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Contents

What constitutes an "article" under REACH?

Whether or not the obligations under Article 7(2) and Article 33 of REACH in this example apply depends on how the 0.1 % SVHC content threshold is calculated, as shown in the table below.[10]

Member state	Approach	SVHC obligations
Austria, Belgium, Denmark, France, Germany, Sweden, Norway	Components within an article are considered separate articles	Yes: Apply to metal buckle only (SVHC content above 0.1 %)
Other member states, Commission, ECHA	Components within an article are not considered separate articles, ie "complex" articles are considered only one article	No: Do not apply for the whole belt (SVHC content below 0.1% for the whole belt)

THE POSITION OF THE AG

With respect to Article 7(2), the AG contends that

- Where an entire article is manufactured in the EU, the producer has notification responsibilities in the context of the entire article. The assumption is that any notification obligations linked to the individual components (which are articles in their own right) will have already been discharged earlier in the supply chain, either by the manufacturer of the component in the EU, or the importer, if the component was manufactured outside the EU
- Where an entire article is manufactured outside the EU, importers and suppliers have notification responsibilities with respect to the individual components.

In relation to Article 33, the AG has adopted the view that if a person supplies an entire article consisting of individual components (which are articles in their own right), they are required to provide information to recipients and, on request, consumers, about the presence of SVHCs in any component above the 0.1% w/w threshold, to the extent that the relevant information is available to the supplier.

The AG's Opinion, for the most part, appears to support the "Once an Article – Always an Article" approach adopted by the dissenting member states (ie the proportion of the SVHC is to be calculated with reference to the individual component articles). While the AG's Opinion with respect to Article 7(2) gives the impression that this is not the case with respect to articles manufactured in the EU, there is still an emphasis on notification obligations in relation to individual components being discharged at the manufacturer or importer level. The AG has additionally limited the scope of Article 33 so that it only applies to the extent information is available to the supplier. It would appear that the AG's caveated approach to the notification obligation under Article 33 stems from a finding that the provision in its current form is potentially too burdensome on suppliers. According to the AG

> "At first sight, that provision seems to mean – at least on the basis of some language versions, such as the German or the English version – that the supplier must in any case – even if that information is not available to him – notify, as a minimum, the name of the candidate substance in question. If the supplier cannot obtain sufficient information on the substance from its supplier, he would therefore in principle have to examine the article to ascertain whether the candidate substances are present in the relevant concentration.
>
> Such a duty of examination appears problematical above all where exposure can be excluded, but also in the case of particularly small quantities of supplied articles."

With a view to avoiding imposing unreasonable burdens on suppliers, the AG recommends that the obligation to notify the name of the SVHC be made conditional upon that information being available to the supplier. It would seem that this interpretation is not ruled out by the English and German translations of REACH and, according to the AG, is more plausible on a reading of the French translation.

The AG does, however, make it clear that suppliers without knowledge of the presence of SVHCs in an article cannot simply ignore the risks posed by their presence, or make claims that SVHCs were not present. According to the AG, such suppliers have a duty to acknowledge that the relevant information was

[10] See http://www.intertek.com/uploadedFiles/Intertek/Divisions/Consumer_Goods/Media/PDFs/Sparkles/2011/sparkle595.pdf.

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not available from their supply chain and would still be required to comply with other product safety laws, such as the General Product Safety Directive. [11]

COMMENT

For product manufacturers, it is critical that the longstanding "component versus entire article" debate be resolved as soon as possible. As the retail landscape evolves and distance-selling becomes more prevalent, the practical and commercial realities associated with product testing and the provision of relevant information to downstream suppliers places an increasing burden on those in the product supply chain. The AG's recommendation to caveat Article 33, if it is accepted by the CJEU, could be perceived as a decrease in the amount of due diligence currently expected of manufacturers in terms of verifying the presence of SVHCs with their suppliers.

In light of the above considerations, it is difficult to predict what the outcome will be and is very much a case of "wait and see". The AG's Opinion is generally authoritative and often indicative of what approach the CJEU is likely to adopt. But in circumstances where it is seemingly at odds with the views of the EU Commission, ECHA and the majority of the member states and appears to undermine the EU's current focus to improve traceability, accountability and safety, the CJEU may be inclined to adopt a different approach to that of the AG. We will report further on this important matter in subsequent editions of *International Product Liability Review*.

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[11] Directive 2001/95/EC of the European Parliament and of the Council 3 December on general product safety.