

Developing national legislation on Pollutant Release and Transfer Register Data



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I. Background

The purpose of the factsheet is to integrate the information given in the video module (available at <http://prtr.unitar.org/site/unique/1372>).

Read more about:

- ✓ Development of PRTR legal basis
- ✓ Mandatory vs. Voluntary reporting
- ✓ How to deal with confidentiality claims
- ✓ Establishing compliance mechanisms

For each element, this document presents recommendations from UNITAR, UNECE, OECD and US EPA and lists the key findings regarding the development of a national legal framework in which the Pollutant Release and Transfer Register will operate, or integrated into the current national environmental legislation (if possible).

Setting up a national PRTR will require deciding on the most appropriate institutional structure for collecting and registering the data on pollutant releases and transfers, and ensuring that these data are publicly accessible.

Once the PRTR objectives have been defined, it is useful to conduct an accurate assessment of the national infrastructures relevant to the design and implementation of the national PRTR system. The starting point may be a review of the existing institutions and systems to determine if they are adequate for carrying out the various tasks and obligations under the PRTR system.

The infrastructures assessment should cover the review of existing monitoring and reporting instruments of pollutants and chemicals at national level, including how information on pollutant releases currently flows among the various institutions.

For example, countries which are parties to Multilateral Environmental Agreements (MEAs) may already have extensive systems in place for collecting and registering data on releases, e.g. through operating permits or monitoring systems, while others may be developing or reforming such structures.

The lack of proper legal and institutional frameworks, and the existence of different data collection obligations, and thus different non-compatible databases maintained by

different State organizations may create confusion and increase unnecessary reporting burdens among operators and industries subject to PRTR reporting.

In some cases, the development of the PRTR system may in fact provide a good opportunity to consolidate or rationalize existing environmental reporting requirements, thereby reducing reporting requirements and administrative costs for both industry and government. Other important legal issues are the procedures for handling data confidentiality claims and the enforcement mechanisms to be used to ensure compliance with PRTR reporting requirements.

The legal assessment should identify and determine the specific legal responsibilities and mandates of each government agency related to collection of emissions data and maintenance of environmental information databases. These include establishing the legal authority for collecting PRTR data from industrial facilities and other sources, particularly if reporting will be mandatory.

II. Regulatory Gap Analysis

The gap analysis between existing regulations and reporting requirements, concerning the emission of pollutants and hazardous waste generation, and the new PRTR provisions allows the National Coordination Team to identify deficiencies in national laws that will undermine PRTR operations and sustainability over time.

The designed national authority should address the following questions:

- 1** Do current national environmental laws provide a framework into which a PRTR system could be incorporated?
- 2** If so, are modifications to the current legislation system required?
- 3** Is there a need to enact new legislation to establish the legal and institutional basis for a national PRTR system?

The main sources of information to answer these questions are the official texts of all relevant environmental laws and regulations. Interviews with the staff of governmental agencies responsible for implementing environmental laws on a routine basis, as well as with private and government environmental lawyers, are also recommended.

Institutional basis for national PRTR are needed to ensure a comprehensive and sustainable system.

The regulatory gap analysis will help national authorities to include PRTR provision into existing environmental legislation. This option is particularly important to consider where structures are already in place for gathering and managing information on polluting emissions, e.g. countries that are complying with MEAs are more likely to have a regulatory framework on chemicals management that addresses the various stages of the chemical life cycle (such as production, storage, transport, use and disposal) or any law/regulation that classify chemicals according to risk to human health and the environment.

Other useful information can be provided by the national authority in charge of licensing and permits for industrial facilities and processes. There might be a law or regulation which provide a mandate to an agency to identify and locate industrial facilities which handle, produce, release and transfer dangerous substances.

In this case, governments should be able to identify national authorities and agencies that have received a legal mandate to regulate and/or control:

- the production, use and transfer of chemicals or chemical products;
- releases of chemical pollutants to air, water, land;
- transfers of pollutants/wastes;
- accidental spills;
- disposal of wastes, including hazardous wastes.

The recommended approach is to limit burdensome administrative procedures, which increase because of duplication of reporting requirements for industrial facilities, and avoid confusion that may arise as a result of the overlapping of national authorities in charge of collecting the PRTR data.

However, there might be countries where legal environmental requirements for industries or monitoring systems are lacking or not easily adaptable to PRTR legal framework. In this case enacting a new PRTR legislation is the suggested approach. The legal PRTR provisions, usually, are drafted after consultations with all key national stakeholders, e.g. ministries, national authorities, industries representatives, academia, etc.

The national PRTR proposal is a document which usually contains all the features of the PRTR system to be implemented, these provisions represent the backbone of the PRTR legislation, namely:



Designate the national authority responsible of PRTR data management (collection, validation and dissemination);



Choose between voluntary or mandatory reporting;



Identify the list of substances and hazardous chemicals to be reported;



In the case of a mandatory reporting system, a compliance system must be identified;



Establish thresholds that will trigger reporting to the national authority;



Dispositions on confidentiality claims;



Options for disseminating PRTR data.

III. PRTR legal requirements

The national legal framework will identify the obligations of the administrative authorities who will be in charge of collecting, validating and managing data reported through the national PRTR, as well as dealing with accessibility of information and confidentiality issues. In most cases, a new legal instrument will be needed to ensure a comprehensive and workable system. In other cases, it may be possible to amend existing legislation to cover the PRTR Protocol's requirements.

In the box below the experiences from existing PRTR systems on the regulatory framework for data collection and dissemination:

In the **United Kingdom**, regulators have a duty to maintain public registers of specified information regarding pollution of the environment by “permitted activities.” The modalities and requirements for public registers are set out in regulations. British pollution control legislation also enables regulators to require operators to submit to them specified information and to compile information on releases, waste and the destination of such waste, and to provide such information in the manner specified.

The **Czech Republic** similarly established its Integrated Pollution Register via provisions in the 2002 Act on Integrated Pollution Prevention and Control that oblige the Ministry of the Environment to establish and maintain such a register as well as the users of registered substances to report certain data to the Ministry. The Act also authorizes the Ministry to lay down implementing regulations stating the manner of determining and assessing the reported substances and the manner of keeping the integrated pollution register “so as to ensure the uniformity of the information system in the area of the environment”.

In the U.S., the Toxics Release Inventory (TRI) was established by the U.S. Congress under section 313 of the *Emergency Planning and Community Right-to-Know Act* of 1986 (EPCRA). TRI reporting began for calendar year 1987, with the first reports due by July 1st, 1988. This information was made publicly available by EPA in June of 1989. This annual cycle of facilities reporting to EPA's TRI Program, and EPA compiling and making the information available to the public has continued ever since. A major change in the types of information required to be reported under TRI regulations occurred in 1990, with passage of the *Pollution Prevention Act* (PPA). In recognizing the potential of the TRI to be a powerful pollution prevention tool, the authors of the PPA expanded the information required to be reported by facilities under EPCRA Section 313 to include information specific to source reduction and preferred waste management techniques. For a given chemical this additional information includes the quantities of the chemical that were recycled, used for energy recovery, or treated at the facility or elsewhere. The PPA also *requires* reporting of any source reduction practices (e.g., process modifications, substitution of raw materials) implemented at a facility during the reporting year. Data fields were added to the TRI reporting Form R for these additional required data elements.

IV. Mandatory vs. voluntary reporting

- 1 Will PRTR reporting be mandatory or voluntary?
- 2 Given local conditions and existing government-industry relations, what are the potential advantages and drawbacks of each?
- 3 If PRTR reporting will be voluntary, is there likely to be a sufficiently high level of reporting so that an adequate database of releases and transfer of pollutants will be achieved?

The decision whether to make PRTR reporting mandatory or voluntary should be taken by Governments during the early design phase of the register. The two systems are not mutually exclusive and can be partially applied together.

A common approach, for countries who are in the first phase of pilot testing the national PRTR at national level, is to set the reporting requirements on a voluntary basis.

Voluntary systems require some form of prior agreements between the selected reporting industries/operators and the collecting authority, such as the types of releases and transfers covered, frequency of reporting (e.g. annually) as well as the means and format for reporting.

Once the PRTR system has been tested and is running at national level, governments can apply mandatory reporting requirements: every operator, facility, industry which is above the selected thresholds (number of employees or quantity of specific substance used, handled or transferred) must report (e.g. annually). This concept represents the basis of a **mandatory system**.

The most important difference is that, once reports are submitted to the national authority, if retained necessary and according to specific rules made clear before the reporting period, the same authority can apply appropriate enforcement measures to reporters, as well as officials responsible for the registration acting in bad faith, fraudulently or negligently. Meanwhile, dealing consistently with non-reporters (or partial reporters) in a voluntary system may be difficult to arrange.

Considering that most governments have subscribed to *Agenda 21* in which the **public right-to-know**, about risks posed by pollution, is clearly stated, national governments will probably wish to ensure that any PRTR data are analysed and placed into a consistent and coherent form for public review. This may be somewhat easier if the data are reported mandatorily in a form which enables government to easily provide appropriate data to the public. In a mandatory system, claims of business confidentiality by reporters can be handled in terms of national law relating to this topic; for example, in the United States, a generic entry of chemical identity is substituted when a claim of confidentiality is

allowed. In that way, the PRTR data are complete and confidentiality is preserved. In paragraph VIII we will come back to confidentiality claims.

The majority of PRTRs involve mandatory reporting for point sources based on reporting thresholds or other criteria. **Over time, countries that began with a voluntary PRTR reporting programmes have changed to mandatory reporting.** Officials have often noted that mandatory requirements tend to provide more consistent and valid reported data. It has also been frequently noted that when reporting was changed from voluntary to mandatory, the reporting ratio increased significantly. Mexico is the only country with a mixed PRTR programme: a voluntary programme for a number of chemicals of concern and mandatory reporting for a few priority air contaminants.

V. PRTR Competent Authority

- 1** If PRTR reporting will be mandatory, is there sufficient legal authority under existing laws to require industry to submit PRTR data?
- 2** If not, will a new law or regulation need to be created?
- 3** What government agency or agencies are empowered under existing laws to implement a PRTR system?

In most countries, **the environment ministry will hold overall responsibility for setting up the relevant structure.** However, many other ministries are likely to also be involved in the collection and management of relevant data, i.e. ministries of agriculture, energy, health or transport. In such cases, **structures for inter-ministerial coordination will be needed to ensure quality of data.**

Some countries may decide to create a single institution responsible for the collection, validation and dissemination of PRTR data. In other cases, it may be possible to maintain existing institutional structures by using, redefine or enforce already existing monitoring and control tasks as well as unify the methodologies used for collecting and validating the data, in order to achieve a unique database.

VI. Ensuring compliance

- 1 If reporting will be mandatory, how will it be enforced?
- 2 What mechanisms or linkages with existing regulations could government authorities use to enforce compliance with PRTR reporting?
- 3 What penalties for non-compliance should be considered?
- 4 If reporting will be voluntary, what strategies or incentives will be used to encourage facilities to report?

Each country will need to decide the best way to enforce the reporting obligations, including the requirement for owners and operators to assure the quality of the information that they report. This could be achieved through, for example, environmental protection agencies or other administrative systems related to the enforcement of environmental obligations.

Performing compliance assurance doesn't have to be necessarily perceived as an admonition or mere sanction: it can help facilities to better understand their reporting requirements and improve their ability to submit high quality information.

For example, when reporting errors are identified by an inspector, records for the facility can be updated to resolve the errors. In this way, staff's understanding of methodologies and the quality of data they report to the PRTR in the future will be improved.

Enforcement actions deriving from compliance mechanisms can result in facilities providing data in a more timely fashion. Thus, PRTR data are reported on time, published datasets are more complete and the quality of reported data can be reviewed prior to publication (OECD, 2008).

Also, maintaining high quality data allows PRTR data to be used for all intended applications and can be more readily harmonised with data from other PRTRs, without unreasonable concern for uncertainties in analytical results.

Compliance mechanisms can prevent or address non-compliance with PRTR regulations and reporting requirements, including:

- Failure to report;
- Failure to report for one or more chemicals;

- Delayed submission of reports;
- Reporting incomplete data;
- Reporting inconsistent or miscalculated data.

Compliance mechanisms may also take the form of compliance promotion, compliance monitoring, or enforcement.



For both voluntary and mandatory PRTRs, **compliance promotion** may help facilities follow reporting procedures and submit high quality data to a PRTR. This strategy may be effective for avoiding non-compliance caused by a lack of knowledge or a lack of capacity to comply with PRTR reporting requirements. In addition, a country may consider providing incentives to encourage facilities to report to a PRTR, e.g. green certificate, eco-labelling, tax reduction.



For PRTRs with mandatory reporting mechanisms, **compliance monitoring** can be used to detect non-compliance through instruments such as inspections, audits, off-site record reviews, and regular meetings between inspectors and operators to discuss existing and potential compliance issues.



Countries may also consider issuing penalties for non-compliance, resulting in **enforcement measures** or administrative and/or penal sanctions designed to punish and return the violator to compliance and deter others.

The introduction of both types of sanctions would create a gradual system in the use of sanctions, however they must be proportional. A repeated violation of the reporting obligation or the submission of false data may be considered more seriously than the mere delay in delivering information.

National authorities will need to decide the best way to enforce the reporting obligations. To select which mechanisms will be used, countries should identify first the existing regulations to enforce PRTR compliance and then what enforcement responses are possible under those regulations. The OECD Council on Implementing PRTRs recommends that a compliance mechanism, to best meet the needs of the goals and objectives, should be agreed on by affected and interested parties.

VII. Potential linkages to other reporting requirements

- 1 How will the new PRTR system relate to existing reporting requirements?
- 2 How might duplication of requirements be avoided or minimized in the design of the PRTR system?
- 3 Are there opportunities to rationalize and streamline environmental reporting requirements through the PRTR system?
- 4 Could it be possible to integrate current reporting on releases to separate environmental media into a single PRTR database covering releases and transfers across all media?

Countries that are Parties to MEAs, such as conventions, treaties and protocols, are more likely to have a regulatory framework on chemicals management that addresses the various stages of

- the chemical life cycle, such as



production,



storage,



transport,



use and



disposal

- or any law/regulation that classify chemicals according to risk to human health and the environment.



**MINAMATA
CONVENTION
ON MERCURY**



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Countries that are complying with such treaties, or have established a monitoring system of emissions to air or tracking chemicals and other hazardous substances, usually present two common structures at national level, such as:

- (a) environmental permits;
- (b) compulsory self-monitoring and reporting.

Through environmental permits to operate, governments can obtain the required information and set environmental parameters to be followed by industries and operators. There are also cases of established self-monitoring programmes, e.g. through direct measurements, that industries have to comply with.

VIII. Data confidentiality issues

- 1 What will be considered legitimate data confidentiality claims?
- 2 What procedures will be used to handle data claimed as confidential that will adequately protect business interests while maintaining the integrity of the PRTR database and its intended uses?

Reporting operators must be provided with detailed guidance material on:



thresholds;



frequency of reports; and



definitions;



conditions for claiming some data as confidential.



units of reportage;

The issue of confidentiality claims needs to be carefully considered prior to testing or implementing a PRTR data system.

Past experiences from OECD countries that have developed criteria for dealing with such claims, showed that, for example, if a claim of confidentiality for data is made, the claimant must indicate the information that is commercially sensitive and provide evidence that its disclosure might cause the claimant industrial or commercial harm.

Under the law governing the US Toxic Release Inventory, reporters can claim confidentiality only for chemical identity; information must be submitted to substantiate a trade secret claim, and a highly ranked corporate official must sign the claim. The US Environmental Protection Agency can levy penalties on corporate officials if the claims are deemed to be false. When confidentiality claims are allowed, the PRTR database is filled in with generic information related to the data points held as confidential. The United Kingdom avoids the confidentiality issue in practice because reports are required for all regulated chemicals.

Where national laws or regulations already govern how confidential business information is to be handled, these should be applied when a PRTR is to be implemented. Affected and interested parties should participate in recommending how confidentiality claims are

to be handled consistent with the goals of the PRTR system chosen. If some or all the PRTR reporting is to be done on a voluntary basis, then any data reporters view as confidential will probably not be reported. There seems no way to estimate how much information would be lost to the PRTR in this situation since no one will have an aggregate view of what data were withheld.

All the data that is reported by operators in accordance with Article 5 of the E-PRTR Regulation will appear in the E-PRTR with the exception of that data that is kept confidential in accordance with to the exhaustive list of reasons set out in Article 4(2) of Directive 2003/4/EC. The decision as to which data will be kept confidential is taken by the competent authorities of the Member States, possibly upon an indication to that effect by the operator. The data that the competent authority of a Member State classifies as confidential will not be transmitted to the European Commission. The European Commission will not check the classification of data transmitted to it by Member States where that information has not been classified as being confidential. All decisions on confidentiality are therefore taken by the competent authorities of the Member States in accordance with the E-PRTR Regulation.

In general, all grounds of confidentiality listed in Article 4(2) of Directive 2003/4/EC can be invoked to withhold any type of information reported by operators under Article 5 of the EPRTR Regulation. An exception applies to information on emissions/releases. Information on emissions/releases may only be kept confidential for the reasons mentioned in Article 4(2)(b), (c), and (e) of Directive 2003/4/EC. Information on emissions/releases may, thus, not be withheld on the grounds of Article 4(2)(a), (d), (f), (g) or (h) of Directive 2003/4/EC nor on any grounds other than those set out in Article 4(2)(b), (c), and (e) of Directive 2003/4/EC. No exception applies to information on off-site-transfers. In this case all of the grounds for confidentiality set out in article 4(2) of Directive 2003/4/EC may be considered. This consideration does not always mean that information will necessarily be treated confidentially. When considering the confidentiality of a particular type of information, the competent authorities of the Member States shall interpret the grounds for confidentiality in a restrictive way and should weigh the public interest served by disclosure against the interest served by confidentiality.

The box below shows Directive 2003/4/EC, Article 4(2) relating to E-PRTR confidentiality of information in force each EU Member State:

[...]

“2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;

(b) international relations, public security or national defense;

(c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;

(e) intellectual property rights;

(f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law;

(g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;

(h) the protection of the environment to which such information relates, such as the location of rare species.

The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment.

Within this framework, and for the purposes of the application of subparagraph (f), Member States shall ensure that the

requirements of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data are complied with (OJ L 281, 23.11.1995, p.31).”

IX. Conclusion

Through this factsheet we have learned how the legal assessment should identify and determine the specific legal responsibilities of both governmental institutions and reporting operators and industries. Setting a specific legal framework, or integrating PRTR provisions into existing environmental legislation, will provide institutional legitimacy and solid basis for quality of reported data, in particular when a mandatory PRTR reporting system is in place at national level.

Moreover, ensuring that PRTR reporting is not unnecessarily duplicative of existing requirements is very important. It will prevent economic operators to provide additional and unnecessary reporting requirements, and help to create a supportive environment at national level for the implementation of a PRTR.