



Chemicals Regulation and Product Stewardship

September 2015

REACH: CJEU judgment on SVHCs in articles

On 10 September 2015, in case C-106/14, the Court of Justice of the European Union (CJEU) gave an important ruling on the notification and information duties applicable to the producers and importers of articles, under the REACH chemicals Regulation. Where such producers and importers are dealing in more than 1 tonne per year of any Substance of Very High Concern (SVHC), and the SVHC is present in articles at over 0.1% by weight, the Court held that the notification and information duties applied to each individual component “article” as defined in REACH, and not just to the whole assembled or finished “article”.

This conclusion is contrary to existing guidance from the European Chemicals Agency (ECHA), which will now be revised, and it has wide implications for makers and importers of articles and components.

We expect this ruling to result in more pressure on non-EU producers of articles to supply better and more detailed information on SVHCs in individual components, to enable their EU importer customers to comply with the revised obligations.

The question for the Court of Justice of the European Union

“...the referring court asks, in essence, whether, in the case of a product composed of one or more articles within the meaning of Article 3(3) of the REACH Regulation, Articles 7(2) and 33 of that regulation must be interpreted as meaning that the concentration threshold for a substance of very high concern of 0.1% weight by weight referred to in those provisions must be established in relation to the total weight of that product.”

The Court's answer

“It follows from all the foregoing considerations that the answer to the question referred is as follows:

- Article 7(2) of the REACH Regulation must be interpreted as meaning that, for the purposes of application of that provision, it is for the producer to determine whether a substance of very high concern identified in accordance with Article 59(1) of that regulation is present in a concentration above 0.1% weight by weight of any article it produces and, for the importer of a product made up of more than one article, to determine for each article whether such a substance is present in a concentration above 0.1% weight by weight of that article.
- Article 33 of the REACH Regulation must be interpreted as meaning that, for the purposes of application of that provision, it is for the supplier of a product one or more constituent articles of which contain(s) a substance of very high concern identified in accordance with Article 59(1) of that regulation in a concentration above 0.1% weight by weight of that article, to inform the recipient and, on request, the consumer, of the presence of that substance by providing them, as a minimum, with the name of the substance in question.”

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 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 had the support of the majority of the Member States (the majority view), and is reflected in current ECHA Guidance on Substances in Articles. The current Guidance, however, expressly notes the dissenting views of Austria, Belgium, Denmark, German, Sweden and France.

The dispute

In 2014, 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. That dispute has now been resolved by the Court in favour of the dissenting Member States.

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...

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. The CJEU ruling suggests that the 0.1% w/w threshold test should be applied to each component part such as a seat, rather than the aircraft as a whole.

AG Kokott's Conclusion in a preliminary opinion

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

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.

The Court's conclusion

The CJEU largely endorsed AG Kokott's opinion, predominantly on the same reasoning. The only significant difference is with regard to suppliers who will always be required to inform recipients of SVHCs present in qualifying amounts (rather than having to do so when the information is available).

The Court's conclusions

- (1) A **producer** must determine whether an SVHC is present in a concentration above 0.1% weight by weight (w/w) of any article it produces. The producer's duty to notify articles is not applicable to component articles which were made by a third party. As such, 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 an 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 determine if an SVHC is present in **a component article** above a concentration of 0.1% weight by weight (w/w) and must notify ECHA accordingly.
- (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 inform recipients and, on request, consumers under Article 33 of the REACH Regulation if an SVHC is present in **a component article** above a concentration of 0.1% weight by weight (w/w) by providing them, as a minimum, with the name of the SVHC in question.

What does this mean for business?

These are some of the potential implications.

- 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 Court was not swayed by this argument. It held that "the fact that it can be difficult for importers to obtain the required information from their suppliers established in non-EU countries" will not alter their duty to notify ECHA.
- However, one only needs to look at the Advocate General's examples to see the implications. In an aircraft, 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 large assembly with smaller components would not have needed to determine the SVHC concentrations in those components for the purposes of Article 7.
- With regard to the duty to inform under Article 33, the court commented that the requirement to pass on the name of the SVHC present in qualifying amounts in a component article was minimal in nature and so could not be regarded as an excessive burden.
- The idea is that the necessary information will be made available by notifications from producers and/or importers and that suppliers will provide an unbroken chain of information allowing all operators in the supply chain to take appropriate risk management measures.
- 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.

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.
- It is importers rather than producers who will feel the impact of this judgment. Importers will need to push non-EU suppliers to provide information or commission analysis on component articles themselves.
- The judgment suggests that importers will only need to notify for component articles and not for the assembled, complex product. However, prudence would dictate notifying for the assembled complex product as well.

More uncertainty for importers?

- Importers of an article have to consider what constituent elements make up the article and whether any of these elements constitutes an article.
- Importers need to be able to identify each and every component article for which they are responsible. This is not a straightforward exercise.

What action should you take now?

- Review your supply chain communications and information gathering procedures to establish whether you have the data you need at component level. Can you meet the requirements of the enhanced standards required by the court?
- ECHA has said that it will commence the process of revising elements of its guidance, so watch out for the publication of updated guidance.
- If you are a non-EU supplier of component articles to the EU, prepare to be able to supply clear and accurate information on SVHC content per component to your EU customers.

Chemicals regulation and product stewardship update webinar

As there have been a number of significant regulatory and commercial developments in the area of chemicals regulation and product stewardship, we will be aiming to provide a short round up of these developments at a lunchtime webinar on **11 November 2015**, in conjunction with Paul Ashford, Managing Director of Caleb Management Services/Anthesis.

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