

Science for Environment Policy

Legal analysis finds REACH authorisation rules on imported substances of 'very high concern' would not violate WTO law

The EU would not be breaking World Trade Organization (WTO) rules if it chose to extend REACH's authorisation scheme on substances of very high concern (SVHC) to products imported to Europe, a recent legal analysis concludes. At present, the scheme — which is effectively a ban on SVHC, with some exceptions — applies only to products made within the European Economic Area (EEA).

The EU's Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation aims to protect human health and the environment. One of its instruments is an authorisation scheme for SVHC. These substances are listed under Annex XIV of REACH. When a substance is added to Annex XIV, it is given a 'sunset date', after which products made in the EEA must not contain it unless authorisation has been granted for a specific use; this can be granted if risks are adequately controlled or if the socio-economic benefits of use outweigh risks.

SVHC are classified as substances which are known to be carcinogenic, mutagenic (they change genetic material) or toxic for reproduction ('CMR'), or persistent, bioaccumulative and toxic ('PBT'). They also include substances which carry '*an equivalent level of concern*' to CMR and PBT substances. The SVHC status triggers certain communications obligations, such as the production on request of a safety data sheet, information on the safe use and disposal of the product or notification to the European Chemicals Agency by manufacturers of the quantities of SVHCs used in their products.

This legal analysis, which was conducted on behalf of the German Environment Agency ([Umweltbundesamt](http://www.umweltbundesamt.de)), considered whether extending the authorisation scheme to goods imported to the EEA would be acceptable under [WTO](http://www.wto.org) law. As these are not currently covered by the scheme, they may still pose health and environmental risks. Also, it has been argued that EEA producers may be at a competitive disadvantage because their products are subject to stricter requirements than goods from elsewhere.

The analysts focused on two articles of the WTO's [Technical Barriers to Trade Agreement](http://www.wto.org) (TBT), which aims to ensure that technical regulations and standards neither discriminate nor create unnecessary obstacles to trade, whilst recognising the right of WTO members to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or protection of the environment. They focused on Article 2.1, concerning national treatment and most-favoured treatment, and Article 2.2, concerning the prohibition of unnecessary trade restrictions.

Under Article 2.1, an extended authorisation requirement — covering non-EEA goods — would only violate the TBT if imported products are 'like' products from the EEA or from other importing countries. 'Likeness' is defined in terms of a range of characteristics, including physical characteristics, usage and consumer taste. It has to be judged on the basis of specific product examples, and as long as they are judged not alike, there would be no violation of this aspect of Article 2.1.

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Also under Article 2.1 of TBT, given compared products are 'like', imported products must not be treated less favourably than 'like' domestic products. There is no discrimination in this respect, the analysis says, in particular as an extended authorisation scheme would treat all products the same.

Article 2.2 of TBT prevents technical regulations that are more restrictive to trade than necessary to fulfil a legitimate objective. Again, the analysis concludes that an extended authorisation requirement would not violate this article.

This is for a number of reasons: first, REACH's objective to protect health and the environment is considered legitimate under Article 2.2's specifications. Second, an authorisation requirement is considered an appropriate means of fulfilling this objective, as it constitutes a clear and strong regulatory mechanism and, as first experiences show, non-compliance is extremely low in EEA countries. In addition, not meeting the objective creates relevant risks covered by the WTO's body of rules. Furthermore, even though the hazards of some SVHC involve scientific uncertainty, the analysis shows that the precautionary principle is widely used in international treaties, and so may also be relevant for the interpretation of WTO rules. Finally, the analysis could not identify any other measures that would achieve an equal or greater contribution to the legitimate objective.

These results are consistent with wider WTO objectives to make international trade contribute to better living standards, quality of life and environmental protection, the analysts conclude. The option of extending the authorisation scheme could be considered in the next comprehensive review of REACH, they suggest.

