The "Once an Article, Always an Article" Approach

Reflections on the Advocate General's Opinion on the Concept of "Articles" Under REACH

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OPINION OF ADVOCATE GENERAL KOKOTT delivered on 12 February 2015 in Case C-106/14, Fédération des entreprises du commerce et de la distribution (FCD) and Fédération des magasins de bricolage et de l'aménagement de la maison (FMB) v Ministre de l'écologie, du développement durable et de l'énergie.

I. Introduction

The 2006 REACH Regulation[1] imposes information and notification requirements on importers and producers of "articles" containing substances of very high concern listed on the Candidate List (SVHCs) above a 0.1% threshold. Member State interpretations of the term "article," however, diverge. The specific issue dividing the Member States has been how the threshold should be applied to complex articles incorporating components that separately would also meet the definition of article (so an "article in article," or, as it is called in this note, a "component-article"), such as aircraft, cars, bicycles, motor bikes, lawn mowers, toys, furniture, clothing, machinery, household and industrial appliances, medical devices, and electronics (not all of which are covered by the RoHS Directive's chemical restrictions); some of these articles incorporate hundreds or even thousands of components. Most Member State authorities have concluded that the threshold applies only to the whole article, not separately to its component-articles, but seven dissenting countries[2] have taken the position that the threshold applies to each individual component-article; in the case of a laptop, for instance, the threshold would apply to each of the screen, plastic case, chip, board, wires, etc.[3] This position is also known as "once an article, always an article."[4]

Needless to say, application of the 0.1% threshold to each component would increase the burden of complying with the pertinent REACH obligations. Specifically, the application of the limit value at the level of each individual component requires that companies collect more granular data on all component-articles. Where supply chains are long and complicated and extend around the world, this exercise becomes onerous. It would also limit an importer or producer's ability to switch suppliers of component-articles. In other words, in light of the number of component-articles some products include, how the current disagreement is resolved, matters a great deal.

In April 2014, the Court of Justice of the European Union was asked to rule on the question whether the

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1 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396/1.

2 These countries are Austria, Belgium, Denmark, France, Germany, Norway and Sweden. See http://echa.europa.eu/doc/sia/draft_guidance_req_sia.pdf. In the EU, Germany and France have the largest direct automotive employment with 749,000 and 225,000 jobs in 2010, respectively (with 66,000, 35,000 and 29,000 jobs, respectively, employment in the car industry is also significant in Sweden, Austria, and Belgium.) European Automobile Manufacturers Association (ACEA), the Automobile Industry Pocket Guide 2013, p. 32. The Scandinavian countries are known for their stringent chemical policies, which due to the absence of substantial chemical industry generally do not have significant economic consequences for them. Ragnar E. Lofstedt. Risk versus Hazard - How to Regulate in the 21st Century, *EJRR* (2011), 149-2011. This suggests that the seven dissenting Member States may have different reasons for supporting the "once an article, always an article" theory (see further below).

3 As discussed further below, there is an issue as to whether any or all of these component-articles should be further broken down into smaller component-articles.

4 German REACH & CLP Helpdesk, *Information from the German National Helpdesk on 'Once an Article - Always an Article' Fulfilment of the notification and information obligations concerning candidate substances in articles*, September 2012.

0.1% threshold applies to the article as a whole or to each component-article separately. This question arose in a case pending before the French Council of State ("Conseil d'État") in which two French federations of trading companies are contesting a Ministerial Notice that requires compliance at the level of component-articles. On February 12, 2015, Advocate General Kokott issued her opinion on this issue, in which she endorses the "once an article, always an article" approach.[5] The opinion is important, since the Court, more often than not, follows the substance of such opinions. In this note, the pertinent REACH requirements and the key elements of the Advocate General's opinion are analyzed. We also make some comments on the legal reasoning reflected in the opinion and its implications from the perspective of REACH compliance management.[6]

II. Information and Notification Requirements for Substances in Articles

Pursuant to the REACH Regulation, the European Chemicals Agency ("ECHA") maintains a list of substances of very high concern ("SVHC"), i.e., CMR, PBT, vPvB and substances of equivalent concern, such as endocrine disrupters. This so-called "Candidate List" currently includes 161 substances, and is regularly expanded, typically in June and December of each year.

Listing of a SVHC on the Candidate List may trigger information and notification requirements for suppliers of articles containing such a substance. These requirements are as follows:

- ***Notification***:[7] The producer or importer of an article must notify to ECHA the presence of a listed SVHC in articles if the concentration exceeds 0.1% by weight (w/w) and the total volume of the SVHC is equal to or more than 1 ton per year. A producer or importer is exempt from this notification requirement if the substance has already been registered for the relevant use in articles or if there is no exposure during normal or reasonably foreseeable conditions of use, including disposal.
- ***Information***:[8] A supplier of an article, which is defined to include a producer, an importer, and a distributor, must provide information on safe use to customers and, upon request, to consumers, if the concentration of the listed SVHC exceeds 0.1% by weight (w/w). This information must, at a minimum, include the name of the listed SVHC.

Given that there is no consensus among authorities as to whether this threshold applies to the article as a whole or to each component separately, producers and importers of articles have had a hard time to manage REACH compliance.

III. Is a Component-Article Also Itself an Article?

The REACH Regulation 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."[9] There is no question that a component that is separately placed on the EU market and meets the definition of article, is an article that could trigger REACH obligations. The issue is, however, whether component-articles that are not separately placed on the EU market, but only as part of a larger article, are also articles for purposes of the REACH Regulation.

The Advocate General reasons that the REACH article definition does not distinguish between standalone articles and articles integrated in a larger article; an article no longer qualifies as such only once it becomes waste, since waste is explicitly excluded from the scope of the REACH Regulation. Thus, according to the Advocate General, a component is an article if, once integrated into a larger product, it "retains a shape, surface or design of its own."[10]

This criteria, however, would not appear to provide any relevant limitation. Under the REACH Regulation, all products, except if exempt, are either sub-

5 The Advocate General's opinion is available at: http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=162239&occ=first&dir=&cid=22499

6 For further discussion of some of the key issues relating to the substances in articles, see L. Bergkamp (ed.), *The European Union REACH Regulation for Chemicals - Law and Practice*, Oxford University Press, 2013.

7 Art. 7.2, REACH Regulation.

8 Art. 33, REACH Regulation.

9 Art. 3.3, REACH Regulation.

10 Opinion, para. 36.

stances (or mixtures of substances) or articles. Thus, the concept of articles would cover all non-exempt products, except substances and mixtures, which, in turn, would mean that once substances are converted into articles, they remain articles once incorporated into a larger product. It is illuminating to compare this interpretation to the RoHS Directive's rule: under the terms of the RoHS Directive, the chemical restrictions apply to each "homogeneous material" that is part of an electronic product,[11] but only as a result of an explicit amendment of this legislation.[12]

Based on the remarkable proposition that Annex XVII of REACH is a separate regime and has little to do with the article definition, the Advocate General rejects the counter-argument that restrictions imposed on articles explicitly refer to "parts" where they apply to the whole article as well as its component-articles (see, e.g., the use of the phrase "articles or any parts thereof" in the cadmium and dimethylfumarate restrictions referenced in the opinion, as well in the proposed restrictions for DecaBDE[13] and PFOAs[14]). This piece of evidence is deemed "*simply* (sic!) of *no particular importance* for the interpretation of provisions of the REACH Regulation that are not directly connected with that annex" (emphasis supplied), although there is no separate definition of the term "article" for purposes of Annex XVII.[15] Under the definition as interpreted by the Advocate General, articles would come into being a level up from homogeneous materials, i.e. very early in supply chains.[16] Consequently, complex articles would include numerous component-articles, to each of which the REACH threshold would apply.

Although the Advocate General seems to understand this consequence, she discusses it only superficially. As a general rule, a component-article does not lose its function once it is integrated in a larger one, although that function might change. To the contrary, as the Advocate General notes, many components, such as the handlebars of a bicycle, perform their function only once they are integrated in a larger article. That argument, however, could also be used to support the opposite conclusion, namely that a component-article is not an article because it does not yet perform a "function," which implies that whatever "special shape, surface or design" it may have "cannot determine its function to a greater degree than does its chemical composition," as the definition requires. In any event, according to the Advocate General, as a general rule, an article that is integrated into a larger article continues to be a separate article, because it retains a shape, surface or design of its own that is more relevant than its chemical composition. As the Advocate General explains:

> "*Only if, when an article is integrated into an entire article, it loses any shape, surface or design of its own which determines its function to a greater degree than does its chemical composition is it no longer possible to identify a component article. In practice, however, such cases are probably of minor importance. And it would always have to be considered, in relation to possible examples, whether the original objects were actually articles and not substances.*"[17]

She does not explain why one would have to consider whether the "original objects" were articles and not substances, but the reference to substances suggests that one would have to go back all the way to the first moment a substance became an article. Of course, the parts procured by an article manufacturer may themselves be composed of multiple articles; this requires that an entire article should be traced back to all of its initial, most basic constituent component-articles, i.e. to the point at which one or more substances or mixtures were converted to an article. For any complex article, such as a car or electronic equipment, this would likely involve a complicated analysis that may require that one traces parts many steps back in the supply chain until the point they first became articles. None of these tremendously complex

11 Article 4.2, Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (recast) [2011] OJ L174/88.

12 Cf. Commission Decision 2005/618/EC amending Directive 2002/95/EC of the European Parliament and of the Council for the purpose of establishing the maximum concentration values for certain hazardous substances in electrical and electronic equipment [2005] OJ L214/65.

13 ECHA, "Annex XV Restriction Report – Proposal for a Restriction – Bis(pentabromophenyl) Ether," version 1, 1 August 2014.

14 German and Norwegian Competent Authorities, "Annex XV Restriction Report – Proposal for a Restriction –, Perfluorooctanoic acid (PFOA), PFOA salts and PFOA-related substances," version 1, 17 October 2014.

15 Opinion, para. 52.

16 ECHA, Guidance on Requirements for Substances in Articles, version 2, April 2011, pages 41 and following.

17 Opinion, para. 35.

practical issues are discussed in the Advocate General's opinion.

IV. Should the 0.1% Threshold Apply To The Whole Article Or To Each Component Separately For Purposes of Determining Whether The SVHC Notification Requirement Is Triggered?

To answer this question, the Advocate General does not merely apply the concept of article as interpreted by her, but engages in further analysis of the definitions of "producer" and "importer." Remarkably, the answer differs for producers and importers, as if the article definition itself (or the related notification requirement) is a function of whether the article is manufactured within the EU or imported into the EU. In the Advocate General's opinion, the 0.1% limit applies at the level of the article as a whole for EU producers and at the level of each component-article for importers.

1. Obligations of Producers of Articles

A producer of a complex article assembles components supplied by third parties or manufactured by itself. Under REACH's definition of the term "producer," the Advocate General notes, the producer of the complex article is *not* also the producer of all components supplied by third parties; it can only be viewed as the producer of the components it made and of the assembled complex article. Therefore, a producer would have to notify ECHA if a listed SVHC is present in concentration higher than 0.1% in the whole article (and in any component-article that it made).[18] To support this argument, she argues also that it is "not necessary" to call on the producer of the complex article to report also SVHCs in component-articles, because the producers or importers of such component-articles should already have notified. Thus, the Advocate General promulgates an additional exception to the relevant REACH provision for substances previously *notified*, although REACH makes only an exception for substances previously *registered*.

An important issue, which the opinion does not discuss, is that the producer definition actually supports an interpretation of the term article endorsed by ECHA, the Commission, and a majority of Member States. The producer is the "person who makes or assembles *an article*" (emphasis supplied).[19] This suggests that the term "article" refers to the end product, not to its components, in the case of both producers and importers. Similarly, the definition of article refers to an object given a special shape, surface or design "*during production*," which includes assembly. Of course, a preliminary issue is whether the producer definition is intended at all to vary the scope of the term "article" as used in REACH's notification and information provisions.

2. Obligations of Importers of Complex Articles

An importer, on the other hand, faces a much more onerous obligation, because, the Advocate General asserts, it imports both the whole article and all of its components. It therefore would have to notify ECHA if a listed SVHC is present in a concentration higher than 0.1% by weight of any "article" that it imports, including any component-article. But why would an importer of a complex article be the importer of all of its component-articles and the producer of a complex article not be the producer of all of its component-articles?

To bolster support for her argument, the Advocate General asks the rhetorical question "[w]hich other natural or legal person should be responsible for the physical introduction of those component articles into the customs territory of the European Union?"[20] This question is intended to suggest that there would be a problem if no notifications on imported component-articles were submitted to ECHA and thus no "comprehensive information is provided to ECHA."[21] Here, the Advocate-General commits a so-called "red herring" fallacy to hide the circularity of her argu-

18 She does not say so explicitly in her answer to the question posed (see Opinion, para. 124(1)), as she assumes that the component-articles were made or assembled by other producers. In this regard, the answer is incomplete, since it should have addressed also the situation where the producer of the entire article also produces one or more components of it.

19 Art. 3.4, REACH Regulation.

20 Opinion, para. 48.

21 Opinion, para. 49.

ment: an importer of a complex article is also the importer of all of its component-articles, because, if it were not, ECHA would be deprived of valuable information;[22] therefore, the importer must be deemed to import all component-articles. Note that her argument also "assumes away" that which must be proven, namely, that an extensive notification regime would help ECHA to protect human health or the environment. A construction of the importer definition in accordance with the ordinary meaning of the words used, however, would not suggest that an importer of, say, a car is *not* the importer of the car, but *is* the importer of the 30,000 parts of which the car is made;[23] for one, under customs law, such an importer would be deemed to import only the car, not its 30,000 components!

3. Rejection of Counter-Arguments

The Advocate General rejects all of the counter-arguments made by the parties based on the absence of clearer rules, REACH's legislative history, legal certainty, ECHA guidance, the internal market, proportionality, and alleged discrimination against importers. The main points of her reasoning, insofar as not previously discussed,[24] are analyzed below. Note that under the heading "absence of clearer rules" she discusses the references to "articles or any parts thereof" in Annex XVII, as well as the legislative history of the REACH Regulation, both which have been invoked to support the current interpretation of the term "article," not to emphasize the absence of "clearer rules." The opinion does not discuss all counter-arguments, but only those advanced by the parties; for instance, there is no analysis of the documentation necessary for demonstrating compliance under the article definition proposed by the Advocate General,[25] which could reveal the enormity of any good faith compliance exercise.

a. ECHA Guidance, Legislative History, and Legal Certainty

With respect to the ECHA guidance, she acknowledges that it has endorsed a different approach, but observes that this guidance is not binding and the issue is one of interpretation of EU law reserved to the Court. True, but the rejection of ECHA's guidance is a slap in its face and undermines the authority of its guidance generally. Should not the fact the ECHA apparently does not consider the extensive interpretation endorsed by the Advocate-General legally required or otherwise defensible, carry more weight? Of course, if ECHA guidance goes beyond or ignores the REACH Regulation, there is good reason to be skeptical of it, but where it provides a sound interpretation of REACH, the situation is different.

Likewise, the legislative history of the REACH Regulation is dismissed as inconclusive, although proposals to add language explicitly extending the notification requirement to parts of articles had been rejected by the EU legislature.[26] Even in the REACH Regulation, the EU legislature shows that it knows exactly what it needs to do if it wants components to be addressed separately: the substance-mixture distinction does exactly that, and requires that both producers and importers, if the applicable conditions are met, register substances in mixtures, not mixtures themselves.[27] Under these circumstances, the absence of specific rules on component-articles is telling. As noted above, she does not make the useful comparison to the legislative solution of the same issue in the case of the RoHS Directive.

Further, the Advocate General recognizes that the pertinent provision of the REACH Regulation is not clear, but opines that it is sufficiently clear in light of the principle of legal certainty:

> "*[T]he principle of legal certainty does not require a rule to exclude all doubt as to its interpretation. What matters is rather whether the legal measure in question displays such ambiguity as to make it difficult to resolve with sufficient certainty any doubts as to the scope or meaning of the provision. That can be done, however, in the present case.*"[28]

Thus, although the pertinent provision raises serious issues as to its "meaning," the Advocate General

22 Whether this is an accurate assessment is discussed in the conclusions section.

23 For this estimate, see http://www.toyota.co.jp/en/kids/faq/d/01/04/

24 See the discussion of the references to "articles or any parts thereof" in Annex XVII, above.

25 Article 36(1) of REACH deals with compliance documentation, but does not apply to articles (unless, maybe, it is also interpreted creatively).

26 Opinion, para. 51.

27 Art. 3.1, 3.2. 5, and 6.1, REACH Regulation

28 Opinion, para. 55.

believes that she can resolve these issues with "sufficient certainty." But is the fact that her opinion is able to resolve the issue the right test for legal certainty?

b. Proportionality and Discrimination

In the opinion, substantial attention is paid to the issue of proportionality. To defend her position, the Advocate General asserts that her interpretation is not disproportional, since it would be necessary to meet the REACH Regulation's objectives. Specifically, "the objective of a high level of protection of human health and the environment and the precautionary principle *require* notification of ECHA."[29] Here, the dangers of teleological interpretation become visible: the Advocate General reads the text as she believes the EU legislature would have wished to have phrased it in order to achieve the REACH Regulation's ends. In fact, the objective of a high level of protection and the precautionary principle can provide only guidance in one direction, and by emphasizing them over both the text and other principles and objectives, the desired results can be achieved.

Remarkably, the opinion states also that the Advocate General's position would impose a lighter burden than the current ECHA interpretation. According to the Advocate General, the ECHA interpretation would require that the concentration of any listed SVHC be precisely determined in each component as well as in the article as a whole, while "*if the notification relates to component articles, the burden is actually smaller because the concentration does not have to be determined precisely.*"[30] The position that threshold applies only at the level of the whole article, it imposes a lighter burden, according to the Advocate General, and "*can only be understood if importers do not closely follow the ECHA Guidance, but rely on more or less precise estimates in order to rule out notification. During the hearing the Commission even expressly proposed such an approach, which has no basis in the ECHA Guidance, for clear cases.*"[31] Here, the ECHA guidance, which the Advocate General is happy to reject on the concept of article, features prominently in her argument.

Unfortunately, this reasoning of the Advocate General reflects a lack of practical experience, and a misunderstanding of compliance management. Her interpretation may imply that a company that does not have to notify under the "entire article" approach, would now have to submit one, several, or many notifications, and update them as changes occur, which may represent a huge increase in administrative burden. Beyond this obvious difference in outcome, there is also a big difference in process, as it is not doable to test all materials in all components used in the manufacturing of complex articles for the intentional or unintentional presence of any listed SVHC. In ensuring compliance with chemical restrictions, a pragmatic approach based on risk management is used, pursuant to which analytical testing is used only as a last resort. The legality thereof has been recognized by the authorities.[32] Under this approach, assuming the 0.1% threshold applies at the level of the whole article, a company can rule out a notification obligation without any chemical analysis or further assessment, if the listed SVHC concerned is present in only one component that weighs less than 0.1% by weight of the whole article. In this case, even if the listed SVHC constitutes 100% of that component, it could never trigger any notification requirement at the level of the whole article. A requirement that the concentration of all listed SVHCs be determined at the level of each component would therefore completely upset the current risk management approach adopted by importers and substantially increase their compliance burden. Thus, the Advocate General should have examined whether this substantial additional burden meets the proportionality principle. Her speculations on the extent to which the exemptions from notification help reduce the burden are not a panacea for sound proportionality analysis.

With respect to the alleged discrimination of importers, the Advocate General seems to suggest that

29 Opinion, para. 81.

30 Opinion, para. 74.

31 Opinion, para. 75.

32 Even the German authorities, which are part of the dissenting group of authorities, have recognized this approach: "In many cases such questions can be answered theoretically, i.e. the presence of candidate substances can be discounted with a high probability and without analysis. If these questions cannot be answered theoretically, however, or there is no information available whether the paint used may contain a candidate substance, an analysis should be conducted if there is any doubt." German REACH & CLP Helpdesk, *Information from the German National Helpdesk on 'Once an Article - Always an Article' Fulfilment of the notification and information obligations concerning candidate substances in articles*, September 2012.

the application of the 0.1% threshold to the whole article would favor importers over EU producers, because each component-article producer in an EU supply chain may have to notify, while the importer's non-EU suppliers would not incur any cost. This difference in regulatory burdens and related costs would make it "less attractive to produce the entire article within the European Union than to import it."[33] Contrary to what the Advocate General suggests, independent of REACH, increasingly, articles for the EU market are manufactured outside of the EU, because it is economically more attractive to manufacture them outside the EU and import them. Extensive interpretation of a REACH notification obligation is not going to change that. Her reasoning, however, may create a dangerous precedent for importers where it is based on the idea that notifications involve costs that are likely reflected in the prices of products and that importers must be exposed to the same total cost as domestic producers (the concept of "approximation of costs"). Pursuant to this theory, all EU measures applying to importers should be broadly construed to shield domestic producers and eliminate any cost differential enjoyed by importers.[34]

To determine whether there is discrimination, the right comparison should be made. An importer of an entire article should be compared to the EU producer of an entire article, without regard to their supply chains, which in both cases could extend to in- and outside the EU. Had the Advocate General made this comparison, she would have concluded that application of the 0.1% threshold to the entire article does not result in discrimination. Now that she did not, she should have assessed the legality of her position under international law, including WTO law. Any such assessment, however, is absent from the opinion.[35]

V. Does the SVHC Information Requirement Apply to the Article As Whole or to Each Component Separately?

Under the REACH Regulation, "suppliers" of articles containing a listed SVHC must provide information, "available to them," to allow "safe use" of the article to customers and, upon request, to consumers, if the SVHC's concentration exceeds 0.1% by weight (w/w).[36] As a minimum, however, they must provide the name of the SVHC.[37] Based on the reasoning set out above, the Advocate General opines that the 0.1% threshold also applies to each component for purposes of the REACH Regulation's informational requirements, provided that relevant information is available. In the Advocate General's opinion, this would also be necessary to achieve the purpose of the REACH Regulation to fully inform customers and consumers who can then "*decide not to purchase the article because of the presence of a substance of very high concern.*"[38] Any misconceptions about risks that might affect consumers' decision would have to be addressed by suppliers by providing "appropriate clarification on the risks of the substances present."[39]

As far as components subject to notification and information obligations are concerned, the incremental burden of providing safe use information would be manageable. In such cases, the Advocate General suggests, the SVHCs are already known and safe use information can relatively easily be compiled. If a supplier of the entire article has obtained the necessary information from the supplier of the component-article, this information should be passed on to the recipients or the consumers of the entire article. As in the case of notification, the Advocate General conveniently forgets to make clear that her interpretation may mean that a supplier that does not have to provide safe use information under the "entire article" approach, now has to provide information on the many SVHCs that may be present in the product's component-articles, which may represent a substantial increase in workload. Insofar as articles are not subject to notification requirements, however, information might not be available. This creates a problem for the "once an article, always an article" approach, because the names of all SVHCs in all components would have to be provided in any event.

To fix this problem, the Advocate General interprets the text of the pertinent REACH provision cre-

33 Opinion, para. 87.

34 The theory also does not bode well for the stringency of judicial review of border carbon taxes and compensatory levies for "social dumping" and human rights violations.

35 For such an assessment, see Lawrence Kogan, "REACH and International Trade Law" in L. Bergkamp (ed.), *The European Union REACH Regulation for Chemicals - Law and Practice*, Oxford University Press, 2013.

36 Art. 33, REACH Regulation.

37 Idem.

38 Opinion, para. 96.

39 Opinion, para. 96.

atively. "Unreasonable burdens on suppliers would be avoided," she suggests, "if notification of the name of the substance was also subject to that information being available to the supplier." That is not exactly what REACH stipulates, so she reasons that "indicating the name can be understood as a subset of providing information to allow safe use of the article" and "that information has to be passed on only if it is available."[40] To support her interpretation, she invokes the French version of Article 33, which she claims makes her interpretation "more plausible than requiring the name of the substance to be notified even where information is not available."[41] Her argument is disingenuous, however, because there is no relevant difference between the French and English versions.[42] That she has to resort to this argument suggests that the legal support for the "once an article, always an article" approach is not as strong as she claims it is.

VI. Conclusions

The reasoning developed by the Advocate General results in an interpretation of Article 7(2) of REACH that is not obvious from the wording of this provision. Although Article 7(2), by its terms, does not impose differential obligations on producer and importers (they both must notify listed SVHCs in their articles if the conditions are met), the Advocate General's interpretation reads a highly differentiated, complex set of obligations into this provision. Likewise, her interpretation of Article 33 challenges the ordinary meaning of this provision. With respect to both the notification and informational requirements, her opinion would not appear to be *required* by any known intent or objectives of the EU legislature; the question therefore is whether it is a permissible reading and, if so, whether it is the preferred reading.

The Advocate General's opinion highlights how tricky it is for a non-specialist and non-practicing lawyer to meddle with the rules designed by an expert-led technocracy, and opine on a highly detailed and technical issue arising in the context of a complicated regulatory regime such as REACH,[43] in particular where recourse is had only to information provided by the parties to a dispute. It demonstrates also why the European courts should receive *amicus curiae* briefs to educate them on the key issues relevant to the decisions they have to make.[44] The opinion does not appreciate the two different types of effects of the proposed interpretation: the effects on compliance activities, and the effects on the number of notifications and safe use notices, with the latter possibly being only the tip of the iceberg.

Disregarding ECHA guidance, the opinion endorses the "once an article, always an article" approach and would thus raise a series of issues for both EU producers and importers. As the Advocate General does not seem to understand the risk-based compliance approach adopted by many companies, her recommendations are not pragmatic and would further complicate REACH compliance in relation to listed SVHCs in articles. Under a risk-based approach, the presence of a listed SVHC in an article may be excluded without chemical analysis and further assessment, but under the interpretation reflected in the opinion, this approach may have to be revisited.

At first impression, from the perspective of attempting to level the playing field for EU producers and importers of articles, the Advocate General's opinion might be understandable: if the term article is deemed to cover only the whole product, not its separate components, importers would have to worry only about compliance of the entire product as placed on the EU market, while separate component-articles manufactured within the EU would qualify also as articles, in addition to the whole product, and could thus trigger the REACH obligations multiple times in the supply chain. Under the approach sug-

40 Opinion, para. 114.

41 Opinion, para. 114.

42 The French text of Article 33(1), REACH, reads as follows: "Tout fournisseur d'un article contenant une substance répondant aux critères énoncés à l'article 57 et identifiée conformément à l'article 59, paragraphe 1, avec une concentration supérieure à 0,1 % masse/masse (w/w), fournit au destinataire de l'article des informations suffisantes dont il dispose pour permettre l'utilisation dudit article en toute sécurité et comprenant, au moins, le nom de la substance.»

43 Note that she provides only an incomplete answer to the question posed by the Council of State, as she does not address the situation where the producer of the entire article also produces some of its components. Moreover, she fails to provide any guidance on the case of a complex article that incorporates component-articles and SVHC-containing substances or mixtures that are not part of any component-article, only of the entire article; would no notification be required?

44 The European Court of Human Rights has permitted *amicus curiae* submissions for over two decades. For an empirical study of this practice, see Laura Van den Eynde. An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights. *Netherlands Quarterly of Human Rights*, 2013, Vol. 31/3, 271–313.

gested by the Advocate General, this difference would be eliminated. That is not to say, however, that the proposed solution is consistent with the REACH Regulation, EU law, and international trade law.

Complex products, such as cars and electronics (not all of which are subject to the RoHS Directive), can easily incorporate hundreds, thousands, or even tens of thousands of parts, and REACH does not provide any indication on how to go about breaking them and their parts into separate component-articles for compliance purposes. The limitation of the concept of "article" to things that have "*retained* a shape, surface or design of their own," as the opinion suggests, does not appear to provide any useful guidance or limitation, but would impose an extra layer of analysis (and legal uncertainty) on article suppliers which would have to determine whether any component, including a component of any part, meets this test. If one just thinks of the compliance efforts and documentation that would be required once there are more than 400 SVHCs on the list,[45] given that a product can be composed of 30,000 component-articles or more, it becomes clear how draconian the Advocate General's solution in practice would be. The vast increase in compliance assurance activities would extend far beyond the upsurge in notifications and safe use notices. The expense associated with this solution would not only be big, but also, by and large, be a waste of resources from a risk management perspective. It is therefore problematic to see the interpretation advanced by the Advocate General as an instance of the kind of consumer protection compatible with Europe's "producerism," as distinguished from US "consumerism."[46] A more plausible explanation is the theory of "public choice,"[47] which would point to the self-interests of the Member States that are bound to gain: those with a large domestic industry manufacturing complex articles, such as cars (Germany and France), and those that can reap "green credentials" (Denmark, Norway, and Sweden), may well benefit from the protection against imports and the appearance of environmental and health protection and sustainability offered by the solution. It may not be entirely accidental that exactly these Member States support the "once an article, always an article" approach.

The Court of Justice of the European Union is expected to release its judgment in the next several months. If it endorses the Advocate General's advice, the REACH compliance burden imposed on companies selling products on the EU market would increase, and it would increase in different ways for EU producers and importers. With respect to SVHC notification, EU producers would have to notify listed SVHCs above the threshold in each component they produce and in the article as a whole. On the other hand, EU importers would have to notify if the threshold is exceeded at the level of each component. In practice, this might mean that producers and importers would more frequently invoke the exemptions available under the REACH Regulation, including where the use in articles has already been registered or exposure can be excluded during reasonable conditions of use and disposal, but overall we should expect to see a substantial increase in the number of notifications to ECHA, which has been low so far.[48]

If the Court were to endorse the Advocate General's recommendations, with respect to the provision of SVHC information, suppliers would have to inform their customers and consumers if the 0.1% threshold is exceeded at the level of each component, provided that relevant information is available. Suppliers of products made in the EU and importers subject to notification obligations would be deemed to possess such information, and therefore would have to integrate this information into their own communication to their customers and consumers, resulting in a potentially substantial increase of safe use information notices of dubious utility. Importers that are not subject to notification obligations, however, would appear to have an easy job and would be better off if they receive no information on SVHCs whatsoever. Would an active strategy aimed at staying ignorant be deemed legitimate?

45 By 2020, the Commission intends to assess 440 substances for listing on the Candidate List. Commission, "Roadmap on Substances of Very High Concern," 6 February 2013.

46 James Q. Whitman. Consumerism Versus Producerism: A Study in Comparative Law. *Yale Law Journal* 117, 2007, pp. 340-406. The consumerism/producerism distinction is based on the extent to which law and policy is more inclined to see the individual as having rights in the guise of "consumer" or "producer." While the US generally promotes "consumerism" and protects the rights of consumers and consumer sovereignty, the EU would pursue "producerism" and protect the rights of producers (including workers). Producerism, however, does not neglect the rights of consumers, but it protects consumer health and safety, rather than the economic interests of consumers.

47 Gordon Tullock, *Public Choice, The New Palgrave Dictionary of Economics* (edited by Steven N. Durlauf and Lawrence E. Blume). Second Edition, 2008, available at http://www.dictionaryofeconomics.com/article?id=pde2008_P000240

48 Art. 7.3 and 7.6, REACH Regulation.

Companies will have to comply with the Court's ruling as soon as it is released, because the Court merely interprets existing requirements. As a practical matter, however, enforcement authorities might allow a grace period to companies that use their best efforts to comply. Given that penalties for non-compliance with the pertinent REACH obligations are determined at the national level and vary greatly among Member States,[49] companies would also face uncertainty at the level of enforcement.

To conclude, the Court has more than one reason to think twice before endorsing the Advocate General's opinion. This case is reminiscent of the Court's ruling that contaminated soil *in situ* is a waste covered by the EU waste legislation;[50] in that case, the EU legislature had to undo the adverse and ill-considered effects of the Court's ruling.[51] Although "technocracy" may not be fashionable in a post-modern EU, it does have its strengths. Should the EU, on thin legal grounds, substantially increase the regulatory burden for industry with little or no evidence of positive effects on the protection of human health and the environment? A Court ruling in line with the Advocate General's opinion could also cause collateral damage beyond the direct waste of resources. For one, it could undermine the authority of ECHA guidance for no good reason, thus increasing legal uncertainty. Further, it could negatively impact international trade at a time when the EU and US are negotiating the largest trade deal in history.[52] Would a creative interpretation of a few REACH provisions justify a large expansion of the obligations for EU importers and the risk of another trade dispute between the two trading blocks?

49 Art. 126, REACH Regulation.

50 Lucas Bergkamp. A new court-made environmental liability regime for Europe. [2004] 4 Env. Liability, pp. 171-177. (commentary on Texaco Belgium SA, Judgment of the European Court of Justice (Second Chamber), 7 September 2004).

51 Art. 2.1.b and 2.1.C, Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L312/3.

52 Lucas Bergkamp and Lawrence Kogan, "Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership," *EJRR* (2013), 493-507.