have acquired a responsibility to assess the risk profile of chemicals and a duty to communicate that information onwards. The following section will discuss the precise scope of this responsibility.

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<sup>28</sup> Note 9 *supra* [REACH] [Art. 10].

<sup>29</sup> Note 9 *supra* [REACH] [Art. 14].

<sup>30</sup> Note 9 *supra* [REACH] [Annex 1].

<sup>31</sup> Note 9 *supra* [REACH] [Art. 33].

<sup>32</sup> Note 9 *supra* [REACH] [Art. 31].

<sup>33</sup> A ‘downstream user’ is any natural or legal person established within the Community, other than the manufacturer or the importer, who uses a substance, either on its own or in a preparation, in the course of his industrial or professional activities: note 9 *supra* [REACH] [Art. 13(3)].

<sup>34</sup> Pavlinic Z., Licko D., Grubic-Dodo J., 2009, p. 54, REACH Regulation and its Influence on Business Activities, The Journal of Fuels and Lubricants.

<sup>35</sup> EP, Socialist Group, REACH Regulation on Chemical Products, 2008. Available at [www.socialistgroup.org/gpes/media3/documents/2293\\_EN\\_reach\\_en\\_070828.pdf](http://www.socialistgroup.org/gpes/media3/documents/2293_EN_reach_en_070828.pdf) accessed on 24 June 2010.

### 3.1 Right to information for consumers

One of the novelties of REACH is the introduction of a consumer right to information about dangerous chemicals, or as they are called in the Regulation ‘Substances of Very High Concern’ (SVHCs). According to article 57 of REACH, a chemical substance (or part of a group of chemical substances) qualifies as an SVHC when it has one of the following characteristics: (1) it is carcinogenic; (2) it is mutagenic; (3) it is toxic for reproduction; (4) it is persistent, bio-accumulative and toxic according to the criteria set out in Annex XIII (‘PBT’ substances); and/or (5) it is very persistent and very bio-accumulative according to the criteria set out in Annex XIII (‘vPvB’ substance). Generally, SVHCs are substances that can have serious consequences for human health (like cancer) or a detrimental impact on the environment.

SVHCs are subject to authorisation by the ECHA. Without authorisation, SVHCs included on the so-called ‘candidate list’ cannot be used on the market.<sup>36</sup> In the framework of the authorisation procedure, the Commission has required the authorised national ‘REACH Competent Authorities’ and the ECHA to prepare dossiers for the identification of SVHCs. Proposals to nominate a chemical substance as an SVHC are published on the ECHA website. Interested parties can submit comments within 45 days, *e.g.* scientific evaluation. If there are no comments, the substance will automatically be included in the ‘candidate list’.<sup>37</sup> However, if comments are received, ECHA will return the dossier to the Member State Committee that initially proposed this chemical substance. The Member State Committee consists of members appointed by each Member State. The Member State Committee needs to reach consensus with each other as to whether the substance meets the requirements of article 57. If such consensus cannot be reached, the Commission will prepare a draft proposal on the substance and a final decision will be taken in accordance with the ‘comitology procedure’<sup>38</sup> set out in article 133 of REACH.<sup>39</sup>

If an SVHC has been processed in an ‘article’<sup>40</sup> (this refers to a product), additional obligations arise for the producer, importer and supplier of the article.<sup>41</sup> Firstly, the supplier has to provide the recipient of the article (industrial or professional users and distributors) with sufficient information to allow for the safe use of the article.<sup>42</sup> If no specific information is necessary for safe handling, the supplier still has to communicate, at a minimum, the name of the chemical substance.<sup>43</sup> Secondly, any other information regarding the substance available to the article supplier, has to be communicated to consumers. *Vide* article 33(2):

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<sup>36</sup> Chemsec, International Chemical Secretariat, REACH step by step. Available at

<<http://www.chemsec.org/chemsec/eu-chemicals-policy/reach/reach-step-by-step>> accessed on 28 June 2010.

<sup>37</sup> Publication of the ECHA candidate list of SVHCs is only the first phase of the authorisation procedure. The second phase will include a far-reaching evaluation of these substances before any decision will be taken by the Commission; note 9 *supra* [REACH] [Art. 133] and the substances are included in Annex XIV’s ‘List of Substances Subject to Authorisation’.

<sup>38</sup> Under the ‘comitology procedure’, the Commission adopts decisions for the implementation of its legislation. The proposals for these decisions must be approved by Member States by a qualified majority vote. In accordance with article 202 of the Treaty establishing the European Community (ECT), the Commission is assisted by a committee during the implementation process of EU legislation, in line with the procedure that is referred to as comitology. The committee consists of representatives of Member States and is chaired by the Commission.

<sup>39</sup> United Kingdom Government Leaflet, REACH–Substances of Very High Concern, 2009. Available at <[www.hse.gov.uk/reach/svhc.pdf](http://www.hse.gov.uk/reach/svhc.pdf)> accessed 24 June 2010.

<sup>40</sup> *I.e.* “An object which during production is given a special shape, surface or design which determines its function to a greater degree than its chemical composition”; note 9 *supra* [REACH] [Art. 3(3)].

<sup>41</sup> European Chemical Agency, Guidance in a Nutshell: Requirements for Substances in Articles, 2009. Available at <[http://guidance.echa.europa.eu/guidance2\\_en.htm](http://guidance.echa.europa.eu/guidance2_en.htm)> accessed on 24 June 2010.

<sup>42</sup> Note 9 *supra* [REACH] [Art. 33(1)].

<sup>43</sup> Note 9 *supra* [REACH] [Art. 33(1)].

‘on request by a consumer, any supplier of an article containing a substance meeting the criteria in Article 57 and identified in accordance with Article 59(1) in a concentration above 0.1 % weight by weight (w/w) shall provide the consumer with sufficient information, available to the supplier, to allow safe use of the article including, as a minimum, the name of that substance. The relevant information shall be provided, free of charge, within 45 days of receipt of the request.’<sup>44</sup>

In October 2008, the first candidate list of SVHC with titles of hazardous substances was published. The last update of the list was on 18 June 2010. It will continue to be regularly updated with new SVHCs. At present, it contains 38 substances.<sup>45</sup> Today, a European consumer can request information regarding items such as an electronic toothbrush or shampoo. He can submit his request to the retailer or the brand manufacturer, and ask whether the product contains any of the chemical substances on the candidate list. A template letter is contained in Annex 1 *in fine*.<sup>46</sup>

### 3.2 *The workers’ ‘right to know’*

REACH also targets workers. According to article 35, “workers and their representatives shall be granted access by their employer to the information provided in accordance with Articles 31 and 32 in relation to substances or preparations that they use or may be exposed to in the course of their work”. This means that workers will have access to SDSs (Art. 31 REACH) and general information about substances (Art. 35 REACH). Article 35 aims to reduce the number of chemical-related occupational diseases. Millions of workers across Europe are exposed to dangerous chemicals in their workplace. In the EU, more than 26,000 deaths of workers were registered in 2001, because of their exposure to hazardous chemicals.<sup>47</sup> Dangerous substances are not only found in chemical industry workplaces, but also employees who are engaged in farming, nursing, construction, health-care services and the automobile and aerospace industry, can be directly exposed to chemicals.<sup>48</sup> The current system of dealing with chemicals poses serious occupational health risks for workers, and unless it changes, an additional 3,000-4,000 cancer deaths per year over the next 30-40 years can be expected.<sup>49</sup> The European Trade Union Confederation is convinced that REACH can help reduce the number of chemical-related occupational diseases and associated costs for both industry and society,<sup>50</sup> provided it is properly implemented throughout the supply chain. Making information available to workers will significantly improve their situation and reduce health risks. Yet, it has been argued that for real progress to be made, dangerous chemical

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<sup>44</sup> Note 9 *supra* [REACH] [Art. 33(2)].

<sup>45</sup> ECHA, Candidate List of Substances of Very High Concern for authorisation, updated on 18 June 2010, at <[http://echa.europa.eu/chem\\_data/authorisation\\_process/candidate\\_list\\_table\\_en.asp?sortby=Date\\_inclusion&order=descending](http://echa.europa.eu/chem_data/authorisation_process/candidate_list_table_en.asp?sortby=Date_inclusion&order=descending)> accessed on 29 June 2010.

<sup>46</sup> Note 11 *supra* [Chemicals Health Monitor].

<sup>47</sup> Musu, T., ‘New Responsibilities for Trade Unions to Ensure Workers Health within the Framework of REACH’ (2007), p. 4, at <<http://www.baua.de/cae/servlet/contentblob/676694/publicationFile/48239/Vortrag-11.pdf>> accessed on 24 June 2010. This source did not disclose whether the number mentioned pertained to the year 2001 or to another period.

<sup>48</sup> Walter L., March 2009, European Workers Face Increasing Health Risks from Hazardous Substances. Available at <<http://ehstoday.com/health/news/euro-workers-health-risks-1273/>> accessed on 24 June 2010.

<sup>49</sup> Risk & Policy Analysts for the Commission, Environment Directorate-General, ‘Final Report: Assessment of Impact of the New Chemicals Policy on Occupational Health’ (2003), p. 64. Available at <[http://ec.europa.eu/environment/chemicals/reach/background/docs/finrep\\_occ\\_health.pdf](http://ec.europa.eu/environment/chemicals/reach/background/docs/finrep_occ_health.pdf)> accessed on 24 June 2010.

<sup>50</sup> Note 47, *supra* [Musu, 2007], p. 1.

substances have to be substituted by safer options. Another issue is the dilemma of nanomaterials. A report by the European Agency for Safety and Health at Work (EU-OSHA) states that nanomaterials top the list of substances that workers need protecting from.<sup>51</sup>

### 3.3 Nanotechnology

Nanotechnology is used in a wide range of products such as IT products and cosmetics, and is expected to grow rapidly into a global, multi-billion euro market.<sup>52</sup> Preliminary observations suggest that exposure to certain types of nanoparticles could be detrimental to human health, for example being a cause of numerous skin diseases.<sup>53</sup> Another study suggests that there is a serious “concern that long-term exposure to some nanoparticles without protective measures may be related to serious damage to the lungs.”<sup>54</sup> Nonetheless, there are no provisions in REACH referring specifically to nanomaterials.<sup>55</sup> Generally, REACH deals with substances, in whatever size, shape and physical state, including substances at nanoscale.<sup>56</sup> Consequently, importers, manufacturers and downstream users have to ensure that their nanomaterials do not adversely affect human health or the environment. Nevertheless, in April 2009, the EP explicitly called for a more serious approach towards nanomaterials. The EP asked for the insertion of provisions in the REACH Regulation that will provide information to consumers on the use of nanomaterials in finished products. Concerns were expressed that nanomaterials need not be registered if manufactured or imported below 1 tonne.<sup>57</sup> This is a valid concern, because, according to the newly-established REACH Competent Authorities Subgroup on Nanomaterials, “several nanomaterials are only produced at low tonnage level”, which leads to a “lack of information on nanomaterials due to the present tonnage triggers for data requirement under REACH.”<sup>58</sup>

In May 2009, during the Helsinki Chemicals Forum organised by the Commission and ECHA, the participants agreed that the handling of nanoscale substances should be reconsidered under REACH. Governmental spokespersons came to the conclusion that a specific regulation on nanomaterials might be adopted after the revision of REACH, which

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<sup>51</sup> EU-OSHA, ‘Workplace Exposure to Nanoparticles’ (2009), p. 48, at [http://osha.europa.eu/en/publications/literature\\_reviews/workplace\\_exposure\\_to\\_nanoparticles](http://osha.europa.eu/en/publications/literature_reviews/workplace_exposure_to_nanoparticles) accessed on 24 June 2010.

<sup>52</sup> Note 51, *supra* [EU-OSHA, 2009], p. 8.

<sup>53</sup> Note 51, *supra* [EU-OSHA, 2009], p. 40.

<sup>54</sup> Song Y, Li X, Du X, Exposure to nanoparticles is related to pleural effusion, pulmonary fibrosis and granuloma, *European Respiratory Journal*, 2009 vol. 34, p. 559-567.

<sup>55</sup> Commission, Environment Directorate-General, Follow-up to the 6th Meeting of the REACH Competent Authorities for the implementation of Regulation (EC) 1907/2006 (REACH), p. 5, 15-16 December 2008. Available at <http://ec.europa.eu/environment/chemicals/reach/pdf/nanomaterials.pdf> accessed on 24 June.

<sup>56</sup> There is a difference between ‘nanomaterial’ and ‘nanoscale’. ‘Nanomaterial’ is manufactured or engineered nanosized and nanostructured materials, without specification as to whether these materials are substances or forms of substances. Nanomaterials include metals or metal oxides, carbon black, carbon nanotubes, fullerenes, silicate, organic nanoparticles or nanocomposites. ‘Substance at nanoscale’ refers to substances with properties specific to nanomaterials. See: Commission, Follow-up to the 6th Meeting of the REACH Competent Authorities for the implementation of Regulation (EC) 1907/2006, 2008.

<sup>57</sup> EP, Press Release: Nanomaterials: MEPs Calls for More Prudence, 24 April 2009. Available at <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20090422IPR54260> accessed on 24 June 2010; WWF, ‘First Improvements on nanoparticles under REACH chemical law’, 2008. Available at [http://www.panda.org/about\\_our\\_earth/teacher\\_resources/webfieldtrips/toxics/news/?136301/First-improvements-on-nanoparticles-under-REACH-chemicals-law](http://www.panda.org/about_our_earth/teacher_resources/webfieldtrips/toxics/news/?136301/First-improvements-on-nanoparticles-under-REACH-chemicals-law) accessed on 24 June 2010.

<sup>58</sup> Note 55 *supra* [Commission, 2008], p. 14.

the EC is required to do by June 1, 2012.<sup>59</sup> However, why wait? Protection at the national level can be instituted today. On 8 July 2009, the Norwegian Board<sup>60</sup> of Technology announced that the Norwegian Pollution Control Authority had established a scheme to report their use of nanomaterials in chemical products.<sup>61</sup>

### 3.4 Non-EU manufacturers

Most consumer products are imported from abroad. Hence, this section will discuss how REACH protects EU consumers from hazardous substances of imported goods. Non-EU manufacturers do not have direct obligations under REACH. Article 8 of REACH states that manufacturers established outside the Community cannot directly pre-register or register substances. However, a foreign manufacturer may “by mutual agreement appoint a natural or legal person established in the Community to fulfil, as his “only representative”, the obligations on importers”.<sup>62</sup> The said representative becomes directly responsible under REACH for registration, in the same manner as an EU importer. Upon the agreement of appointing a representative, the non-EU manufacturer must inform his EU importer(s) thereof.<sup>63</sup> The importer then becomes a ‘downstream user’.<sup>64</sup> The representative should possess the latest information on quantities imported and customers sold to (including their uses).<sup>65</sup> He should also prepare the information required for the communication down the supply chain.

There are significant REACH implications for non-EU manufacturers. For example, clothing exports to the EU from India account for nearly 47 % of all Indian clothing exports.<sup>66</sup> It has been indicated that the implementation of REACH will become a great challenge for the Indian textile industry. Indian processors and manufacturers of clothing use a number of chemical substances, such as solvents, pigments and dyestuffs. In view of the export to the EU, these chemicals have to undergo the process of registration, evaluation and authorisation under REACH.<sup>67</sup> The Indian government has to create adequate infrastructure, so that exporters can comply with REACH.<sup>68</sup>

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<sup>59</sup> Bergeson, Lynn, ‘EU Examining how REACH Applies to Nanomaterials’, Nanotechnology Law Blog (2009). Available at <<http://nanotech.lawbc.com/2009/06/articles/international/eu-examining-how-reach-applies-to-nanomaterials/>> accessed on 24 June 2010.

<sup>60</sup> After adoption the REACH Regulation entered into force in Norway on 30 May 2008. Norwegian Ministry of Environment, REACH adopted in Norway, news and story 25.08.2005. Available at <[www.regjeringen.no/en/dep/md/Whats-new/News/2008/reach-adopted-in-norway-2.html?id=515102](http://www.regjeringen.no/en/dep/md/Whats-new/News/2008/reach-adopted-in-norway-2.html?id=515102)> accessed on 28 June 2010.

<sup>61</sup> Norwegian Board of Technology, ‘Businesses Asked to Declare Use of Nanomaterials’, Teknologiradet, 2009. Available at <[www.teknologiradet.no/FullStory.aspx?m=3&amid=7830](http://www.teknologiradet.no/FullStory.aspx?m=3&amid=7830)> accessed on 24 June 2010.

<sup>62</sup> Note 9 *supra* [REACH] [Art. 8(1)].

<sup>63</sup> Note 9 *supra* [REACH] [Art. 8(3)].

<sup>64</sup> For EU importers it means that they will be relieved from their registration obligations within the supply chain as they will be regarded as downstream users of the foreign manufacturer’s only representative.

<sup>65</sup> European Chemical Agency, Guidance on Data Sharing, September 2007, p. 22, at <[http://guidance.echa.europa.eu/docs/guidance\\_document/data\\_sharing\\_en.htm](http://guidance.echa.europa.eu/docs/guidance_document/data_sharing_en.htm)> accessed on 24 June 2010.

<sup>66</sup> ‘New REACH Regulation can impact apparel exports’, Fibre2fashion News Desk– India, 4 August 2009, at <[www.fibre2fashion.com/news/apparel-clothing-policy-news/newsdetails.aspx?news\\_id=75752](http://www.fibre2fashion.com/news/apparel-clothing-policy-news/newsdetails.aspx?news_id=75752)> accessed on 24 June 2010.

<sup>67</sup> Pointed out in a workshop of the Apparel Export Promotion Council of the Federation of Indian Chambers of Commerce and Industry. See ‘Textiles Industry Needs to Prepare for Compliance with REACH Regulation’, 31 July 2009, at <[www.fibre2fashion.com/news/textiles-association-organization-news/newsdetails.aspx?news\\_id=75586](http://www.fibre2fashion.com/news/textiles-association-organization-news/newsdetails.aspx?news_id=75586)> accessed on 24 June 2010. For more information, see the website of FICCI-AEPC at <<http://www.ficci.com/>> accessed on 24 June 2010.

<sup>68</sup> At the present time, only a few laboratories in India are presently capable of certifying REACH compliance. See ‘REACH is coming. Are you prepared?’, 4 March 2009, *The Indian Star News Service*. Available at <[www.theindianstar.com/index.php?uan=3805](http://www.theindianstar.com/index.php?uan=3805)> accessed on 24 June 2010.

### 3.5 *Non-EU consumers*

The question arises whether Indian, Chinese and other non-EU consumers can benefit from consumer protection under REACH. The answer is no. Although the ‘Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides’ entered into force in 2004<sup>69</sup> and is aimed at the protection of human health and the environment, there are still serious problems for non-EU consumers and employees. The main reason is that the majority of electronic items used in the EU (which typically contain chemical substances) find their way to developing countries for a ‘second life’ or as waste products. For example, countries such as China, India, Ghana and Nigeria experience problems because of electronic waste (E-Waste) from the EU.<sup>70</sup> The increased EU consumption of electronics has also led to an increase in E-waste. Developing countries generally lack the capacity and legislative framework needed to deal with E-waste in a responsible manner. Local workers are often exposed to hazardous chemicals when products such as refrigerators and computers are taken apart in order to extract valuable components and metals. A study published in 2007 indicates that children in the ‘recycling town’ of Guiyu in China had much higher lead levels in their blood than children living in a settlement where the recycling of electronics did not take place.<sup>71</sup> Other health problems reported included diseases and problems related to skin, the stomach, the respiratory tract and other organs. The EU directive on the Waste Electrical and Electronic Equipment (WEEE) aims to deal with this problem by stipulating that the costs of disposing electronic products must be borne by the producers of the waste.<sup>72</sup> Another European Directive prescribes that producers must phase out some of the most hazardous substances (*i.e.* the RoHS Directive).<sup>73</sup> Despite these measures, the export of EU waste to the developing world continues. The financial incentives for EU companies to export waste is high. For example, it costs approximately € 10 to recycle a computer in Sweden; in India, the same computer can be recycled for € 1.50 within the informal sector.<sup>74</sup> EU legislation provides a framework; however, only companies themselves can bring about a real change in the handling of chemicals.

### 3.6 *Preliminary observations on REACH*

Although REACH is a significant step forward in closing the safety gaps and increasing transparency in respect of information relating to chemicals in products, there are still points of concern for consumers:

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<sup>69</sup> Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (known as the Rotterdam Convention and also commonly known as PIC) The text of the Rotterdam Convention, which sets out the provisions and obligations that apply to all parties can be accessed via the PIC site. Available at: <[www.pic.int](http://www.pic.int)> accessed on 28 June 2010.

<sup>70</sup> Report from SwedWatch as a part of the European makeITfair campaign, Out of Control: E-Waste Trade Flows from the EU to Developing Countries, April 2009, p. 9, at <<http://makeitfair.org/the-facts/reports>> accessed on 24 June 2010.

<sup>71</sup> Huo X., Peng L., Xu X., Zheng L., Qiu B., Qi Z., Zhang B., Han D., Piao Z, Elevated Blood Lead Levels of Children in Guiyu, an Electronic Waste Recycling Town in China, Environmental Health Perspectives Volume 115, Number 7, July 2007, at <<http://ehp03.niehs.nih.gov/article/fetchArticle.action?articleURI=info:doi/10.1289/ehp.9697>> accessed on 24 June 2010.

<sup>72</sup> Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE) [2002] OJ L0096.

<sup>73</sup> Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electric and electronic equipment (RoHS) [2002], OJ L0095.

<sup>74</sup> Note 70, *supra* [makeITfair], p. 33.

- (1) The main criterion of substances' registration is the massive quantity of those substances. Only substances manufactured or imported in volumes starting at 1 tonne need to be registered. The same substances in low quantities do not fall within the REACH application except when they are identified as an SVHC. Consequently, if a particular substance has never been registered in the EU because of its low production volume, and has never been tested in any other way, "its hazardous properties may not be known".<sup>75</sup> The dilemma concerning nanomaterials illustrates that one should not be too optimistic about REACH.
- (2) Only facts related to substances have to be assessed and dispersed. This excludes information concerning products, especially regarding their full composition. Moreover, the assessment does not have to address the production process.<sup>76</sup> CSR concerns, e.g. possible human rights abuses and environmental impacts in relation to the production of substances or products, are not covered by REACH.
- (3) The fact that the burden of carrying out risk assessments in respect of chemicals has been placed on the producer is positive. However, it has also been noted that a great deal of responsibility is entrusted to the industry.<sup>77</sup> Therefore, the success of REACH directly depends on how the private sector manages the safety system, and how companies discharge their responsibilities to inform consumers about any dangers and safety aspects related to chemicals in products.
- (4) The information that consumers may request relates only to SVHCs. Presently, only 30 substances are on the SVHC candidate list. NGOs have reacted critically to this list: "the first-ever list is a welcome start, but it is a drop in the ocean when compared to the hundreds of well-known dangerous substances presently used in products every day across Europe."<sup>78</sup> Only six States have put forward candidate substances for the SVHC list. The expansion of the list depends on the motivation of the Member States and the Commission. The reason for the brevity of the first list is mainly political. Consumers and industries might see the candidate list as a 'blacklist' of unwanted substances. Hence, the Commission and Member States supported the idea of keeping the list brief 'to test the system'.<sup>79</sup> One can argue that such reasoning is too pragmatic, considering the urgency of the situation.<sup>80</sup> German and other EU experts have already identified 400 chemicals that are mutagenic, teratogenic and generally harmful to health and to the environment.<sup>81</sup> At this point in time, it is up to the Member States to put forward all hazardous substances and to include these in the SVHC list.

<sup>75</sup> EC, Questions and Answers on REACH, July 2007. Available at <http://ec.europa.eu/environment/chemicals/pdf/qa.pdf> accessed on 24 June 2010.

<sup>76</sup> Note 11, *supra* [Chemicals Health Monitor].

<sup>77</sup> Note 11, *supra* [Chemicals Health Monitor].

<sup>78</sup> Breddy M., 2008, First REACH Hazardous Chemicals List is a Drop in the Ocean, at [www.greenpeace.org/eu-unit/press-centre/press-releases2/First-REACH-hazardous-chemicals-list-is-a-drop-in-the-ocean](http://www.greenpeace.org/eu-unit/press-centre/press-releases2/First-REACH-hazardous-chemicals-list-is-a-drop-in-the-ocean) accessed on 24 June 2010.

<sup>79</sup> Musu T., March 2009, REACH Authorisation: Will the Mountain Give Birth to a Mouse? Available at [http://hesa.etui.rehs.org/uk/newsletter/files/NWL\\_35\\_UK\\_p23.pdf](http://hesa.etui.rehs.org/uk/newsletter/files/NWL_35_UK_p23.pdf) accessed on 24 June 2010.

<sup>80</sup> German Federal Environmental Agency, Chemicals: Federal Environment Agency proposes inclusion of five anthracene oils as subject to EU authorisation, Press Release 054/2009, p. 1, at [www.umweltbundesamt.de/uba-info-presse-e/2009/pe09-](http://www.umweltbundesamt.de/uba-info-presse-e/2009/pe09-054-chemicals-federal-environment-agency-proposes-inclusion-of-five-anthracene-oils-as-subject-to-eu-authorisation.htm)

[054-chemicals-federal-environment-agency-proposes-inclusion-of-five-anthracene-oils-as-subject-to-eu-authorisation.htm](http://www.umweltbundesamt.de/uba-info-presse-e/2009/pe09-054-chemicals-federal-environment-agency-proposes-inclusion-of-five-anthracene-oils-as-subject-to-eu-authorisation.htm) accessed on 24 June 2010. As the Vice President of the German Federal Environmental Agency (UBA), Dr Thomas Holzmann has underlined: "Some Member States are hesitant and so far only a few Members have taken advantage of the great opportunities provided by REACH to do more to protect the environment and health".

<sup>81</sup> Note 80, *supra* [Press Release 054/2009], p. 1.

- (5) SVHCs are still allowed to be used, even if safer alternatives or technologies are available. During the REACH negotiations, this issue was debated heatedly. The EP voted in favour of a requirement to substitute an SVHC by a safer option as a part of the authorisation clause.<sup>82</sup> However, in the end, as part of a political compromise, the EU Council decided to continue to allow the use of these hazardous substances, even if they could be replaced by safer alternatives.<sup>83</sup>

To summarise REACH in the framework of the consumer's right to information, the following observations can be made. It took a long time for the EU to succeed in enforcing a powerful chemical Regulation that aims to protect consumers' health and the environment. Many compromises in the final version of REACH had to be made because of the pressure exercised by powerful lobbyists representing industries. Discussing the impact of REACH on consumers, two contrasting opinions exist. The first, usually expressed by members of 'green' (environmentally engaged) parties and NGOs, is that the Regulation was watered down and would do little to improve human health.<sup>84</sup> The second position is that REACH is a great EU success because it is the first time that adequate protection against hazardous substances has been provided. Both positions contain an element of truth. On the one hand, REACH erased the distinction between 'new' and 'old' chemicals, *i.e.* covering most of the substances used in the market. The Regulation places the responsibility to assess the risks related to the use of chemicals, and to communicate these, on the industry. REACH has also given consumers a voice, by obliging producers and retailers to provide them with information regarding any SVHCs contained in a product. On the other hand, REACH mandates the registration of chemicals based on their quantity, except when they qualify as SVHCs. Hence, chemicals in small quantities, which can also pose a risk to human health and the environment, might never become known to the public. The same is true for nanomaterials. Moreover, the information that consumers are entitled to is very limited as it only concerns 38 SVHCs. The right of consumers to information is clearly 'balanced' with the interest of industry. Last but not least, hazardous substances contained in everyday products will continue to be used, even if safer alternatives exist. The lack of knowledge concerning exposure to chemicals in everyday consumer products (such as textiles and computers) remains a serious problem, as well as the consumer information gap in respect of CSR aspects of the production process.

#### 4. Comparison with other EU legislation

The consumer's right to information under REACH provides just one approach. Other relevant EU legislation will be discussed in this section 4. and compared to REACH from the 'to know or not to know perspective'.

##### 4.1 *The General Product Safety Directive*

The General Product Safety Directive (GPSD)<sup>85</sup> applies when the safety of a product is not covered by specific legislation such as REACH. Although the GPSD does not offer

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<sup>82</sup> EP, 'Parliament adopts REACH - new EU chemicals legislation and new chemicals agency', press release 13-12-2006, at <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20061213IPR01493+0+DOC+XML+V0//EN&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20061213IPR01493+0+DOC+XML+V0//EN&language=EN)> accessed on 24 June 2010.

<sup>83</sup> Greenpeace International, *Cleaning Up our Chemical Homes Changes the Market to Supply Toxic-Free Products* (February 2007), p. 15-16, at <[www.greenpeace.org/raw/content/international/press/reports/chemical-home-company-progress.pdf](http://www.greenpeace.org/raw/content/international/press/reports/chemical-home-company-progress.pdf)> accessed on 28 April 2010.

<sup>84</sup> Kanter, J., *European Union chemical plans are criticized*, *International Herald Tribune, Business*, Wednesday 1 November 2006.

<sup>85</sup> Note 8 *supra* [GPSD].

harmonisation in a particular product area, it offers a new approach by working with broad requirements and by laying down a general legislative framework designed to ensure a high level of protection of safety and health for consumers with adequate enforcement procedures.<sup>86</sup> As the GPSD is a directive, it has to be implemented in national law.

Manufacturers are obliged to take necessary measures to avoid the risks to which consumers might be exposed. These measures can entail: (1) providing consumers with relevant information in order to enable them to assess risks inherent to a product throughout its normal or foreseeable use, especially when the risks are not directly obvious;<sup>87</sup> (2) recalling products that have been supplied to consumers;<sup>88</sup> and (3) withdrawing products from the market.<sup>89</sup> Distributors also have an obligation to act with due care to help to ensure compliance with the applicable safety requirements, in particular by not supplying products which they know or should have presumed on the basis of the information in their possession and as professionals, do not comply with those requirements.<sup>90</sup>

One of the inconsistencies between REACH and the GPSD concerns the definition of a 'product'. REACH uses the term 'article', and defines this as "an object which during production is given a special shape, surface or design which determines its function to a greater degree than does its chemical composition."<sup>91</sup> In contrast, GPSD defines a product as:

'any product — including in the context of providing a service — which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used or reconditioned.'<sup>92</sup>

The REACH definition is confusing and can give rise to implementation problems, *e.g.* there can be an uncertainty as to whether a certain item qualifies as an article (*i.e.* the substance as an integral part) or as a substance in a container. Printer cartridges and pens are examples of 'borderline' cases. A harmonised approach to EU consumer protection would benefit from using a single and clear definition in various EU legislation.

#### 4.2 *The General Food Law*

Regulation 178/2002 (General Food Law) lays down the general principles and procedures in matters of food safety and established the European Food Safety Authority (EFSA).<sup>93</sup> Important elements are the precautionary and traceability principles that aim to ensure the consumer's safety, and to build up product knowledge. Article 7(1) introduces the precautionary principle:

In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health

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<sup>86</sup> Nebbia P., Askham T., *EU Consumer Law*, Richmond Law & Tax Ltd, Richmond 2004, p. 61.

<sup>87</sup> Note 8 *supra* [GPSD] [Art.5].

<sup>88</sup> Note 8 *supra* [GPSD] [Art.3(4)].

<sup>89</sup> Note 8 *supra* [GPSD] [Art.3(4)].

<sup>90</sup> Note 8 *supra* [GPSD] [Art. 5(2)].

<sup>91</sup> Note 9 *supra* [REACH] [Art. 3].

<sup>92</sup> Note 8 *supra* [GPSD] [Art. 2(a)].

<sup>93</sup> Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (GFL) [2002] OJL31/1.

protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.

The Commission conducts the process of evaluating the safety of a food product mainly relying on scientific advice. If a particular ingredient or food additive is suspected of not being completely safe, the Commission can act to limit possible risks and does not have to await proof concerning such risk.<sup>94</sup>

In comparison, despite the fact that REACH is based on the precautionary principle,<sup>95</sup> the facts suggest otherwise. For example, chemicals that are under suspicion of having adverse effects to consumers or the environment, but concerning which little research has been carried out, or no political consensus has been reached to ban them, continue to be present in consumer products. Also, REACH fails to oblige producers to substitute SVHCs for safer options.<sup>96</sup> Another example concerns the ongoing debate as to whether nanomaterials pose serious risks to human health. Due to their small volumes they generally fall outside the REACH scope, hence no data concerning their use or effect are being collected and communicated in the supply chain.<sup>97</sup> Although both REACH and the General Food Law aim to protect human health, very different approaches have been chosen to realise this.

The landmark aspect of the General Food Law is the establishment of the traceability of food at all stages of production, processing and distribution.<sup>98</sup> Food business operators shall put systems and procedures in place which allow them to retrace where food ingredients are sourced from and they are held to make this information available, upon demand, to the competent authorities. Each operator should therefore be able to identify its suppliers, and should also be capable of indicating to which business it has supplied its products. This is known as the ‘one-step-backward, one-step-forward’ approach.<sup>99</sup> This traceability system throughout the supply chain is not only important with a view to ensuring consumer safety. It can also aid a company in complying with CSR standards: “traceability of food products will help isolate industry response to problems, thus enabling the industry to more rapidly and cost effectively control disease and reduce impacts from tampering”.<sup>100</sup>

The traceability requirement is also present in REACH as REACH maintains a registration system for chemical substances, which system requires the traceability of chemicals and the identification of chemical substances within consumer goods. Although both REACH and the General Food Law enhance traceability in the supply chain, the traceability does not concern CSR aspects related to the production process. One might argue that it could prove too burdensome for industries to provide information on societal aspects to consumers. However, the counter-argument would be to state that when a consumer is willing to pay € 2,000 for a new TV set, he should also be entitled to receive full information about the history of the product and its properties.

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<sup>94</sup> Note 93 *supra* [General Food Law] [Articles 19 and 20].

<sup>95</sup> Note 9 *supra* [REACH] [Art. 1(3)].

<sup>96</sup> Hansen S., Carlsen, L., Chemicals regulation and precaution: does REACH really incorporate the precautionary principle, *Environmental Science and Policy*, vol. 10, No. 5, August 2007, pp. 395-404.

<sup>97</sup> Friends of the Earth, ‘Nanomaterials, sunscreens and cosmetics: Small ingredients, big risks’, 2006, available at <<http://nano.foe.org.au/nanomaterials-sunscreens-and-cosmetics-small-ingredients-big-risks>> accessed on 28 June 2010. Nanoparticles like carbon and graphite are since 2008 no longer exempted from registration under REACH; see also note 57 *supra* [WWF].

<sup>98</sup> Note 93 *supra* [General Food Law] [Art. 18].

<sup>99</sup> Food Standards Agency, Guidance Note for Business Operators on Food Safety, Traceability, Product Withdrawal and Recall. A Guide to Compliance with Articles 14, 16, 18 and 19 of General Food Law Regulation (EC) 178/2002, July 2007. Available at <<http://www.food.gov.uk/multimedia/pdfs/fsa1782002guidance.pdf>> accessed on 1 July 2010.

<sup>100</sup> Maloni, M.J., Brown, M.E., ‘Corporate Social Responsibility in the Supply Chain: An Application in the Food Industry’, *Journal of Business Ethics*, 2006, No.68, p. 42.

### 4.3 Draft Consumer Rights Directive

On 8 October 2008, the Commission adopted a proposal for a Directive on Consumer Rights (Consumer Rights Directive).<sup>101</sup> This piece of legislation unifies four existing consumer directives.<sup>102</sup> It modernises and strengthens existing consumer rights.<sup>103</sup> This draft directive covers consumers' rights with regard to different types of purchasing and the methods in which these purchases are effected, *e.g.* distance selling and doorstep sales. This directive will stimulate clear information on price, extra charges and fees. It also aims to provide security against non-delivery and late delivery. Article 2 of the draft directive contains provisions on consumer information. Specifically, article 5 includes general information requirements, which a seller is obliged to provide to a consumer. These requirements are: (1) the main characteristics of the product; (2) the address and, if possible, identity of the trader and, if possible, the identity of the trader on whose behalf he is acting; (3) the price and additional price-related information; (4) the arrangements for payment, delivery, performance and the complaint handling policies; (5) the existence of a right of withdrawal; (6) the existence and the conditions of after-sales services and commercial guarantees; (7) the duration of the contract or if the contract is open-ended, the conditions for terminating the contract; (8) the minimum duration of the consumer's obligations under the contract; and (9) the existence and conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader. This long list of information items only refers to the 'traditional' type of consumer information, and does not contain any item regarding the way in which and under which circumstances a certain product has been produced (*e.g.* CSR aspects). That being said, it still concerns a draft directive and many comments and proposals for amendments have been circulated, hence it will probably undergo some amendments. Subsequently, it has to be considered by the Council and the EP.<sup>104</sup>

### 4.4 Tobacco Directive

Directive 2001/37/EC (Tobacco Directive)<sup>105</sup> concerns the sale, manufacture and presentation of tobacco products in the Member States of the EU. In particular, the Tobacco Directive regulates the use of warnings on cigarette packs, the prohibition of descriptions such as 'mild' or 'light,' the maximum tar, carbon monoxide yields and nicotine and the prohibition of tobacco for oral use.<sup>106</sup> This Directive unified Community legislation on this subject,<sup>107</sup> and contributes to a higher level of consumer health protection by stating that companies are to provide more information to consumers. The information has to appear on the cigarette

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<sup>101</sup> Proposal for the Directive of the European Parliament and of the Council on Consumer Rights, 8 October 2008, Brussels [Directive 2008/0196/COD].

<sup>102</sup> *I.e.*: The Unfair Terms Contract Directive, the Distance Selling Directive, the Consumer Sales and Guarantees Directive and the Doorstep Selling Directive.

<sup>103</sup> Note 100 *supra* [Proposal Directive Consumer Rights] context of the proposal, p. 3.

<sup>104</sup> For an analysis of the draft directive, see LUZAK J., Information duties in the new proposal for the Directive on consumer rights, in: Hesselink M., Loos M., *Het voorstel voor een Europese richtlijn consumentenrechten* (Boom Juridische Uitgevers: 2009); HARDY, R., Heslen, G., 'Het voorstel voor een richtlijn betreffende consumentenrechten', WPNR 140, no. 6785, 24 January 2009, pp. 69-72..

<sup>105</sup> Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [2001] OJ L194.

<sup>106</sup> Europa, Manufacture, presentation and sale of tobacco products. Summaries of EU Legislation, 2006, available at

<[http://europa.eu/legislation\\_summaries/public\\_health/health\\_determinants\\_lifestyle/c11567\\_en.htm](http://europa.eu/legislation_summaries/public_health/health_determinants_lifestyle/c11567_en.htm)> accessed on 25 June 2010.

<sup>107</sup> Note 105 *supra* [The Tobacco Directive] repeals Directive 89/622/EEC (amended by Directive 92/41/EEC) and Directive 90/239/EEC.

containers, e.g. health warnings, product description, ingredients, and a traceability number. Article 6 states that manufacturers and importers of tobacco products have to submit a list of ingredients per product to the authorities. Ultimately Member States will ensure that the list of ingredients for each product, indicating tar, nicotine and carbon monoxide yields, is made public.<sup>108</sup> However, a Commission report on the implementation of the Tobacco Directive reveals that only 13 Member States have provided information about the ingredients of tobacco products.<sup>109</sup> Overall, it was concluded that the available information concerning the ingredients and its effect on consumers' health still remains incomplete and rather limited.

Article 5(9) of the Tobacco Directive also incorporates the traceability principle. It states that "to ensure product identification and traceability, the tobacco product shall be marked in any appropriate manner, by batch numbering or an equivalent hereof, on the unit packet enabling the place and time of manufacture to be determined." This means that each pack of cigarettes should have a traceable number through which the producer can be identified. For consumers, however, this does not have added value, because the codes on the pack are not understandable outside of the tobacco industry.<sup>110</sup> A system which is comprehensible to consumers still has to be developed. Furthermore, similar to REACH and the General Food Law, the Tobacco Directive framework does not allow for CSR aspects relating to production to be traced.

#### 4.5 *The Unfair Commercial Practices Directive*

The Unfair Commercial Practices Directive<sup>111</sup> lays down rules that prohibit certain practices across the EU, e.g. misleading and aggressive marketing practices. This legislation also aims to protect vulnerable groups of consumers, such as children, against advertising that directly encourages them to buy. The overall goal of the Unfair Commercial Practices Directive is to clarify consumer rights and to simplify cross-border trade. The Directive's scope is wide. It covers all business-to-consumer transactions. A trader has to provide certain basic, factual information to a consumer prior to a contemplated purchase transaction, including the key characteristics of the product, data about price, delivery costs and the right of withdrawal.<sup>112</sup> The listed items do not include information regarding the conditions under which a product has been produced.

#### 4.6 *Fish products labelling Regulation*

The regulation on the common organisation of the markets in fishery and aquaculture products (Fish Regulation)<sup>113</sup> requires producers to collect information on fish, marketed in the Community, on its origin or catchment area and production method, i.e. caught or farmed

<sup>108</sup> Note 105 *supra* [The Tobacco Directive] [Art. 6(3)].

<sup>109</sup> The Commission of the European Parliament, the Council and The European Economic and Social Committee, 'First Report on the application of the Tobacco Products Directive', 2005, p. 6, at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0339:FIN:EN:PDF>> accessed on 25 June 2010.

<sup>110</sup> McNEILL A., JOOSENS L., JARVIS M., 'Review of the Implementation of the Tobacco Product Regulation Directive 2001/37/EC', ASH March 2004, p. 50, at <[www.ash.org.uk/files/documents/ASH\\_164.pdf](http://www.ash.org.uk/files/documents/ASH_164.pdf)> accessed on 24 June 2010.

<sup>111</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, PBL of 11 June 2005.

<sup>112</sup> Note 111 *supra* [Unfair Commercial Practices Directive] Art. 7]. This aligns with the Consumer Rights Directive.

<sup>113</sup> Council Regulation (EC) laying down detailed rules for the application of Council Regulation (EC) No 104/2000 as regards informing consumers about fishery and aquaculture products (Fish Regulation) [2001] OJ L278/6.

or cultivated.<sup>114</sup> According to the Fish Regulation a producer shall provide such information together with the scientific name of the species to consumers by means of the labelling or packaging of the product, or by means of a commercial document accompanying the goods. The increasing variety of supply, particularly of fresh and chilled fishery products, makes it essential to provide consumers with a minimum amount of information on the main characteristics of the fish products.<sup>115</sup> Another reason for the disclosure of the information is the potential for consumer influence in creating a sustainable fishery market. The Dutch view on the European fishery policy is formulated in a report published by the Ministry of Agriculture, Nature and Food Quality.<sup>116</sup> In this report it is stated that the government alone is not able to stimulate the necessary sustainability of the fishing industry.<sup>117</sup> Since the market and consumers are powerful allies, it is wise to use their involvement to the advantage of the fishing sector. By providing consumers with information on the characteristics of the fish products, the consumer will have a larger role in the realisation of the goals of the fisheries policy, such as a sustainable fishery market.<sup>118</sup>

#### 4.7 *Electrical and electronic equipment*

As stated in section 3.5, there are two EU directives that address the handling of chemical substances in electronic goods: the WEEE Directive<sup>119</sup> and the RoHS Directive.<sup>120</sup> The WEEE Directive aims to both reduce the amount of electrical and electronic waste being produced, and to promote the reuse, recycling and recovery of these products (*i.e.* to reduce disposal). Importantly, it requires that certain information be divulged to consumer households, including the potential effects on the environment and human health as a result of the presence of hazardous substances in electrical and electronic equipment.<sup>121</sup> Member States may require that some or all of the information shall be provided by manufacturers and/or distributors, *e.g.* in the instructions for use or at the point of sale.<sup>122</sup>

The RoHS Directive requires that new electrical and electronic equipment that is put on the market should not contain any of the six following banned substances: lead, mercury, cadmium, hexavalent chromium, poly-brominated biphenyls or polybrominated diphenyl ethers in quantities exceeding maximum concentration values. The RoHS Directive does not explicitly refer to compliance procedures, specific certificates or testing methods to be used by the Member States for demonstrating compliance; hence the Member States are responsible for setting the relevant compliance rules. Similar to REACH, the RoHS Directive deals with chemical substances. It has been argued that companies could face a situation where a chemical substance is allowed in IT equipment under REACH, but banned under the RoHS regime and vice versa. Apparently, there are inconsistencies between these two legislative products.<sup>123</sup>

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<sup>114</sup> Note 113 *supra* [Fish Regulation] [Art.4].

<sup>115</sup> Council Regulation (EC) No 104/2000 of 17 December 1999 on the common organization of the markets in fishery and aquaculture products [2000] OJ L17/22, preamble consideration 8.

<sup>116</sup> Report from Dutch Ministry of Agriculture, Nature and Food Quality, Fish as a sustainable capital: the Dutch view on the European Fisheries Policy, 2009-2010, at

[www.minlnv.nl/portal/page?\\_pageid=116.1640360&\\_dad=portal&\\_schema=PORTAL&p\\_file\\_id=49282](http://www.minlnv.nl/portal/page?_pageid=116.1640360&_dad=portal&_schema=PORTAL&p_file_id=49282) accessed on 28 June 2010.

<sup>117</sup> Note 116 *supra* [Fish as a sustainable capital], p. 27.

<sup>118</sup> Note 116 *supra* [Fish as a sustainable capital], p. 27.

<sup>119</sup> Note 72 *supra* [WEEE].

<sup>120</sup> Note 73 *supra* [RoHS].

<sup>121</sup> Note 72 *supra* [WEEE] [Art.10].

<sup>122</sup> Note 72 *supra* [WEEE] [Art.10(4)].

<sup>123</sup> Speech by Alexandre Affre, Adviser, Environmental Affairs Business People, Confederation of Danish Industry (DI) Conference on the implementation of REACH, 2 September 2009. Available at

## 5 Enforcement of the consumer's right to information

### 5.1 Experiment regarding consumer information under REACH

The effectiveness and enforceability of the consumer's right to information provided for in article 33(2) of REACH can be measured in various ways. One of them is by measuring the compliance rate of companies in answering a consumer's request for information regarding the presence of SVHCs in a product, and to evaluate the quality of the responses. In view of this article, such an experiment was conducted by sending a request for information to 32 companies in the Netherlands. Each request pertained to a specific product of that company. For the request, they used the format included in Annex 1. The results are presented in Figure 1 below, and in Table 2 *in fine* in more detail. Since the experiment only concerned a small sample and was only undertaken for illustrative purposes, the authors will refrain from drawing affirmative conclusions. However, certain observations can be made. Firstly, the response rate of 52 % illustrates that not all companies consider their legal obligation to provide information to consumers pursuant to article 33(2) to be a 'hard' obligation. Secondly, the variety in the level of detail provided in the responses raises questions of uniformity: 24 % of the companies included in the sample gave an incomplete answer. Arguably, the lack of a standard reply template can lead to ambiguous and vague answers. Finally, 28 % of the companies adequately addressed the question posed. Most of them referred in their e-mails or letters to their websites, where the requested information could be found. From an enforcement perspective, the question emerged whether an incomplete or vague answer qualifies as an insufficient response, and should therefore be regarded as a breach of REACH.

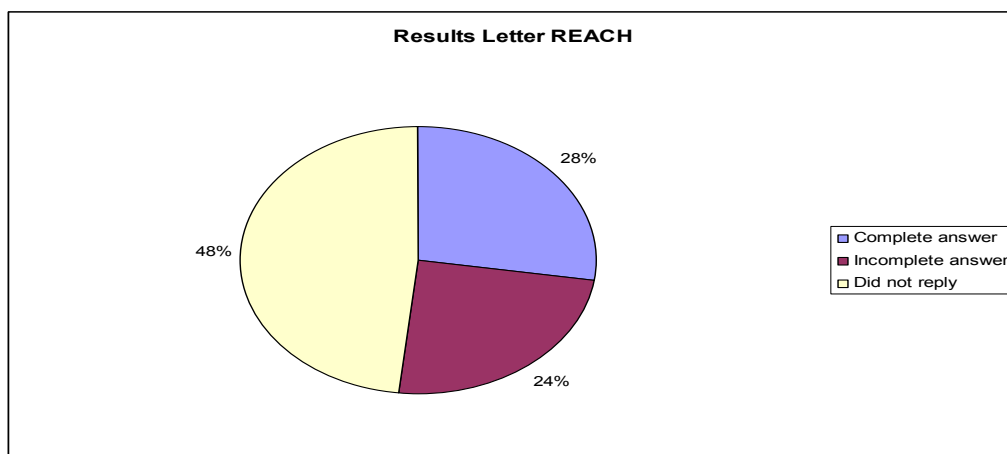
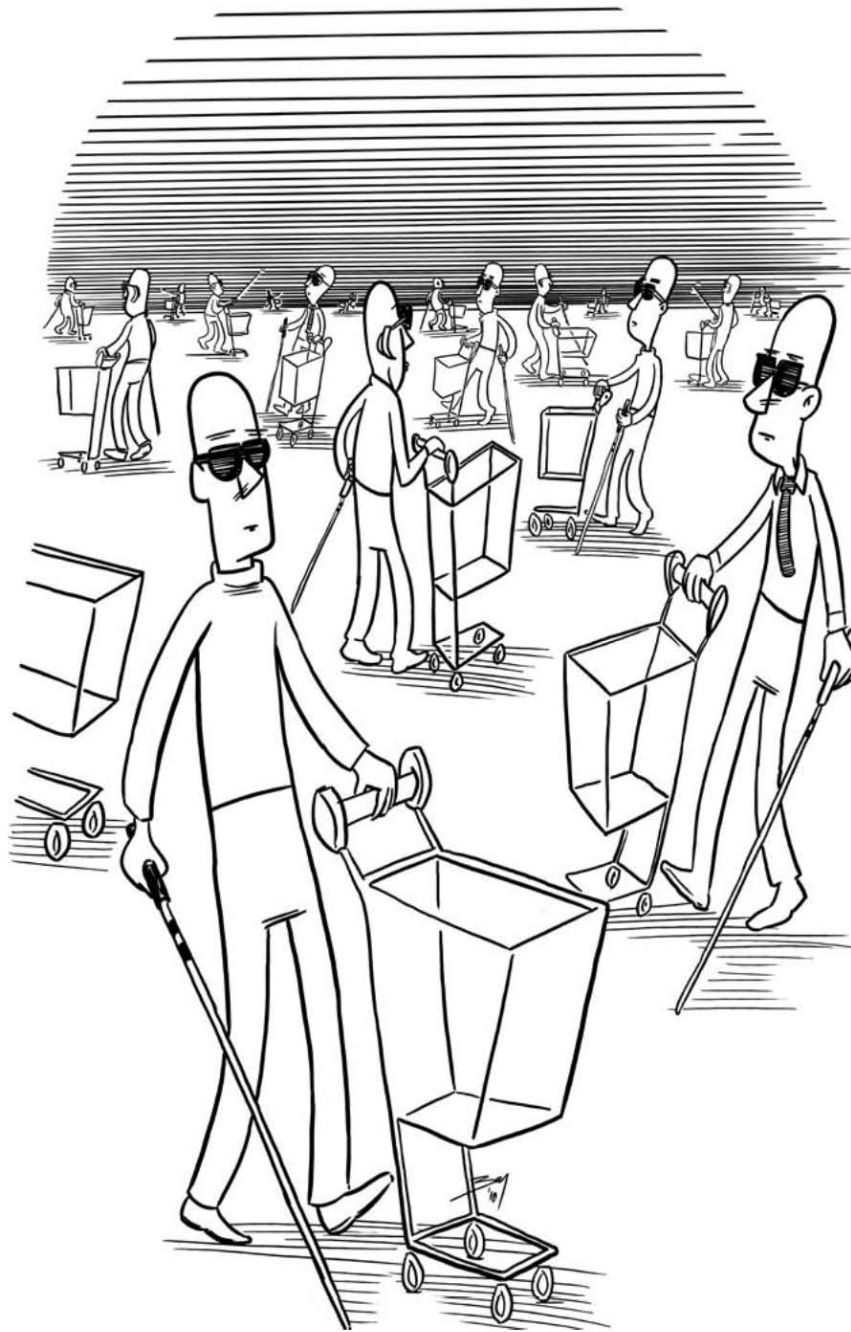


Figure 1: Compliance by Dutch companies

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<<http://212.3.246.117/docs/1/JECCCKPBEAFKJCBAHOIIMLPPDBG9DWWB39LTE4Q/UNICE/docs/DLS/2009-01807-E.pdf>> accessed on 18 June 2010. See also: Europe environmental news and information system, 'EU chemicals legislation remains inconsistent', September 2009. Available at <<http://www.endseurope.com/22118?referrer=search>> accessed on 18 June 2010.



To know or not to know? The consumer's right to information

## 5.2 Enforcement of REACH

As REACH is a Regulation, it has direct effect in all Member States,<sup>124</sup> *i.e.* it will automatically form part of Member States' national legislation.<sup>125</sup> In accordance with the principle of procedural autonomy,<sup>126</sup> the enforcement of REACH is carried out through Member State legislation. The Member States thus have a significant responsibility for establishing mechanisms that will ensure the smooth implementation of REACH by their industries. Due to the complexity of REACH (849 pages of legislation), a 'Forum for Exchange of Information on Enforcement' (Forum) was created for the purpose of assisting the Member States with the implementation. The Forum is part of ECHA.<sup>127</sup> It has issued non-binding guidelines<sup>128</sup> which allow Member States a certain degree of discretion to adopt enforcement strategies according to their national priorities. Member States' enforcement regimes may therefore vary. For example, the penalty system according to article 126 of REACH stipulates that the Member States shall lay down "the provisions on penalties applicable for infringement of the provisions of the Regulation and shall take all measures necessary to ensure that they are implemented". Many differences can be observed among the States that have already determined the penalty system for infringements of the Regulation.<sup>129</sup>

The consumer's right to information under article 33(2) of REACH can only be guaranteed if sanction mechanisms or other measures are adequately set up and maintained at a national level. The question is how the enforcement of the consumer's right to information can be regulated. To find an answer to this question, the authors examined the Dutch legal system.

## 5.3 Enforcement regime in the Netherlands

The Netherlands has chosen to implement REACH strictly. The maximum punishment for a breach is a fine of € 670,000 and/or imprisonment for up to six years. Dutch restrictions on using hazardous substances are more severe than those listed in Annex XVII<sup>130</sup> of REACH.<sup>131</sup>

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<sup>124</sup> EC Treaty (Treaty of Rome, as amended), Art. 249.

<sup>125</sup> Note 10 *supra* [Craig, De Burca], p. 85.

<sup>126</sup> The principle of procedural autonomy implies that in the absence of uniform procedural rules, the Member States have authority to lay down the procedural rules and remedies available before national courts as a matter of national law. Also see note 2 *supra* [Reich, Micklitz], p. 35.

<sup>127</sup> ECHA, 'The Forum of the European Chemical Agency', at [http://echa.europa.eu/about/organisation/forum\\_en.asp](http://echa.europa.eu/about/organisation/forum_en.asp) accessed on 25 June 2010.

<sup>128</sup> Strategies for enforcement of Regulation (EC) no. 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), 2009, Forum for Exchange of Information on Enforcement, 2-4 December 2008, at

[http://echa.europa.eu/doc/about/organisation/forum/strategies\\_enforcement\\_reach.pdf](http://echa.europa.eu/doc/about/organisation/forum/strategies_enforcement_reach.pdf) accessed on 24 June 2010.

<sup>129</sup> Most of the new Member States have chosen more lenient measures to penalise violations of REACH. *E.g.*, in Latvia, the fine is from 300 to 1,000 Lats (1000 Lats is equivalent to € 1.426) depending on the seriousness of the infringement; in Romania, the punishment is a fine from 6,500 to 50,000 Lei (50,000 Lei is equivalent to € 11.771 euro); and in the Czech Republic, fines range from 50,000 to 500,000 CZK (500,000 CZK is equivalent to € 19.772). The majority of the other EU States have imposed more stringent penalties.

<sup>130</sup> Article 67 (3) of REACH provides that until 1 June 2013, a Member State may maintain any existing and more stringent restrictions in relation to Annex XVII on the manufacture, placing on the market or use of a substance, provided that those restrictions have been notified according to the Treaty.

<sup>131</sup> *E.g.*, the restrictions affecting coatings containing polyaromatic hydrocarbons and short-chain chlorinated paraffins will be maintained until 1 June 2013. From June 2009 the Marketing and Use Directive (76/769/EEC) became Annex XVII to REACH. Annex XVII imposes restrictions on hazardous substances. See Chemical Inspection & Regulation Service Limited, 'Netherlands Strictly Implemented REACH', 16 June 2009. Available

Under Dutch law, the enforcement of REACH has become part of the Environmental Management Act (EMA; *Wet milieubeheer*). Article 9.3.3(1) EMA qualifies the violation of certain provisions of REACH, including article 33(2) concerning the consumer's right to information, as a 'serious infringement' or 'environmental offence' under the Economic Offences Act (*Wet op de economische delicten*). The supervision of company compliance with REACH falls within the sphere of competence of the Ministry of Housing, Spatial Planning and the Environment (*VROM*). The Inspectorate for Housing, Spatial Planning and the Environment (*VI*), the Food and Consumer Product Safety Authority (*VWA*) and the Labour Inspectorate (*AI*) also supervise company compliance with REACH pursuant to administrative law. These governmental authorities are authorised to investigate infringements of REACH provisions and are authorised to issue an official report on their findings. In the event of an infringement, the Minister has discretionary powers to enforce administrative measures under article 18.7 EMA. Additionally, the Minister can impose an order for incremental penalty payments under article 5:32 of the General Administrative Law Act (*Algemene wet bestuursrecht*) on the infringer.

From a consumer perspective, it is essential to understand what he can do if the company does not reply to his request for information. There are no guidelines or relevant provisions on how the consumer can proceed with his complaint if and when this should occur. Pursuant to inquiries by the authors, VROM officials informed us that, in principle, the VWA is responsible for the enforcement of article 33(2) of REACH. Hence, the consumer has to contact this agency with a complaint and the VWA might impose sanctions that can be of an administrative as well as of a penal character.

The authors however, doubt whether a consumer would actually take action against a company. Firstly, most consumers are simply unaware of the fact that they have a right to information concerning dangerous chemicals. This has been poorly communicated to consumers.<sup>132</sup> Secondly, even if a consumer wishes to undertake action against a company, the absence of clear guidelines as well as difficulties which present themselves when trying to access the relevant authorities will most likely bring his enthusiasm to an end. Obviously, it will not be a priority for the authorities to employ their resources to take action against a company that has failed to send a response to a consumer.

If *not* providing a full answer on an 'article 33(2) REACH question' was to be qualified by the Dutch authorities as tortious behaviour, *e.g.* as an 'unfair trade practice', it would certainly assist a consumer, or a consumer organisation on his behalf, in addressing such a company, and if relevant in claiming damages (*e.g.* in line with articles 6:193b or 6:193c of Dutch Civil Code (DCC) on unfair trade practices and misleading information). Alternatively, civil law could stipulate that non-compliance with article 33(2) of REACH provides ground for rescission of the purchase contract for the product concerned.

## **6 The consumer's right to product information on societal aspects**

### *6.1 New Dutch legislative proposal*

In the Netherlands, the Labour Party (*Partij van de Arbeid*) is preparing a legislative proposal to assist consumers in promoting CSR.<sup>133</sup> According to many in the Netherlands, including

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at <[http://www.cirs-reach.com/index.php?option=com\\_content&view=article&id=113:netherlands-strictly-implement-the-reach-regulation&catid=42:news&Itemid=78](http://www.cirs-reach.com/index.php?option=com_content&view=article&id=113:netherlands-strictly-implement-the-reach-regulation&catid=42:news&Itemid=78)> accessed on 3 May 2010.

<sup>132</sup> However, the Chemicals Health Monitor Project, note 11 *supra* [Health and Environment Alliance], provides relevant information.

<sup>133</sup> The text has not yet been published (by 7 July 2010). MP Mei Li Vos has been kind enough to share a working draft of 5 March 2010, as well as the accompanying Explanatory Memorandum, with the authors. The proposal for the WOP will probably be soon submitted to the Dutch Parliament.

the Labour Party, consumers play an important role in promoting CSR, *i.e.* by taking conscious decisions when buying products. As they need information upon which to base their decision to buy, they are expected to request information from companies regarding the societal aspects of a product, thereby helping companies to better manage and control their supply chain.<sup>134</sup>

The objective of the proposed *Wet Openbaarheid Productieketens* (WOP, Act on the transparency of supply chains), is to grant consumers a ‘right to know’ concerning the sustainability aspects of products offered on the Dutch market with a view to enhancing sustainable consumption. A right to information could contribute to transparency concerning the manner in which products are produced. Transparency is one of the cornerstones of a well functioning market economy. Therefore, only if a consumer has access to information about the extent to which supply chains comply with societal norms during the production process, will he be able to make an educated decision to either buy or not to buy the certain product. As a consequence, the consumer’s decision will be an incentive to companies to sell products that are produced in a sustainable manner. ‘Consumer power’ is one of the means embraced by the Dutch government and the EU Commission to exert influence on international supply chains. The WOP grants consumers a right to information regarding the CSR aspects of a certain product. These aspects relate to compliance during the production process (in the supply chain) with (see draft article 2):

- (1) the ILO norms on ‘decent work’ (*i.e.* ILO treaties 138 [minimum age], 182 [worst forms of child labour], 29 [forced labour], 111 [discrimination], and 87 [establishment of unions]);
- (2) corruption as defined in article 2 of the Council of Europe Civil Law Convention on Corruption (1999);
- (3) article 2 of the Convention on Biological Diversity; and
- (4) the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

A manufacturer operating on the Dutch market has to provide, upon request, the abovementioned information to a consumer or consumer association. According to the WOP, a ‘consumer’ is any natural person who is acting for purposes which are not related to trade, business or a profession. ‘Manufacturers’ are manufacturers of a finished product, producers of raw materials and elementary components, or any persons purporting to be a manufacturer by placing their name, trade mark or other distinctive sign on the consumer goods (the same definition is used as the one in the Product Liability Directive<sup>135</sup>). Whether or not a purchasing agreement has been concluded is not a decisive factor; the consumer’s intention to buy the product is sufficient to activate the right to information. The information requested shall be provided within 45 days after having received the request (the same period as under REACH). An information request can be submitted by the consumer, and answered by the manufacturer, on paper or by means of another durable medium which is easily accessible to the consumer.<sup>136</sup>

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<sup>134</sup> *E.g.* SER [Social-Economic Council], ‘De winst van waarden’ (2000-11), p. 31, 32, 43; SER, ‘Duurzame globalisering: een wereld te winnen’ (SER 2008-06), pp. 223-227; MVO Nederland (platform to promote CSR in the Netherlands), ‘Consumenten: rechten, veiligheid en gezondheid’ [consumers: rights, safety and health], available at <[www.mvonederland.nl/dossier/7/152](http://www.mvonederland.nl/dossier/7/152)>; EU Commission, Greenbook on CSR, COM(2001) 366 def., 18 July 2001 [no. 79-83]; Interview with the director of the Dutch Consumers’ Organisation, available at <[www.basisboekmvo.nl/files/interviews/Klaske%20de%20Jonge.pdf](http://www.basisboekmvo.nl/files/interviews/Klaske%20de%20Jonge.pdf)>; sites accessed on 16 June 2010.

<sup>135</sup> Directive 85/374/EEC [1985], OJ L 210.

<sup>136</sup> Note 133 *supra* [WOP] [draft art. 3].

In order to protect the competitive position of manufacturers, the proposed act exempts a manufacturer from providing information if this could cause serious or irreparable damage to its legitimate commercial interests. Furthermore, to alleviate the burden on manufacturers to produce answers, the WOP has built in quantitative limitations. Draft article 4 relieves the manufacturer from the obligation to respond if he is able to demonstrate that he has satisfied a certain maximum number of information requests in the same year. This article contains a table which provides quantitative limitations related to the number of employees. On an annual basis, for every product, information has to be communicated at a pace of (on average) one request for every hundred employees. For example, if a company with 650 FTEs places 15 different products on the market, it has to deal with a maximum of 90 information requests submitted by consumers on annual basis.

A manufacturer acts in accordance with the WOP by providing the requested information within the agreed deadline. However, the data in question might not be available in the supply chain. In that case, a manufacturer can still fulfil his duty under the WOP by simply informing the consumer of this fact. The WOP does not contain a sanction mechanism. In fact, the WOP relies on market forces and consumer empowerment. Notwithstanding, the legislative proposal could seek analogous application of the legal framework of ‘unfair trade practices’ (Directive 2005/29/EC; see sections 4.5 and 5.3 *supra*), if it were to define a manufacturer’s failure to timely answer a consumer request as an ‘unfair commercial practice’. Hence, pursuant to article 5 of this directive, such manufacturer can be considered to have ‘distorted the economic behaviour of a consumer with regard to the product in question’. Under articles 6:193b or 6:193c DCC this might qualify as a tort against the consumer because the former impairs the latter’s ability to make an informed decision. This could in turn lead to a compensatory damages claim (article 6:162 DCC).

From the perspective of a European legal framework, the proposal is consistent with current legislation as discussed in the previous sections. Manufacturers use information mechanisms, such as the information exchange channels which have been developed in the supply chain pursuant to obligations imposed by REACH, the General Food Law, the Fish Directive and the Tobacco Directive. Besides, the WOP is in line with the European trend of consumer empowerment and the emergence of awareness. The Fish Regulation (see section 4.6 *supra*) is an example thereof. Additionally, in the Consumer Rights Directive, rules about consumer rights on information constitute an important element (see section 4.3 *supra*).

## 6.2 *Experiment regarding consumer information on CSR*

Similar to the REACH experiment described in section 5.1, an experiment was conducted in view of this article. An information request was submitted to manufacturers concerning CSR aspects of a certain product. A total of 32 companies<sup>137</sup> was requested to provide information concerning such a product with respect to (1) the labour conditions, including in the supply chain of the product; (2) corruption practices, and (3) the environmental impact (see the full text of the letter in Annex 2). In comparison to the REACH experiment, the response rate was significantly lower, namely 38 % in total. Assumedly, the fact that companies are not obliged to provide CSR information is one of the explanations for this. The quality of the responses was diverse. Only 17 % of the companies addressed all of the questions, and gave full and detailed answers. The other 21 % responded only to some of the questions or merely referred to their websites.

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<sup>137</sup> Most of the products and companies were the same as in the first experiment. Only the questions posed were different.

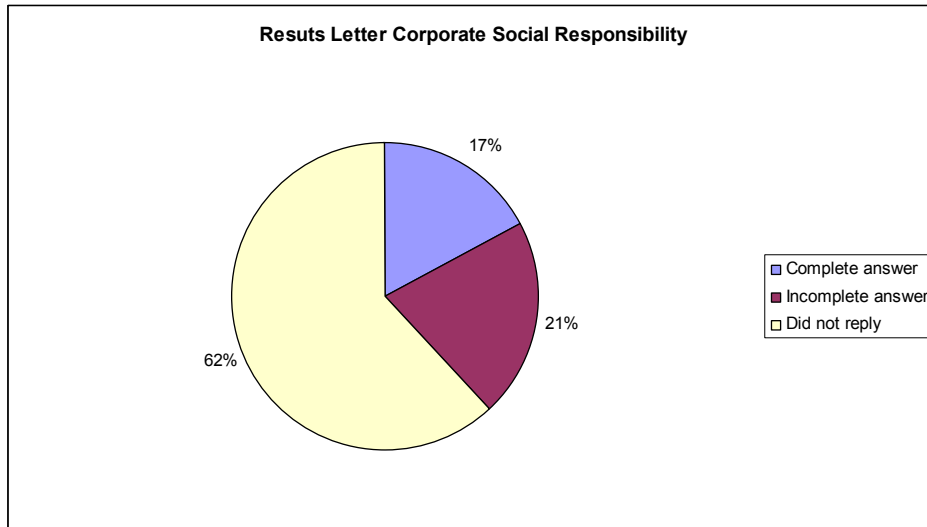


Figure 2: Answers by Dutch companies

#### a. CONCLUSION

The objective of this article was to analyse the consumer's right to information. As this right is considered to be one of the most important consumer rights, also under REACH, the REACH Regulation was evaluated in sections 2 and 3 with a focus on the provisions that deal with consumer protection. On the basis of this research, the authors have identified certain problematic elements. Examples are: the registration criterion of chemical substances is based on volumes rather than on health impact and the information that consumers can request is limited to only a few hazardous substances.

In section 4, REACH was compared with other EU legislation that directly or indirectly concerns the consumer's 'right to know'. Inconsistencies were discovered between the terminology used in REACH and in the GPSD. This does not improve the effectiveness of the EU legislation. Neither does it strengthen the position of EU consumers. Furthermore, an analysis was conducted regarding obligations on companies to set up systems so that they can trace products and ingredients throughout the supply chain. Product traceability requirements were found under REACH, the General Food Law, the Tobacco Directive, and the Fish Regulation. It is contended that such a system will help companies in providing answers to consumers.

Section 5 revealed that the right to information under REACH is not easy to enforce. The outcome of an experiment undertaken as part of the study for this article demonstrated that not all companies respond clearly to a question submitted to them concerning possible chemical substances in one of their products. Moreover, an examination of the Dutch procedures set up for enforcement of a consumer's right to information has shown that these procedures are not necessarily effective or adequate for these types of rules.

Furthermore, the question was posed whether it is sufficient for a consumer wanting to make an informed purchase decision to only receive information on the presence of chemical substances. An argument was made in favour of consumers who wish to receive full product information that also includes the societal aspects of production. Section 6 assessed a new legislative proposal that is being prepared in the Netherlands, the WOP. It intends to provide a consumer with the right to information on societal aspects of a product. The results of a second experiment showed that only a small portion of companies made an effort to answer the questions posed. Apparently, legislative pressure helps companies in dedicating resources

to answering consumer questions. As both authorities and the private sector indicate that consumers have to ask for more responsible supply-chain strategies, this presents itself as an interesting field for further research. More in-depth studies are surely needed.

**Annex 8.1      Template consumer letter [REACH]**

TO: [.....]

Dear Sir/Madam

Date, place

*Re: [describe product or mention brand or retail store]*

In accordance with the new European regulation on Chemicals, REACH, I am writing to ask you to inform me about the presence in the product XX or its packaging of any chemical from the group of “substances of very high concern” as specified by REACH.

Should any of these substances be present in the product XX or its packaging, I wish to be informed about the name of this substance. I would be grateful to receive this information within 45 days as required by REACH.

I would also be grateful if you would inform me about steps you are taking to provide products intended for the same use but which do not contain such potentially hazardous chemicals.

Yours faithfully,

[NAME and (email) address of the consumer]

CC: European Chemicals Agency – Helsinki  
Annankatu 18, 00120 Helsinki, Finland  
([www.echa.europa.eu](http://www.echa.europa.eu))

CC 2: Your national consumer or environmental organisation

**Annex 8.2      Template consumer letter [CSR Aspects]**

TO: [.....]

Dear Sir/Madam

Date, place

*Re: [describe product or mention brand or retail store]*

As a concerned consumer, I would be grateful to receive information on the corporate social responsibility aspects of one of your products. It concerns the production of product (name of the product).

Specifically, I would like to know:

- 1) With regard to labour conditions, can you guarantee that in the supply chain of the Product no form of child labour is employed (below the minimum age, specified in ILO Conventions) or forced labour; and that employees through the entire supply chain of the Product are not discriminated against on the basis of their gender, race, nationality and religion?
- 2) Can you guarantee that in the supply chain of the Product, employees are not willingly involved in corruption?
- 3) Can you inform me of the steps that your company undertakes to reduce any negative effects of the production of the Product on the environment? Can you guarantee that the production of the Product does not violate the Convention on Biological Diversity?

I would be very grateful to receive [...]

**Table 8.1 Corporate obligations under REACH**

Actors	Obligations
(1)  Manufacturers of substances	<ul style="list-style-type: none"> <li>➤ to register chemical substances <math>\geq 1</math> tonne/yr</li> <li>➤ to provide information (including the Technical Dossier and the Chemical Safety Report (CSR) for substances manufactured or imported in quantities <math>\geq 10</math> tonnes per/year)</li> <li>➤ to provide information on the safe use of chemicals with particularly hazardous properties (this requirement depends on the concentration level of these chemicals in products) upon a consumer's request</li> </ul>
(2)  Importers of substances	<ul style="list-style-type: none"> <li>➤ to pre-register chemical substances with ECHA (applies to companies which started to import the substances before December 2008)</li> <li>➤ to register chemical substances <math>\geq 1</math> tonne/yr</li> <li>➤ to inform ECHA electronically about the classification and labelling of chemicals, if imported chemicals are subject to registration or classified as 'dangerous'</li> <li>➤ to provide information on the safe use of chemicals with particularly hazardous properties (this requirement depends on the concentration level of these chemicals) upon the consumer's request</li> </ul>
(3)  Downstream Users	<ul style="list-style-type: none"> <li>➤ to comply with restrictions set for certain dangerous substances listed in Annex XVII</li> <li>➤ to communicate any potential hazards caused by chemicals up and down the supply chain</li> <li>➤ to comply with Risk Management Measures stated in suppliers' Safety Data Sheets</li> <li>➤ to classify and label 'dangerous substances' and those registered under REACH</li> <li>➤ to assess their own uses and prepare a Chemical Safety Report and to report, where necessary</li> <li>➤ to submit the required notifications to the ECHA</li> <li>➤ to obtain authorisation to use substances of very high concern that have not been authorised</li> </ul>

**Table 8.2 Company responses to consumer questions on chemicals**

no	Company	Product	Type of letter: hard copy/e-mail	Content of Response	Type of response
				(use of chemical substances)	
1	Canon	Ink cartridge	No reply		
2	Dell	Laptop	E-mail	No SvHC	Unclear
3	Esprit	Cotton jacket	Hard copy	No SvHC (they think)	Unclear
4	Etos	Shower gel	E-mail	No SvHC	Full answer
5	European Salt Company	Salt	Hard copy	No risk for using product	Unclear
6	H&M	Shoes	E-mail	No SvHC above 0,1	Full answer
7	Head & Shoulders	Shampoo	No reply		
8	Hewlett-Packard	Ink cartridge	Hard copy	It contains SvHC	Full answer
9	HTC	Mobile phone	Letter returned		Did not reach addressee
10	Imation Europe BV	CDs	Letter returned		Did not reach addressee
11	Inkstation International	Ink cartridge	No reply		
12	Jonson Benelux N.V.	Cleaning liquid	Hard copy	No SvHC	Full answer
13	Keune	Shampoo	E-mail	No SvHC	Unclear
14	Kyocera	Ink cartridge	No reply		
15	Lexmark	Ink cartridge	No reply		
16	Lexmark International	Ink cartridge	Hard copy	No SvHC, with the exception of extra parts	Full answer
17	Lidl	Cleaning product	No reply		
18	Logitech	Wireless desktop	Hard copy	No SvHC	Full answer

19	Merison BV	Cleaning product	No reply		
20	Nokia	Mobile phone	No reply		
21	Philips	Headphones	No reply		
22	Philips	Lamp	No reply		
23	Plus	Washing liquid	E-mail	No SvHC	Unclear
24	Procter & Gamble	Washing liquid	Hard copy	No SvHC	Unclear
25	Sara Lee	Toothpaste	E-mail	No SvHC (they think)	Full answer
26	SCA Hygiene Products B.V.	Hankerchiefs	No reply		
27	Sony	Laptop	No reply		
28	Sony	Playstation	No reply		
29	TEFAL	Tefal Compact frying pan	E-mail	No SvHC (they think)	Unclear
30	Toshiba	Satellite	E-mail (much later after deadline)	It contains SvHC	Full answer
31	Unilever	Bleach	No reply		
32	Unilever	Fabric softener	No reply		

**Table 8.3 Company responses to consumer questions on CSR**

<b>no</b>	<b>Company</b>	<b>Product</b>	<b>Reply</b>	<b>Content of Response (labour/corruption/environment)</b>	<b>Type of response</b>
1	Akai Sales Pte Ltd	Television	No		
2	Apple	iPhone 3G	No		
3	Canon	Ink	No		
4	Dell	Dell Vostro 1520 laptop	Yes	Vaguely answered	Unclear
5	ESCO, European Salt Company	Salt	Yes	Vaguely answered	Unclear
6	Esprit	Clothing (jacket)	Yes	One issue from three was answered	Unclear
7	Etos	Shower gel	No		
8	Groupe SEB Nederland BV	Cooking Pan	No		
9	H&M	Clothing (jacket)	Yes	All issues answered	Full answer
10	Hennes En Mauritz Netherlands BV	Shoes	No		
11	Hewlett-Packard BV	Ink	No		
12	HTC Headquarters	HTC Touch HD Mobile Phone	Yes	All issues answered	Full answer
13	Ikea	Wardrobe	Yes	All issues answered	Full answer
14	Ikea Ltd.	Wardrobe	No		
15	Imation Europe BV	CDs	Letter returned		Did not reach addressee
16	Inkstation International BV	Ink cartridge	No		
17	Keune Hair Cosmetics	Shampoo	Yes	Two Issues from three were answered	Unclear
18	Logitech	Wireless keyboard K350	Yes	All issues answered	Full answer

19	Mango Nederland BV	Dress	No		
20	Men at Work	Jeans	Yes	All issues answered	Full answer
21	Mexx	Dress	No		
22	Nestle	Coffee	No		
23	Nokia	Mobile phone, Nokia N97	No		
24	Philips	Lamp	No		
25	Samsung Electronics	Television	No		
26	Sara Lee	Toothpaste	Letter returned		Did not reach addressee
27	SCA Hygiene Products B.V.	Hankerchiefs	No		
28	Sony	Playstation	No		
29	Toshiba	Satellite	No		
30	Unilever	Textile Softener	Yes	Not answered (link to website)	Unclear
31	Unilever	Fabric softener	Yes	Vaguely answered	Unclear
32	Vorbrood Meubelen	Closet	No		