



Chemicals Regulation and Product Stewardship

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REACH: AG opinion on SVHCs in articles

A recent opinion from Advocate General Kokott of the Court of Justice of the European Union concludes that, for articles assembled from component articles, the notification and information obligations for Substances of Very High Concern (SVHCs) apply to each component article and not just the assembled article. This conclusion is contrary to current ECHA guidance and, if the Court adopts the Advocate General's opinion, this may place additional administrative burdens on product manufacturers, importers and suppliers.

The question for the Court of Justice of the European Union

For an article that is composed of several elements, which amount to articles themselves, do the thresholds for the notification of SVHCs and the supply of information obligations (Articles 7(2) and 33 of REACH, see below) apply to the component articles or the assembled article?

The history: differing approaches by Member States

Under Article 7 of the REACH Regulation, producers and importers of articles must notify ECHA of SVHCs present in articles in quantities over 1 tonne per producer or importer per year, where the substance is present in the articles above a concentration of 0.1% weight by weight. Suppliers of articles with SVHCs at the same concentration have duties under Article 33 to provide information to recipients, and to consumers upon request.

Since the EU REACH Regulation came into force in 2007, there has been disagreement amongst the Member States on whether the 0.1% w/w threshold should apply to the constituent components of an assembled article or to the assembled article as a whole.

The European Commission's view has been that the 0.1% w/w threshold applies to the assembled article. This view also has the support of the majority of the Member States (the majority view), and is reflected in current ECHA Guidance on Substances in Articles. The Guidance, however, expressly notes the dissenting views of Austria, Belgium, Denmark, German, Sweden and France.

The dispute

Last year, two French trade federations challenged a 2011 French Ministerial Notice stating that the threshold applied to each component (the dissenting view). The French Council of State referred the case to the Court of Justice of the EU for a preliminary ruling.

Written observations were submitted by the six dissenting Member States and by Norway, Greece, Ireland and the Commission.

The REACH requirements

Article 7(2) – Any producer or importer of articles shall notify the European Chemicals Agency (ECHA) if an SVHC is present in those articles above a concentration of 0.1% weight by weight (w/w) and the substance is present in those articles in quantities totalling over one tonne per producer or importer per year.

Article 33 – Suppliers of articles containing an SVHC above a concentration of 0.1% w/w shall:

- (1) provide the recipient of the article with sufficient information, available to the supplier, to allow safe use of the article, including as a minimum the name of that substance
- (2) provide that same information to a consumer, on request, free of charge, within 45 days

Article 3(3) defines an "article" as an object which during production is given a special shape, surface or design which determines its function to a greater degree than does its chemical composition.

Illustrative examples...

It's useful to think about it in terms of the examples given in AG Kokott's opinion:

A bicycle's handlebars

A bicycle might have plastic handlebars that contain plasticisers on the SVHC candidate list. The 0.1% w/w threshold might be reached for the handlebars, but may not be for the bicycle as a whole.

Seats within an aircraft

The seat covers might contain SVHCs. Does the 0.1% w/w threshold apply to the cover, the seat, or the aircraft as a whole?

The opinion

AG Kokott concluded that the thresholds applied to the components of an assembled article (the dissenting view).

The Advocate General's opinion is not binding; it merely provides an opinion for the Court to consider in due course. However, it is often the case that the Advocate General's opinion is followed by the Court in its final ruling.

If the Court of Justice follows the opinion, then ECHA's current guidance will require significant amendment and all importers, producers and suppliers of assembled articles will need to reconsider their current supply chain information. They will need to take steps to ensure that they comply with the notification and information obligations for components as well as assembled articles.

What action should you take now?

- Watch this space for the Court of Justice's ruling
- Review your supply chain communications and information gathering procedures to establish whether you have the data you need at component level. Could you meet the requirements of the enhanced standards suggested in the Advocate General's opinion?

AG Kokott's conclusions:

- (1) The **producer** of an entire article consisting of component articles which, despite being integrated into an entire article, retain a shape, surface or design of their own, but were made or assembled by other producers, is required to notify ECHA if a SVHC is present in the **entire article** above a concentration of 0.1% weight by weight (w/w).
- (2) The **importer** of an entire article consisting of component articles which, despite being integrated into an entire article, retain a shape, surface or design of their own is required to notify ECHA if a SVHC is present in **a component article** above a concentration of 0.1% weight by weight (w/w).
- (3) The **supplier** of an entire article consisting of component articles which, despite being integrated into an entire article, retain a shape, surface or design of their own is required to provide information to recipients and, on request, consumers under Article 33 of the REACH Regulation on a SVHC if it is present in **a component article** above a concentration of 0.1% weight by weight (w/w) and relevant information is available to the supplier.

A copy of the opinion can be found [here](#).

What does this mean for business?

If the approach contained in the Advocate General's Opinion is adopted by the Court, here are some of the potential implications.

More work?

The Commission argued that the application of the 0.1% w/w threshold to components was disproportionate and an unnecessary increase in the administrative burden for businesses.

The Advocate General was not sympathetic. She stated that, in order to establish the concentration in the whole article, the concentration in the component articles needs to be determined in any event. It should not be disproportionate or unduly onerous to then report that available information to ECHA.

However, one only needs to look at the Advocate General's own example to cast doubt on her assumption. Returning to the aircraft example, the seat cover is probably less than 0.1% of the weight of the assembled seat, and certainly less than 0.1% of the weight of the aircraft. Whatever the concentration of the SVHC in the seat cover, the threshold for SVHCs will not be met in the assembled article. Previously, importers of a heavy assembly with lightweight components would not have needed to determine the SVHC concentrations in those components for the purposes of Article 7.

Implications

- The number of notifications to ECHA is likely to increase.
- Producers and importers may make greater use of the exemptions available, for example by demonstrating that exposure to the SVHC is not foreseeable during the lifecycle of the product.

Increased uncertainty for suppliers?

The supplier's information communication obligations only extends so far as the information is "available", and a supplier has no obligation to carry out its own tests.

Unanswered questions What level of effort is expected of the supplier to obtain the information? Is there a due diligence test or is ignorance a valid excuse?

Inconsistencies between producers and importers?

Producers in the EU, assembling products from component articles provided by third parties, must notify ECHA at the assembled article level, whereas importers notify at component level. The logic is that suppliers to those EU producers will have already notified for those components.

Unanswered questions AG Kokott is silent on whether importers must, in addition to the components, also notify for the assembled article. Nor does the opinion address the situation where a producer assembles an article in part from purchased components and in part from its own production. What about sub-assemblies? The full complexities of product manufacturing are not explored in the opinion.

More uncertainty for importers?

Importers of an article have to consider what constituent elements made up the article and whether any of these elements constitutes an article. The opinion leaves uncertainty around where the line is drawn.

Unanswered questions Are importers able to identify each and every component article in a complex assembly? How easy is it to identify every constituent article in an assembled aircraft?

Our team has significant experience of Chemicals and Product Stewardship issues. Recent examples include:

- Advising a manufacturer on product liabilities and responsibilities through the supply chain in relation to a phase-out substance under REACH;
- Advising a consortium on one of the first REACH data-sharing disputes before ECHA;
- Advising a product manufacturer on High Court litigation arising from the environmental consequences of the supply and use of its products and the subsequent escape of bio-accumulative substances;
- Advising a UK manufacturer on a police investigation by another Member State into the supply of its products into that Member State's market; and
- Defending a UK importer in one of the first NMO investigations into non-compliance with the RoHS Directive following the supply of non-compliant products to the UK market.

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