From Information to Action: Right-to-Know Laws in the European Community

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Laws requiring the communication of hazardous substance data, community right-to-know laws, are recent developments in environmental regulation. Community right-to-know laws focus on industry's use and release of hazardous substances and the attendant health and environmental risks of such use. Their goal is to reduce both use and emissions levels. However, unlike environmental laws that command and control industry's use of hazardous substances through regulatory standards or economic incentives, right-to-know laws rely on information-based public action to encourage change.¹

The concept of a right to know addresses numerous facets of pollution prevention: industry's duty to disclose information pertaining to its use of hazardous substances, the public's right to access such information, and the community's need to develop emergency notification and response plans for accidental release. This Comment focuses primarily on reporting requirements for hazardous substance storage, use, and release created by right-to-know statutes and on the right of the public to obtain such data.

Both the United States and the European Community ("EC") have established community right-to-know standards. Right-to-know law in the United States is set out in the Emergency Planning and Community Right-to-Know Act ("EPCRA"), which obligates industry to report hazardous chemical data and requires governmental authorities to disclose such data.² Similarly, the EC has

¹ A.B. 1988, Harvard University; J.D. Candidate 1993, University of Chicago.

adopted a set of directives establishing a framework for community right-to-know laws in the individual Member States. EC right-to-know laws are less developed than their counterparts in the United States. The EC directives establish the groundwork and rely on each Member State to implement provisions through domestic legislation. Whereas Community standards for industrial disclosure of hazardous chemical data were initially adopted in 1982, the 1990 Directive on Freedom of Access to Information on the Environment only recently established perhaps the most important component of a right-to-know regime—broad public access to such information.

Right-to-know laws depend on public action for their success. If made available, information should drive individuals to make the correct economic and political decisions concerning industry’s use of toxic substances. Therefore, the challenge in creating an effective right-to-know regime lies in providing to the public sufficient, comprehensible data. In the EC, this task falls on both the Community government and the national governments.

Part I of this Comment examines the reasoning behind information strategies and the mechanisms through which right-to-know laws can improve industrial behavior. Parts II and III examine, respectively, EC right-to-know standards and U.S. right-to-know laws. Part IV examines some of the problems of informational remedies, namely cognitive dysfunctions that inhibit the proper functioning of such laws and undermine the efficacy of such strategies. Finally, Part V analyzes the functions of right-to-know laws in the EC and proposes measures to enhance their effectiveness.

I. Functions of Informational Remedies

Informational strategies address two intertwined characteristics of industrial use of toxic chemicals: externalities (third party costs) and failures in the distribution and use of information (market failures of information). Often, industry will not fully internalize the associated environmental and health costs of its use of toxic

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a facility may not, and perhaps cannot, bear the full costs of its industrial processes. It thus passes on to others certain costs. This problem can be attributed, in part, to industry's ignorance of the full environmental effects of its operations. Reporting requirements, therefore, can make a company more aware of the externalities involved in its use of hazardous substances. Whether or not industry fully recognizes the ecological and health risks its operations pose, externalities will exist as long as industry knows more about the effects of its hazardous chemical than the public. Right-to-know laws seek to correct this disparity in information, while also addressing the larger externality problem of environmental risks.

Distinct from command and control strategies, informational remedies seek to affect industry conduct through public action. Because the risks associated with hazardous chemical use are often not apparent, informational strategies possess particular importance. Making hazardous substance data available to the public enables individuals to act in the market, political, and public arenas, and in the courts to create more environmentally sound industrial practices. Informational remedies give individuals the data they need to express their political and economic preferences, without inhibiting preference formation or precautionary behavior.

Right to know laws can be as effective as more costly command and control strategies in reducing a facility's use or release of a hazardous substance. Command and control strategies restrict both industrial and public choice. Conversely, right-to-know laws give both individuals and society the information they need to properly assess the costs and benefits of industrial action, thereby enabling them to negotiate for the optimal levels of environmental/health protection and industrial activity. Because right-to-know laws use the formation and exercise of personal preferences to drive the cost-benefit analysis, they are more flexible and efficient than their command and control counterparts.

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7 Id at 909.


9 Id at 1831.


A. The Market Function

Individuals frequently express their preferences with their pocketbooks. Consumer choice depends on sufficient information regarding a good’s relevant characteristics. Potential risks constitute part of the bundle of characteristics that any given good possesses. An informed consumer can balance the risks of a certain economic decision against its benefits. Even if risks cannot be calculated with precision or certainty, more useable and reliable information should enable the consumer to more accurately value the risks associated with a given product.

This market function of informational strategies works particularly well in the area of consumer goods, where the buyer makes purchases based on knowledge of the product or group of products concerned. In such circumstances, sufficient, accurate, and properly presented labelling, as well as other information programs, facilitates informed consumer choice.

However, with respect to environmental hazards resulting from industrial processes, information-based market strategies may not function as well. Industries whose processes adversely affect the environment may not themselves directly produce a good that affected individual consumers buy. Neither the individual ultimately purchasing an end-product, nor the customer of an industrial facility, necessarily has the same incentives as an individual who will bear the environmental and health costs imposed by that same facility. Therefore, informed individual purchasing decisions may not improve industrial conduct and attitudes.

B. The Democratic Function

In addition to improving economic decisionmaking, right-to-know laws serve an important democratic function. The availability of information affects not only individual economic decisions, it also affects political choices. Information enables the public to

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13 Viscusi & Magat, Learning about Risk at 60 (cited in note 10).
14 For a detailed discussion of consumer response to labelling, see W. Kip Viscusi, Predicting the Effects of Food Cancer Risk Warnings on Consumers, 43 Food Drug Cosm L J 283 (1988).
16 Id. Id.
17 Id.
identify and hold accountable polluters, thereby facilitating in-
formed political choice. This democracy-enhancing feature is es-
sential for improving industrial practices: disclosure of hazardous
substance data provides impetus for public pressure, particularly
at the state and local level, on both government and industry. This
feature of informational remedies allows a community, once
fully informed, to negotiate for optimal, preference-driven levels of
risk and exposure.

Right-to-know laws, by imposing reporting requirements, also
heighten industry awareness of the environmental effects of its op-
erations. This increased awareness may generate greater concern
for the firm's legal liabilities, thereby encouraging voluntary ac-
tion to reduce environmental and health risks to reduce such lia-
bility. Specifically, EPCRA's reporting requirements have pres-
sured industry to change its use of hazardous substances. In the
aftermath of Bhopal and other similar disasters during the 1980s,
companies have also become acutely image conscious. The Envi-
ronmental Protection Agency ("EPA") has used reporting require-
ments as a means of encouraging voluntary initiatives. Companies
have responded and have often sought to preempt or mitigate
negative public attention and reputational harm by voluntarily es-

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19 Keith Schneider, For Communities, Knowledge of Polluters is Power, NY Times 4-5 (Mar 24, 1991) (quoting Mary Lee Orr, Director of the Louisiana Environmental Action Network).
20 Blomquist, 14 Vt L Rev at 563 (cited in note 18). For example, the Silicon Valley Toxics Coalition used data generated by EPCRA to pressure an IBM facility to begin phasing out use of ozone depleting chlorofluorocarbons ("CFCs"). The facility was the largest CFC emitter in California. Environmental Protection Agency, Toxics in the Community: National and Local Perspectives 323 (US Gov't Printing Ofc, 1991).
21 Informational remedies might prove important to a community forced to choose be-
tween the environmental benefits of closing a facility and the cost in jobs that such closure
may incur. The community can reach the best compromise if it is fully informed as to both
the costs and benefits of the industrial operation.
22 Schneider, NY Times at 4-5 (cited in note 19).
23 In September 1990, nine companies entered into voluntary agreements with the EPA
pledging an 80 percent reduction in toxic emissions by the end of 1993. These agreements
cover 40 of the nation's worst polluters. EPA Administrator, William K. Reilly, attributed
this progress to the reporting requirements of EPCRA. George Lobsenz, Toxic Reductions
24 See, for examples, Robert Abrams and Douglas H. Ward, Prospects for Safer Com-
munities: Emergency Response, Community Right to Know, and Prevention of Chemical
Accidents, 14 Harv Env L Rev 135, 141-43 (1990) (discussing accidental toxic substance
releases in Basel, Switzerland; Seveso, Italy; and Institute, West Virginia).
establishing emissions reduction targets and replacing hazardous substances with less toxic ones.\textsuperscript{26}

C. The Civil Liability Function

In the United States, right-to-know laws also use private litigation to change industrial behavior. As the amount of civil litigation and the size of jury awards increases, public awareness of hazardous substance risks can only rise, thereby encouraging additional litigation.\textsuperscript{27} Right-to-know laws, by properly organizing and presenting hazardous substance information, thus spur litigation: they can help establish causation by connecting a facility's operations to the plaintiff's alleged harms, they can help identify defendants, and they can facilitate discovery.\textsuperscript{28} Additionally, as noted above, the mere threat of litigation, with its attendant costs and damage to reputation, has encouraged industry to voluntarily alter its use of hazardous substances.\textsuperscript{29}

II. EC Framework for Right-to-Know Regimes

EC right-to-know laws were enacted in the early 1980s in response to the threat posed by major chemical accidents. More recently, these laws have been broadened to enhance public awareness by encouraging disclosure of hazardous chemical data.

A. The Seveso Directive

The EC adopted a directive in 1982 on Major-Accident Hazards of Certain Industrial Activities, commonly known as the Seveso Directive.\textsuperscript{30} The Seveso Directive seeks to "prevent[] the creation of pollution or nuisances at source" by creating Commu-

\textsuperscript{26} In December 1990, Chevron ceased its use of chlorine at one refinery after environmental groups began voicing concerns about the storage and use of this chemical. Also in December of 1990, Raytheon, reacting to criticism from a citizens' group, pledged to replace ozone-depleting cleaning agents with safer, water-based solutions. Schneider, NY Times at 4-5 (cited in note 19).

\textsuperscript{27} For an example of such litigation, see John Riley, \textit{Environmental Group Tries to Nail Kodak}, Gannett News Service (March 14, 1990).

\textsuperscript{28} Lyndon, 87 Mich L Rev at 1833 (cited in note 8).

\textsuperscript{29} GAO, \textit{Toxic Chemicals} at 24 (cited in note 1).

nity standards for manufacturers who use hazardous substances. As originally adopted, the Directive requires facilities to inform relevant state authorities of the chemicals it uses and stores, the risks and hazards posed by such substances, and the safety and emergency-response measures it has adopted to minimize such risks.

Under the Seveso Directive, all parties engaged in industrial activity involving or possibly involving dangerous substances and "capable of presenting major accident-hazards" must "identif[y] existing major-accident hazards." Article 5 of the Directive requires businesses to disclose the following types of information pertaining to their use of hazardous chemicals: substances stored or used by a facility—including by-products, residues, quantities present, and chemical behavior during normal conditions of use; type of production and storage; and nature of the technical processes employed. Additionally, under Article 5, companies must disclose short- and long-term environmental and health risks posed by their use of hazardous substances.

The Seveso Directive does not establish measures to ensure compliance with its reporting requirements. It leaves this to the Member States. The Directive does, however, authorize relevant national authorities to evaluate information disclosed pursuant to the Directive, to request supplementary information, and to conduct on-site investigations.

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31 Council Dir 82/501, preamble, 1982 OJ at L230:1 (cited in note 3). As used in the Seveso Directive, "manufacturer" describes any person responsible for any operation carried out in an industrial installation ... involving ... one or more dangerous substances and capable of presenting major-accident hazards, and also transport carried out within the establishment for internal reasons and the storage associated with this operation within the establishment.

32 Id, arts 3-5, 1982 OJ at L230:3-4.


35 However, Community-level procedures do exist to enforce the Directive against Member States that do not comply with the Directive's requirements. Rolf Wagenbaur, The European Community's Policy on Implementation of Environmental Directives, 14 Fordham Intl L J 455, 461-65 (1990-91).

The "right to know" encompasses not only industry's obligation to disclose chemical risk data, but also, and perhaps more importantly, the dissemination of such information to the public. Article 8 of the original Seveso Directive requires Member States to ensure that persons liable to be affected by a major accident originating in a notified industrial activity . . . are informed in an appropriate manner of the safety measures and of the correct behavior to adopt in the event of an accident.\textsuperscript{38}

The policy behind this provision, therefore, focused not on public disclosure, but rather on providing the specific information that affected individuals "need to know"\textsuperscript{39} in the event of accidental release.\textsuperscript{40}

Article 8 was amended in 1988 by a Directive enacted to strengthen and better define the public information components of the Seveso Directive.\textsuperscript{41} The amended language of the Seveso Directive now provides that

Member States shall ensure that the information on safety measures and on the correct behaviour to adopt in the case of an accident is supplied in an appropriate manner, and without their having to request it, to persons liable to be affected by a major accident . . . [Such information] shall also be made publicly available.\textsuperscript{42}

These amendments also specify the types of information to be communicated to the public, including such data as the common names of on-site hazardous substances, an "indication of their principal dangerous characteristics,"\textsuperscript{43} and "[g]eneral information relating to the nature of the major-accident hazards, including their potential effects on the population and the environment."\textsuperscript{44}

Although these amendments broaden Member States' obligations to include the dissemination of data to the general public, the

\textsuperscript{39} Baram, 6 BU Intl L J at 29 (cited in note 30).
\textsuperscript{43} Id, annex B, 1988 OJ at L336:18.
content of this obligation is left undeveloped, with no specifics on the means or extent of public disclosure. Additionally, the information disclosed remains limited to, primarily, that needed to respond properly to an accidental release.45

Implementation of the Seveso Directive remains incomplete. Although most Member States have developed emergency response programs pursuant to the Directive's guidelines,46 the Member States have been inconsistent in implementing risk communication standards. Consequently, some nations have minimal reporting requirements while others47 have more extensive requirements that predate implementation of the Seveso Directive.48

B. The Information Directive

Recent EC Council action may establish broad standards for public disclosure of hazardous chemical data. With respect to public disclosure, the 1990 Directive on the Freedom of Access to Information on the Environment ("Information Directive") suggests a way to remedy the Seveso Directive's shortcomings.49 Notwithstanding certain narrow exceptions,50 the Information Directive directs Member States to:

ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest.51

Member States must fully implement these provisions through domestic legislation by the end of 1992.52 The language of the Information Directive seems to amend the original Seveso Directive lan-
guage to give the public access to virtually all hazardous substance data.  

III. RIGHT-TO-KNOW LAW IN THE UNITED STATES

Congress, spurred by unions, public interest groups, and events such as the Bhopal disaster, enacted the Emergency Planning and Community Right-to-Know Act ("EPCRA") as Title III of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). Described by some as a prime example of Reagan's "new federalism," EPCRA distributes the burden of policing industrial disclosure and use of hazardous substances among federal, state, and local governments, as well as private individuals. EPCRA seeks to improve both emergency planning and public access to information. It imposes extensive reporting requirements on industry, mandates public access to reported information, and creates a multi-tiered system of hazard communication, emergency planning, and enforcement.

EPCRA requires states to establish Emergency Response Commissions and local Emergency Planning Committees. These state and local authorities, as well as the EPA, serve as the repositories of the hazardous substance data generated by EPCRA. Under EPCRA, manufacturers, processors, and users of hazardous substances must complete three forms: (1) they must submit material safety data sheets to state and local authorities; (2) they must also submit emergency and hazardous chemical inventory forms to the same authorities; and (3) they must submit toxic chemical release forms to federal and state authorities. Like the Seveso Directive, these provisions mandate disclosure of virtually every aspect of industrial use of hazardous chemicals: hazardous components of chemicals used, description of storage, average

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54 Abrams & Ward, 14 Harv Env L Rev at 135 (cited in note 24).  
56 Baram, 6 BU Intl L J at 37 (cited in note 30).  
57 See 42 USC §§ 11001, 11021-23, 11045, 11046.  
58 See 42 USC §§ 11001, 11003-05, 11021-23, 11044-46.  
59 42 USC §§ 11001(a), 11001(c).  
60 See 42 USC §§ 11021-23.  
61 42 USC § 11021.  
62 42 USC § 11022.  
63 42 USC § 11023.  
daily amounts present, specific locations of chemicals within a facility, nature of use, annual quantities released into the environment, and estimates of the efficiency of treatment programs.

Although both EPCRA and the Seveso Directive require industry to disclose hazardous chemical data, EPCRA places greater emphasis on the public access component of a right-to-know regime. While the amended Seveso Directive, in conjunction with the Information Directive, may create a very broad public right to hazardous substance data, EPCRA explicitly states that:

[each emergency response plan, material safety data sheet, . . . inventory form, . . . [and] toxic chemical release form . . . shall be made available to the general public.]

This provision clearly requires relevant federal, state, and local authorities to disclose to the public any information they obtain.

EPCRA also establishes several different enforcement mechanisms at every level of government. The statute establishes administrative and civil penalties for failure to comply with reporting requirements. At the federal level, a person or entity that violates reporting requirements can be held liable for up to $25,000 per day, per violation. Empirical data indicate that the EPA has successfully enforced EPCRA, though limited resources have restricted the number of enforcement actions it has been able to initiate. The EPA has also used EPCRA enforcement measures to encourage industry to reduce its use of hazardous substances. It has entered into consent decrees with companies, reducing fines...
where firms agree to implement new technologies or to replace chemicals currently in use with less toxic substances. 78

EPCRA also authorizes civil claims by state and local governments against facility owners and operators for failure to submit the required information. 77 However, EPCRA, unlike the Seveso Directive, does not grant explicit inspection authority as part of its enforcement procedures. 78 Finally, EPCRA creates a private right of action; "any person may commence a civil action on his own behalf" against an owner or operator who fails to properly meet EPCRA reporting requirements. 79

IV. COGNITIVE DYSFUNCTIONS

Laws designed to correct failures of information, in order to be effective, must generate data that the public can understand. An informational strategy should not merely provide for total disclosure, but should also inform in a manner that fosters improved decisionmaking. 80 Right-to-know regimes must account for limited information processing ability and deficiencies in the information actually produced.

Individuals must understand and order new data for it to affect their political and economic decisions. 81 New data must first be accepted. It must convince individuals to alter their understanding of the environmental impact of industrial use of hazardous substances. 82 It must thus possess sufficient authority and validity to cause individuals to rethink their valuations of environmental and health risks. 83

Even if accepted, cognitive dysfunctions can still impair the use of newly acquired data. An individual's ability to absorb and process new data is not unlimited. Individuals who are over-

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78 Four New Jersey Firms Agree to Improve Facility Operations to Benefit Environment; EPA Collects $45,000 for Right-to-Know Violations, PR Newswire (January 24, 1991).
77 42 USC § 11046(a)(2).
79 See GAO, Toxic Chemicals at 55 (cited in note 1). In practice, EPA regional inspectors do conduct investigations to identify facilities that violate EPCRA reporting requirements, though facility operators have challenged the EPA's authority to conduct such investigations. Therefore, the EPA must often rely on authority provided under other environmental statutes. Id.
80 42 USC § 11046 (a)(1).
81 Viscusi, Reforming Products Liability at 133 (cited in note 15).
82 Cass R. Sunstein, Democratizing America through Law 19 (Dec 1991) (unpublished manuscript on file with the University of Chicago Legal Forum).
83 Viscusi & Magat, Learning About Risk at 7 (cited in note 10).
84 Id at 126.
whelmed with new data may forget an important portion of it or may fail to properly process it.\textsuperscript{84} Without some means of analyzing and ordering the data, particularly large amounts of data, individuals cannot properly value it.\textsuperscript{85} These quantitative limits may thus render information-based regulation ineffectual,\textsuperscript{86} because right-to-know statutes may generate unmanageable amounts of environmental and toxic chemical data.\textsuperscript{87}

Moreover, individuals may be qualitatively limited in the types of data that they can digest. Much of the data generated by right-to-know laws consists of "raw" data. Such information may not enable the public to better assess the risks an industrial facility presents. To digest such data, one may have to process highly complex and technical information and reduce it to a form more amenable to risk-benefit analysis. Without assistance, individuals are likely to make errors that can distort risk valuation.

Complex raw data, when married with scientific uncertainty, may make individual risk valuations so flawed as to be of little or no assistance in regulating industry use of hazardous chemicals.\textsuperscript{88} The environmental and health effects of chemicals may not yet be known.\textsuperscript{89} If science cannot accurately determine the hazards associated with a particular industrial operation, individuals probably cannot be expected to properly assess the risks posed by such an operation.

Uncertainty about the risks associated with the use of particular chemicals may also result in individual inaction. Uncertainty generates anxiety. To reduce such anxiety, individuals may deny uncertainty and undervalue the risks posed by present use levels.\textsuperscript{90}

\textsuperscript{84} Id at 140.
\textsuperscript{85} Id.
\textsuperscript{86} However, Professor Lyndon suggests that this difficulty does not exist, as individuals frequently deal with large amounts of complex data. Lyndon, 87 Mich L Rev at 1831 (cited in note 8).
\textsuperscript{87} Viscusi, Reforming Products Liability at 139-40 (cited in note 15).
\textsuperscript{88} See Asch, Consumer Safety Regulation at 91-94 (cited in note 12) (where individuals moderately underestimate risks, only the mildly safety-conscious individual will change his preferences; moderate overestimation of risk will affect only moderately price-conscious consumers).
\textsuperscript{89} See id at 158. This time lag between exposure and the manifestation of its effects creates significant difficulties in any hazardous substance, regulatory regime. These difficulties include establishing effective production and technology standards and determining when liability should attach so that tort claims can create effective risk reduction incentives.
Also, because the hazards associated with toxic substance use generally involve future risks, the potential for error increases and confidence in one's ability to properly value risks diminishes.\(^1\)

Beyond these difficulties, even unambiguous information may provoke improper response. Individuals may overestimate the likelihood of low probability events.\(^2\) If they fail to analyze or prioritize risk data, they may overestimate the likelihood of rare, but highly sensational and publicized, toxic substance catastrophes.\(^3\)

V. PROPOSAL FOR EC MEMBER STATE IMPLEMENTATION

Existing EC directives provide little more than the skeleton for a right-to-know regime. Architects of domestic implementing legislation, as well as of future Community initiatives, must retain the most effective functions of informational remedies while addressing those cognitive dysfunctions that inhibit proper and effective information-based public action. Within this framework, a right-to-know regime, aggressively enforced at the national level and using Community institutions to process and coordinate hazardous substance data, would do much to enhance the effectiveness of EC regulation of hazardous substance use.

A. Weaknesses of the Market and the Civil Liability Functions

Whether in the United States or in the EC, if no transaction exists between the polluter and those bearing the risks associated with his industrial processes, individual consumer choices may have little persuasive or coercive effect. Therefore, market-based strategies alone may fail to create the incentives needed to change industrial behavior.

Moreover, the incentive effect of the threat of civil litigation in the EC is much less than that in the United States. European attitudes toward litigation differ greatly from the litigious inclinations of many in the United States. Americans frequently tend to view

\(^1\) Richard H. Thaler, Illusions and Mirages in Public Policy, in Arkes & Hammond, eds, Judgment and Decision Making at 165.

\(^2\) Viscusi & Magat, Learning About Risk at 128 (cited in note 10).

\(^3\) Viscusi, Reforming Products Liability at 135 (cited in note 15). See also Slovic, Fischhoff, & Lichtenstein, Informing the Public at 116 (cited in note 90). The authors cite a 1978 study demonstrating that:

the frequencies of dramatic or sensational causes of death, such as accidents, homicide, cancer . . . and tornadoes, were greatly overestimated, [whereas] frequencies of undramatic causes, such as asthma . . . and diabetes, which take one life at a time and are common in nonfatal form, were greatly underestimated.

Id.
lawsuits as a viable means of resolving disputes and redressing wrongs. Conversely, Europeans do not feel that “they have a God-given right to go to court as people in the U.S. do,” and thus “you don’t have attorneys running around dropping cards.”

Procedural and substantive elements of European legal systems also may make litigation a less attractive alternative than in the United States. With respect to procedure, class actions are extremely rare, and plaintiffs assume substantial economic risks in initiating suits: not only are contingency fees nonexistent, but the United Kingdom and some other EC countries also require a losing plaintiff to pay the defendant’s attorney fees and costs. A litigant faces additional hurdles in Civil Law countries: the dearth of pre-trial discovery and of compelled discovery of documents and witnesses create significant difficulties in adducing the proof needed to recover damages. Even in common law countries such as the United Kingdom, whose system resembles that of the United States, the scope of discovery remains quite limited.

With respect to substance, the financial rewards of civil litigation in the EC countries simply do not approach those of United States jury awards. Generally, civil matters are not tried before a jury, awards are limited to actual damages and related expenses, and courts virtually never award punitive and trebled damages.

Despite these differences, European legal systems may be moving toward more civil actions and larger awards. A pending
Community proposal may signal and encourage such a trend. The proposed directive holds waste generators strictly liable for any environmental damage they may cause and makes them jointly and severally liable for any such damage. If adopted, such measures would greatly facilitate recovery of damages from hazardous waste generators. Plaintiffs' problems of proof would diminish greatly, as the proposed directive shifts the evidentiary burden to potential defendants, and joint and several liability would make it much easier for plaintiffs to obtain compensation.

However, this new legislation remains in the proposal stage, and it is unclear when, if ever, the Council will adopt it. Therefore, the incentive effect of civil litigation in the EC remains speculative. The prospect of crushing liability imposed by courts remains a distant one for EC industry. Thus, toxic tort and environmental litigation in the EC may not have a highly effective and persuasive impact on industrial attitudes toward and use of hazardous chemicals.

B. Predominance of the Democratic Function

Informational remedies in the EC must rely heavily on the democratic function for their success. By increasing industry's public accountability and empowering the populace, right-to-know laws can effectively precipitate public action in the EC. The high level of toxic chemical use in the EC, combined with the success of the Green movement, suggests that information-driven public action may prove quite effective.

The role of the "Greens" in European politics reflects the potential for both political activism on environmental issues and public concern for environmental protection. Individually, how-

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105 Id. at 3, 1989 OJ at C251:5.
106 Id. at 5, 1989 OJ at C251:5.
108 Murphy and Gross, however, suggest that Council approval is "virtually inevitable." Id.
110 The multi-party parliamentary systems of the EC countries are also a key factor in facilitating the growth of Green parties in Europe. Such systems, unlike the American two-
ever, European nations frequently lag behind the U.S. in environmental regulation. Information-based public pressure on industry, both direct and through political institutions, can help fill this gap between the promising national and supranational political attention that environmental matters receive, and the disappointing level of substantive environmental regulation.

Public awareness of environmental and health issues already affects the way that European companies use toxic substances. Beyond the growth of the Green parties, private groups ranging from local citizens' groups to international organizations, such as Greenpeace, pressure both governments and industry. Under the Seveso and Information Directives, greater availability of hazardous substance data should encourage both public and industrial initiatives to improve industrial practices.

C. Enforcement

The Seveso Directive and the Information Directive establish a solid framework for Community right-to-know regimes, requiring thorough and detailed reporting and creating a potentially extensive public right of access to disclosed information. These Directives, however, depend heavily on adequate implementation at the national level. National implementation permits various states to use Community standards to create right-to-know laws that effectively regulate industry's use of hazardous substances. Unfortunately, domestic implementation may also dilute the impact of the

party system, encourage single issue parties and their candidates. See Dean Lokken, Europe's Greens Movement Faces Tough Political Road in U.S., Reuters (June 15, 1989).

Andrew Gimson, Force that through the Green Fuse Drives the Flower, The Independent 20 (Sept 23, 1990). This seems somewhat odd, because a Green movement did not emerge in the United States until the mid 1980s and remains, today, far from mainstream politics.


See Rosenbaum, Industry Week at 62 (cited in note 109). Moreover, American and multinational firms, particularly aware of the potential ramifications of such public pressure, have often led the way by adopting policies that benefit both the environment and their corporate images. Id.


See text at notes 36-37.
Directives, resulting in either no or improper information-driven, individual action.

Strict enforcement of the reporting requirements and the provisions for public access is crucial to the success of right-to-know laws in the EC. Such enforcement must be established and carried out entirely through national legislation. Because of the difficulties with private litigation in the EC, national governments should ensure compliance by establishing thorough, objective, and aggressive administrative review of industry reporting practices, including substantial fines and penalties for facilities that violate reporting requirements.\textsuperscript{116}

Limited resources and potential agency or government bias may make national enforcement problematic. The Seveso Directive seems to account for such difficulties, however. It authorizes national authorities to evaluate reported information, to request supplemental information, and to conduct on-site inspections.\textsuperscript{116} To best utilize these provisions, national governments should establish objective criteria for use in identifying and penalizing violators. An agency can then collect citizen complaints and evaluate and rank the complaints against a list of predetermined standards. This would assist them in allocating limited enforcement resources and would make biased agency action more difficult.

D. Structuring the Information

The data disclosed must be made available to the public in a comprehensible manner. Right-to-know laws should seek not just to maximize public disclosure but also to inform in a manner that enables rational and accurate decisionmaking.

Although they each contain limited requirements concerning health and ecological risk data,\textsuperscript{117} the reporting requirements of both the Seveso Directive and EPCRA focus primarily on generating raw data. As discussed in Part IV, such unorganized and disorderly data present difficulties when individuals are required to

\textsuperscript{116} United States right-to-know law includes a citizen suit provision, 42 USC § 11046(a)(1), which the EPA anticipates will be a significant component of EPCRA enforcement. To date, however, private suits have been rare. Conversation with Attorney, EPA, Chicago, Illinois (Nov 1991).

\textsuperscript{117} See 42 USC § 11022(d)(1)(A), requiring certain emergency and hazardous chemical inventory data to be organized according to health and physical hazards; Council Dir 88/610, annex B, 1988 OJ at L336:18 (cited in note 3), requiring communication to the general public of "[g]eneral information relating to the nature of the major-accident hazards, including their potential effects on the population and the environment."
make uncertain valuations of costs and benefits. The burden of ordering and distilling data must fall on someone beyond individual citizens if right-to-know laws are to succeed in regulating industry’s use of hazardous substances.

The national governments, as the enforcers of the reporting requirements and the collectors of data, are the obvious candidates to refine raw data for individuals. However, limited administrative resources suggests the need for independent, learned intermediaries. The political importance of environmental issues in the EC suggests that public interest groups would gladly undertake the task of refining the raw data. Not only can environmental groups use such data to pressure industry and government, but environmental groups can also use the data to compile listings and indices of facilities.

Equally important, the potential exists for a Community system of organizing and analyzing hazardous substance information. In May 1990, the Council of the European Communities adopted a regulation establishing the European Environment Agency (“EEA”) and the European environment and observation network. The EEA, an independent agency, is designed to collect, process and analyze data and to provide the Member States with “the objective information necessary for framing and implementing sound and effective environmental policies.” The regulation gives the EEA a broad mandate covering a wide array of environmental concerns. Finally, the regulation provides that

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118 A GAO study of EPCRA’s toxic release reporting requirement (42 USC § 11023) found that environmental and public interest groups have used this data extensively. GAO, Toxic Chemicals at 25 (cited in note 1).

119 See id. Of course, private industry groups will also have an interest in serving as a learned intermediary. In the United States, for example, the Chemical Manufacturers Association uses information produced by EPCRA as a basis for annual reports tracking industry progress in pollution control and other environmental management practices. EPA, Toxics in the Community at 324 (cited in note 20). Such involvement by private interest groups on both sides of the issue should help to ensure a balanced presentation of data and should promote democratic deliberation.

However, interest groups, though significant in filling a void requiring knowledgeable “middlemen,” should not be relied upon as the sole entities performing the learned intermediary function. Such a regime guarantees neither consistency nor breadth of coverage. Even where groups from both sides are involved, slanted analyses may. nevertheless obscure the true significance of information.


121 Id, preamble, 1990 OJ at L120:1.

122 Id, art 2(i), 1990 OJ at L120:2.

123 Id, art 2(ii), 1990 OJ at L120:2.

124 See Council Reg 1210/90, art 3(2), 1990 OJ at L120:2 (cited in note 120). The EEA does not yet exist. It cannot be established until after the Community has selected a site for
"[e]nvironmental data supplied to or emanating from the [EEA] may be published and shall be made accessible to the public."  

Without stifling governmental and private interest groups in their activities in distilling and organizing raw data, the creation of a Community entity designed to handle raw environmental data will give both structure and support to national efforts. The EEA, therefore, may be the most efficient learned intermediary: charging a Community institution with responsibility for processing and assessing hazardous substance data avoids potential duplication and enables Member States to pool their resources.

**CONCLUSION**

Effective right-to-know laws are a powerful tool in environmental regulation. Properly implemented, such informational remedies shift the regulatory burden from government to individuals. Public action based on full and comprehensible information induces changes in industry’s use of hazardous substances.

The EC countries currently have the opportunity to use Community legislation—the Seveso Directive, the Information Directive, and the regulation establishing the EEA—to develop highly effective right-to-know regimes. For these to succeed, however, Member States must establish strict enforcement measures, and they (and the Community as a whole) must impartially and accurately analyze and organize the data in order to catalyze individual decisionmaking.

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126 Council Reg 1210/90, art 6, 1990 OJ at L120:3 (cited in note 120).