REACH & CLP Hub Echa's new waste framework Directive database – mission impossible

Tim Becker, REACHLaw senior legal adviser, looks at the Echa database on articles containing candidate list substances under the waste framework Directive.

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An emerging EU legal requirement under the (revised) waste framework Directive (WFD) is worrying article suppliers to the EU market. Many others are not even aware of it. Whether you are selling simple childrens toys, household equipment, complex electronics, super complex aircraft or components thereof – Article 9(1)(i) of the revised WFD of 30 May 2018 potentially covers the entire article world. However, the European Commission did not do a prior regulatory impact assessment.

This article will introduce the new WFD notification requirement for articles containing candidate list substances, address the state of play of the corresponding Echa database under construction and reflect on industry concerns with possible options going forward.

What's the requirement?

Article 9 of Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste (as transposed) will oblige any EU/EEA article supplier to communicate information related to articles containing candidate list substances above 0.1% weight by weight (w/w) pursuant to REACH Article 33(1) to Echa for its new database.

Echa shall provide access to that database to waste treatment operators, and to consumers upon request (see Figure 1). At first glance this doesn't sound so onerous, but a closer look will show otherwise.

The implementation timeline is as follows:

- 4 July 2018 – Directive entered into force;
- 5 January 2020 – Echa database to be established and subsequently maintained;
- 5 July 2020 – member state transposition of the Directive required; and
- 5 January 2021 – first notification deadline for industry, with possible subsequent enforcement by the national authorities.

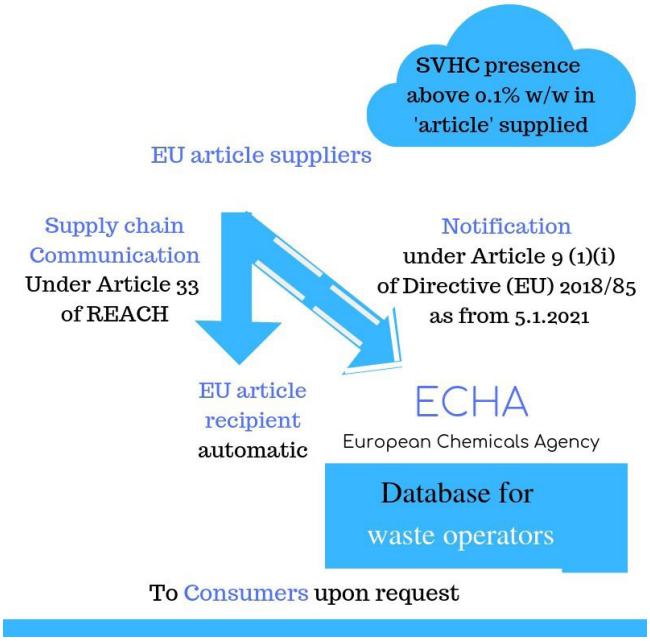

Figure 1. WFD notification and database – complementing REACH Article 33(1).

It is unclear who is going to enforce this new requirement at the national level.

REACH through the backdoor

REACH Article 7(2) already has an existing 'substance-centric' duty for producers and importers of articles containing candidate list substances to notify Echa, but only if they are present in articles above one tonne per legal entity per year.

Also, this duty does not apply if exposure can be excluded or the substance has already been registered for that use. Consequently, the level of notifications has been very

low. By contrast, REACH Article 33(1) and, hence, the new WFD notification requirement, applies where an article containing a candidate list substance in a concentration above 0.1% w/w is supplied to an industrial or professional user, or a distributor.

Information to be communicated pursuant to REACH Article 33(1) includes "sufficient information, available to the supplier, to allow safe use of the article including, as a minimum, the name of that substance".

In its landmark judgment of 10 September 2015 in case C-106/14, the European Court of Justice ruled that assemblies are not 'articles' in terms of REACH, but each component is such an 'article' and remains so when incorporated into the (complex) object – "Once an article, always an article."

> The judgment's practical impact has been tremendous

This means REACH Article 33 is triggered for an assembly supplied, each time the 0.1% threshold is exceeded in a component article, not only with reference to that assembly. Since most of the products are not simple articles but complex objects made up of numerous to millions of components (think of a car, computer or an aircraft), the judgment's practical impact has been tremendous.

Adding to the challenge, Echa and some member states interpret the judgment widely, to the end that it would also require suppliers of complex objects to report the component article(s) containing the candidate list substance each time, when communicating under Article 33. By contrast, various industries argue that the provision of aggregated data at higher levels of very complex objects is fully permissible and sufficient, while being the only meaningful way to communicate (for example, ASD Sectoral Guidance for Substances in Articles under REACH, Version 1 – November 2017). Nevertheless, Echa retains its wide interpretation on REACH Article 33 in its latest plans for the WFD Article 9 database.

The waste dimension

The new requirement is an odd provision in the waste framework Directive, addressing EU article suppliers in the midst of other rules targeting the "prevention of waste" for the purpose of a more circular economy. In terms of recital (38) of the revised WFD, the key rationale appears to be that the waste operators' increased knowledge about "contaminated" products would facilitate waste treatment operations and the cleaning of waste for recycling, thus promoting non-toxic material cycles.

The provision is the EU legislator's first attempt to flow down information on SVHCs in materials and products (articles in legal terms) to the waste stage. Notification and a database were not part of the original Commission legislative proposal, but were added later during the co-decision procedure of the European Parliament and Council. Consequently, there was no prior regulatory impact assessment.

Echa database plans

Last October, Echa presented a first "draft scenario" for its new database at a stakeholder workshop in Helsinki. There were six key elements:

- an article-centric approach (unlike REACH Article 7(2)), that is, information submitted to Echa is structured around articles/complex objects that are supplied in the EU – as opposed to substances;
- duty holders are any (EU) suppliers of articles – including for example, assemblers, distributors/retailers;
- a unique identifier system, generated by Echa, is put in place for each 'item' (article/complex object) to ease referencing in the supply chains and minimise database content;
- information requirements refer to Article 33(1) (as per Echa Guidance on requirements for substances in articles of June 2017);
- all the data (as) received should be made publicly available; and
- streamlined data submission and format.

Echa's analysis of the initial stakeholder feedback received showed that "[...] many stakeholders do not anticipate the use of detailed information from the database by waste operators. There was no consensus as to which level of information is needed, including among waste operators themselves."

Not unsurprisingly therefore, Echa's draft database detailed information requirements of May 2019 foresee far-reaching, mandatory and optional requirements, which go beyond the information required for Article 33(1) purposes – even for the mandatory ones.

In the case of products containing some of multiple SVHCs above 0.1%, the notification would essentially resemble a comprehensive bill of materials (BOM), where the supplied product structure is to be broken down from the highest assembly level to the next ones, until the component containing the candidate list substance is identified.

Various identifiers (including names and codes) should be provided for each assembly, article and mixture/material. According to Echa, all of this information should be fully searchable in order to enable optimised access and used not only by waste operators and consumers, but also actors in the supply chain, NGOs and authorities.

> Article producers and importers in various industries are highly concerned about the ambitious Echa database plan

Industries' 'very high concerns'

Article producers and importers in various industries are highly concerned about the ambitious Echa database plan. If implemented according to the latest concept, the database would have serious and immediate resource implications for them, while the added value for waste treatment operators has not been confirmed or is even completely irrelevant.

A striking example of irrelevant notifications are products sent into space (for example, satellites for telecommunication, navigation or space exploration). At the end of their service life, such products typically burn in the atmosphere or are re-/de-orbited and never come back to Earth. Hence, they do not form part of the circular economy. Nevertheless, such space hardware should be notified to the Echa database to the extent that a corresponding REACH Article 33(1) duty applies, according to the Commission's WFD-responsible DG Environment in response to a Eurospace opinion. Never will any waste operator on Earth draw any benefit from these respective database contents.

Many industry stakeholders consider that the BOM-like Echa database model will not be workable, not least because the required data is not available (for example, SVHC concentrations ranges, EU production flag, article categories/codes and material/mixture categories from supplied components/objects) and cannot be retrieved for legacy products and those generated from long and complex global supply chains – especially from outside the EU due to confidentiality constraints. The protection of business sensitive or security-relevant information is also not accounted for in Echa's current database model.

Conclusions and outlook

The database plans raise a number of legal and practical concerns. It may be useful to remember the general legal principle *impossibilium nulla obligatio est* – no one can be obliged to do the impossible. This argument can also be invoked in the European courts (see, for example, Opinion of Advocate General Wathelet delivered on 11 April 2018, Joined Cases C-622/16 P to C-624/16 P; Judgment of 20 December 2017, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation, C-664/15; Judgment of 3 March 2016, Daimler AG, C-179/15).

Echa has only a couple of months left to design its database. It wants to have at least a 'prototype' ready by early 2020. Following that, industry will need to prepare their notifications during next year. A strong coalition of article manufacturers is now calling for a more sensible database concept following a waste stream-specific approach, based on expert discussions in a chemicals-article-waste cross industry platform.

It is advised to listen to these industry experts and work to ensure that notifications will be practically manageable and usable to some extent for waste treatment operators, while not overloading article industries with an excessive amount of data provisioning. This way, a balance between human health and environment protection objectives and actual industrial needs, capabilities and realities could still be found.

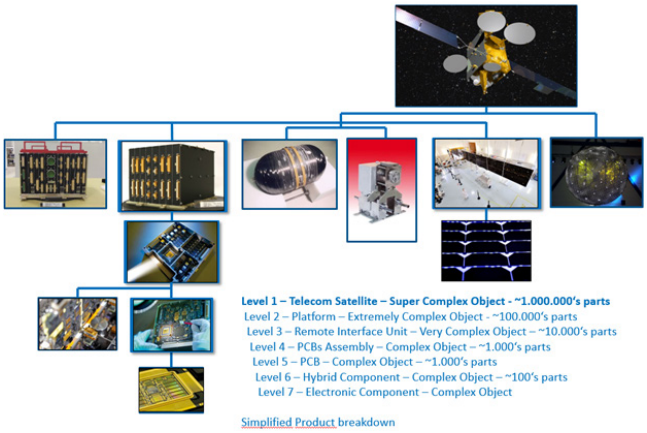

Figure 2: Super Complex Object: Telecom Satellite. Photo © Airbus SAS 2017 – All rights reserved. Title and breakdown: ASD Sectoral Guidance for Substances in Articles under REACH (2017). See hyperlink below for further information.