

## Cefic views on access to justice/collective redress in the context of the REACH revision

The private sector – including companies and NGOs - can play a role in the enforcement of REACH by providing data to identify non-compliance. Public authorities should remain responsible for deciding enforcement actions and penalties.

Any collective redress mechanism requires to build in appropriate safeguards against abuse, as recognised in the Commission recommendation of June 2013 and the Directive on Collective Redress.

Standalone provisions on collective redress or compensation in REACH should be avoided. A ‘substantiated concerns’ mechanism could be explored to incentivise collaboration between private actors and enforcement authorities.

We fully support the Commission’s acknowledgment in the Communication on the Chemical Strategy for Sustainability of the need to step up enforcement and address non-compliance with EU chemicals legislation. Evidence shows that the majority of goods containing banned or restricted substances are imported from outside the EU<sup>i</sup>.

Cefic has expressed the need to make online marketplaces responsible for verifying compliance of products proposed for sale and to coordinate enforcement at the EU borders<sup>ii</sup>. We also support the revocation of registration numbers as a possible response to persistent non-compliance with registration requirements subject to legal and procedural safeguards<sup>iii</sup>.

### **Public enforcement of REACH should remain the key priority**

- The enforcement of REACH, especially the definition of fines and penalties for non-compliance, should remain the responsibility of enforcement authorities, via administrative and potentially criminal procedures<sup>iv</sup>.
- Private actors have a role to play as facilitators of public enforcement, and potentially also to help establish a violation and request cessation of violations. However it is not appropriate for courts to impose punishments for breaches of public laws in privately brought, civil actions.

### **Any collective redress mechanism should be appropriately regulated to prevent abuse.**

- Collective redress systems must be regulated by **appropriate safeguards against abuse**, as recognised by the Commission recommendation of June 2013<sup>v</sup>, **to prevent litigation systems being captured for private gain** as can be observed in the United States.

- Without appropriate safeguards, mechanisms will fall short in delivering appropriate redress to consumers/affected individuals. Where incentives exist for intermediaries/funders to seek financial gain, claimants can be misled into unsuitable procedures.
- Key safeguards against abuse include:
  - **an appropriate ‘gating’ or filtering system** for any collective action, with **clear admissibility conditions set out by law** (legitimate interest and legal standing, non-profit making character, established activity for period of time, legitimate statutory purpose and connection between the purpose and the claim, independence from ‘backers’). This is to prevent a situation where entities can initiate collective actions for purely commercial reasons or to enrich intermediaries (e.g. law firms/funders)<sup>vi</sup>.
  - **constitution of the claimant by ‘opt-in’ principle** for compensatory claims, requiring explicit consent of the consumers/affected individual to join the action. Consumers/affected individuals who are not aware of, but are still directly involved in lawsuits in their name are vulnerable to having their grievances exploited by those directing or funding the action.
  - **balanced rules on evidence and disclosure**, allowing both parties to request evidence to be disclosed by the other party subject to the control of the judge, without relieving the claimant from the burden of proof<sup>vii</sup>.
  - **prohibition of punitive damages and contingency fees**. Punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited. Contingency fee arrangements give another party (the law firm/lawyers) a financial stake in the outcome of a case. This is problematic in collective litigation situations where individual claimants may not have the interest, knowledge or motivation to challenge the actions taken by lawyers, which means that the outcome of the case can effectively be driven by the law firm/lawyers<sup>viii</sup>.

**The EU Directive on Collective Redress<sup>ix</sup> (CRD) has built in some crucial safeguards against abuse, yet it remains uncertain today whether the CRD will lead to a fair and balanced collective redress system on the ground.**

- Member States are **still in the transposition phase**, and retain **discretion in key areas**.
  - Qualified entities may apply to be qualified to bring either “domestic” or “cross-border” actions. The CRD only harmonises the conditions to be fulfilled by qualified entities to bring ‘cross-border’ actions. **Member States are free to decide on conditions that entities must fulfill to file ‘domestic actions’**.
  - As ‘domestic’ actions are actions brought in the same country where the entity is designated<sup>x</sup>, even where they involve claimants residing in other EU states, most actions are likely to qualify as ‘domestic’ and thus largely fall outside the scope of the Directive, with certain jurisdictions potentially acting as ‘magnets’ for litigation.
  - Member States **remain free to permit damage claims to be brought on an opt-out basis** – i.e. as claims in which consumers do not have to explicitly express their consent for them to be represented by the qualified entity/NGO - and allow punitive damages<sup>xi</sup>. Some Member States, like the Netherlands, have already chosen for an opt-out system<sup>xii</sup>.
- **Third party litigation funding is booming but remains largely unregulated at EU level**. Whilst the Collective Redress Directive recognises the risks of third party litigation funding and imposes minimum requirements<sup>xiii</sup>, there is a need for a more transversal regulation at EU level, as proposed

by the European Parliament in its [own-initiative report](#) on responsible private funding of litigation of 13 September 2022<sup>xiv</sup>.

### **Standalone provisions on collective redress or compensation in REACH should be avoided.**

- **Article 79a of the legislative proposal amending the Industrial Emissions Directive** requires Member States to ensure that NGOs promoting the protection of human health or the environment are allowed to represent individuals affected and bring collective actions for compensation without having to prove the causality link between the damage and the IED permit violation.
- **We do not consider this as an appropriate regulatory approach:**
  - **qualification criteria** for NGOs promoting the protection of human health or the environment to bring representative actions **should be harmonised at EU level** and consistent with those provided for in the CRD. The **usual standing conditions for environmental NGOs to request the review of administrative decisions under the Aarhus rules are insufficient** in the context of private damage claims, as they do not consider risks linked to litigation funding and fee shifting.
  - **the burden of proof should remain with the claimants, supported by the NGO**, in accordance with the national rules of evidence and civil procedure. This is essential to avoid opportunistic claims and situations where defendants are forced to settle due to the costs of defending the case<sup>xv</sup>. There should also be fair and balanced rules on disclosure allowing both parties to request the court to order the production of evidence under a strict control of proportionality and necessity.
  - **All other rules foreseen by the EU legislator in the CRD should apply to claims brought by environmental and public health NGOs on behalf of affected consumers/individuals.**

### **Cefic supports exploring a ‘substantiated concerns’ mechanism for the most serious breaches to the REACH Regulation, as a tool to incentivise collaboration between private actors and public enforcement authorities.**

In our view, the private sector can support enforcement **by facilitating data to identify non-compliance** to Member State enforcement authorities (see [joint industry statement, 23 November 2021](#)).

Enforcement authorities have a legitimate interest in keeping a margin of discretion to prioritise their action and decide on the need to follow up on information received from third parties. Enforcement strategies and controls should be risk-based whilst keeping full oversight.

To incentivise collaboration between enforcement authorities and the private sector, a **‘substantiated concerns’ mechanism for a closed list of infringement categories which are considered to be the most serious** could be explored.

The features of such mechanism could be inspired by art 29-30 of the [legislative proposal](#) for a regulation on deforestation-free products:

- a mechanism **open to any natural or legal persons**;
- **a requirement on the third party to substantiate** their claims (only well-founded claims based on objective and verifiable information);
- **a requirement on the authority to take operational steps and respond** to the request for action; and

- where appropriate, access by the third party to **administrative or judicial procedures** at the national level to review the legality of the decisions taken in response to the request for action.

In connection with REACH, such mechanism should be **limited to the most serious breaches**, i.e. the placing on the market or use of substances on their own, in mixtures or in articles in **breach of a restriction** under Title VIII and Annex XVII of REACH or **in breach of a prohibition** under Title VII of REACH.

Non-compliance with registration/information requirements should remain addressed via the existing EU-level administrative procedure and remedies available under REACH, reinforced by the registration number revocation mechanism in case of persistent failure to comply (cf. [Cefic position on revocation](#)).

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About Cefic  
Cefic, the European Chemical Industry Council, founded in 1972, is the voice of large, medium and small chemical companies across Europe, which provide 1.2 million jobs and account for 15% of world chemicals production.

<sup>i</sup> See, for instance, CSS Communication section 2.3.2 and Cefic news release '[2020 Enforcement data reveals increasing number of hand sanitizer imports violating EU chemical safety laws](#)'.

<sup>ii</sup> [Cefic response to REACH revision open public consultation](#), April 2022. See Section 8.

<sup>iii</sup> [Stepping up enforcement of REACH: Cefic supports the revocation of registration numbers subject to a transparent legal process](#), October 2021.

<sup>iv</sup> The proposal for a directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC criminalises the most serious infringements of the REACH Regulation and other chemicals legislation provided certain conditions are met, harmonising the minimum maximum of financial penalties for legal persons for these offences at 5% of the total worldwide turnover of the legal person [/undertaking] in the business year preceding the fining decision.

<sup>v</sup> Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law ([2013/396/EU](#)).

<sup>vi</sup> This should be accompanied with a collective action qualification procedure, allowing courts to determine if all of the claims of the proposed group of members can be adjudicated fairly in a single proceeding and established through common proof – and that no other form of dispute resolution would be practical.

<sup>vii</sup> Article 5 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions offers a balanced regime in that regard.

<sup>viii</sup> Contingency fee arrangements involve another party having a financial stake in whether, for example, a settlement is satisfactory. Instead of focusing exclusively on whether the settlement provides justice to consumers, the level of the lawyers' fee becomes part of any settlement discussion.

<sup>ix</sup> Directive 2020/1828 on representative actions for the protection of collective interests of consumers, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020L1828> ('Collective Redress Directive' or 'CRD')). The EU Collective Redress Directive enables qualified entities to bring representative actions to protect the collective interests of consumers against traders that infringe specific provisions of Union law. The Annex to the Directive includes a number of pieces of chemicals legislation which are directly relevant to consumers (CLP, Cosmetics Regulation, Toy Safety Directive, Product Liability Directive).

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<sup>x</sup> A ‘domestic representative action’ is defined in art 3(6) of Directive 2020/1828 as a representative action brought by a qualified entity in the Member State in which the qualified entity was designated. The definition takes no account of where the alleged harm arose, where defendants are, where the allegedly injured consumers are, or what the case involves.

<sup>xi</sup> Member States must transpose the Directive by 25 December 2022 and make the new rules applicable by June 2023. Most Member States are incurring delays in defining the national transposition provisions.

<sup>xii</sup> The Dutch system operates an opt-out mechanism for Dutch class members and an opt-in mechanism for foreign class members. A significant number of international companies have their European principal place of business in the Netherlands owing to favourable business and tax conditions. Accordingly, there are many companies available for claimant law firms to target. In 2021, 39 class actions were filed in the Netherlands, of which 14 sought compensation for damages. Source: CMS European Class Action Report 2022 available at <https://cms.law/en/int/publication/cms-european-class-actions-report-2022>.

<sup>xiii</sup> The Collective Redress Directive has introduced transparency requirements (qualified entities must disclose sources of funding); a prohibition on funders to ‘unduly influence’ outcomes of litigation in their own interests at the expense of the claimants; measures to seek to manage the conflicts of interests that arise when a funding third party has its own economic interest in the bringing of the action; and supervisory powers for courts to influence funders’ terms or reject the standing of the qualified entity.

<sup>xiv</sup> Commercial third party litigation funding is a growing practice whereby private investors who are not party to a dispute invest for profit in legal proceedings and pay legal and other expenses, in exchange for a share of any eventual award. According to the [2021 EPRS study](#) the EU litigation services market represented a worth of almost Eur 39 billion in 2019, having seen an annual growth rate of 3.5% since 2008, and could increase by an additional Eur 9 billion in to reach more than Eur 48 billion by 2025. The study also draws attention to the large returns for investors, with third party litigation finance outperforming other financial market investments. Very few Member States have regulated litigation funding. The Parliament’s resolution contains a number of highly relevant proposals to protect claimants and prevent abuse, including further rules to prevent potential conflicts of interest, the prohibition for litigation funders to claim unfair, disproportionate or unreasonable reward at the expense of claimants and the obligation to inform the competent court or administrative authority of the existence of commercial funding and the identity of the funder, as well as full disclosure of third party funding agreements to courts or administrative authorities at their request or at the request of the defendant.

<sup>xv</sup> California’s Safe Drinking Water and Toxic Enforcement Act (‘Proposition 65’) is one of the most onerous chemical control statutes in the United States. It prohibits businesses with 10 or more employees, including those that merely ship products into California, from: exposing people in California to listed chemicals without a “clear and reasonable” warning; and Discharging or releasing listed chemicals to “sources of drinking water” in the state. Part of those costs are due to the reversed burden of proof: once a plaintiff establishes that a listed chemical is present, even at a very low level, the burden of proof to demonstrate that an actionable exposure has not occurred shifts to the defendant business. Because this is a difficult burden to meet, most Proposition 65 cases are resolved through negotiated settlements.