LIFE AskREACH Letter to European Commission

Experience from the LIFE AskREACH project (LIFE16GIE/DE/738) indicates urgent need for the Commission to advance Article 33 of REACH

To: DG Growth Dir F, Director Kristin Schreiber
DG Environment Dir B, Director Kestutis Sadauskas

The REACH Regulation aims to ensure a high level of protection of human health and the environment while enhancing competitiveness and innovation. This also applies to chemicals in articles. In this context, Article 33 of REACH has two objectives: Actors along supply chains as well as consumers should receive the relevant information they need to ensure safe use of articles containing substances of very high concern (SVHCs) at concentrations above 0.1% weight-by-weight. Additionally, the legal requirement to provide this information to professional recipients and to consumers on request should foster market incentives based on "informed decisions" so as to develop and employ safer alternatives for the substitution of SVHCs – whose potential fate is the inclusion into the list of substances subject to authorisation. The market-based impulses and their anticipation by the supply chain actors is one of the most relevant non-hierarchical innovations in the chemicals regulatory framework, recently further fostered by the development of the SCIP-Database that also relies on the contents and quality of the information to be provided through Article 33 of REACH.

In its review of Article 33 pursuant to Article 138(8) of REACH, the European Commission, citing *inter alia* findings from an ECHA Forum pilot project on enforcement, notes "*challenges with its implementation and the low level of compliance"* and concludes that the "*Commission and stakeholders should continue working together to*

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improve the implementation of the provisions already in force".[1]

The LIFE AskREACH project has invested a great deal of effort into the development and promotion of IT tools aimed at facilitating the communication on SVHCs along the supply chain [Article 33(1) of REACH] as well as between suppliers and consumers [Article 33(2)]. This is necessary because in surveys[2] consumers constantly express deep concerns with regard to the potential negative impacts on health and the environment of chemicals in articles. Notwithstanding these concerns, the number of SVHC requests raised by consumers is still very low. The positive impacts of Article 33 intended by the legislators are therefore not being realised. The experience gained in LIFE AskREACH suggests that the current regulatory structure is a major cause of this shortcoming. Being able to analyse the impact of almost 80,000 consumers using the App Scan4Chem developed by LIFE AskREACH and 7,000 companies providing information on SVHCs in their articles via the LIFE AskREACH platform, the project creates a real-life laboratory for the implementation of the consumer 'right to know'. The project also engages with companies to improve communications along the supply chain by means of an automated IT-tool. Based on this experience, LIFE AskREACH perceives an urgent need for the Commission to consider – also with a view to the further development of the SCIP database and in the light of the revision clause (Article 138(8) of REACH) – the following policy options for improving the implementation of Article 33, i.e. within the existing legal mandate, as part of the REACH revision process by the end of 2022:[3]

- **Measures for enhancing the quality of suppliers' responses to consumers**
- **Strengthen the communication requirements towards consumers by supporting and extending suppliers' duty to provide information on SVHCs in articles**

1 SWD(2020) 247, p. 35.
2 A recent Eurobarometer poll showed a clear majority of EU citizens are worried about the impact of chemicals present in everyday products on their health (85%) and on the environment (90%).
3 Ares(2021)2962933, p. 4.

- **Shorter period to respond to consumer requests**
- **Improved consumer information when shopping via online marketplaces**
- **Development and implementation of a unique product identifier to reduce transaction costs of all actors involved**

These options, which are further elaborated in the Annex, are not intended as a conclusive list of adaptations deemed necessary. Rather, others have already indicated legal options to modify Article 33(1)[4] that are also relevant and that stand in a systematic relation to the policy options identified by LIFE AskREACH.
The Commission, through its Chemicals Strategy for Sustainability, commits to "*ensure availability of information on chemical content and safe use, by introducing information requirements in the context of the Sustainable Product Policy Initiative and tracking the presence of substances of concern through the life cycle of materials and products*"[5] and aims at facilitating the transition targeted by the EU Green Deal to a resource efficient "*clean and circular economy*".[6] Enhancing the regulatory context of Article 33 as mentioned above would be an important step towards this goal.

Sincerely,

Dr. Ioannis Dosis
Project manager of the LIFE AskREACH Consortium

[4] See Martin Führ, Julian Schenten et al., Advancing REACH: Substances in Articles, published by Umweltbundesamt (2020), explicit duty to provide SVHC information in the supply chain before supply to support informed purchasing decisions, reporting obligations after candidate list updates, explicit duty to organize with regard to supply chain communication on SVHCs, etc.
[5] COM(2020) 667, p. 6; cf. COM(2018) 116, p. 6.
[6] COM(2019) 640, p. 7.

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ANNEX

Measures enhancing the quality of suppliers' responses to consumers

Users of "Scan4Chem" often turn to the LIFE AskREACH team when they are uncertain whether the responses received from suppliers comply with Article 33 of REACH. Unfortunately, it is rather common that these responses do not identify the article in question or the current status of the Candidate List. Often suppliers simply state in a general manner "Our company is REACH compliant" instead of referring to the duties pursuant to Article 33. There are numerous additional examples of incorrect response behaviour.

Against this background, we strongly support the conclusion formulated in the Review according to Article 138(8) that there is a need to improve the implementation of the provisions.[7] Measures should include improved enforcement and capacity building, also with regard to effective communications of substances in articles along the supply chains.

Strengthen the communication requirements towards consumers by supporting and extending suppliers' duty to provide information on SVHCs in articles

Currently, article recipients in most cases do not receive any the SVHC-related information foreseen in Article 33(1). There are two possible reasons: (i) the article and all sub-components contain no SVHCs at a concentration above 0.1% w/w, or (ii) the supplier is unaware of the obligation to communicate the presence of such SVHCs. The resulting uncertainty in turn makes it very difficult for the article recipient to comply with Article 33 requirements. The same uncertainty applies to consumers expecting responses to information requests. Survey findings confirm that a large proportion of companies

[7] SWD(2020) 247, p. 35.

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are not well-prepared to respond to consumer requests.[8]

By the end of December 2021, the LIFE AskREACH project had registered 22,500 consumer requests based on Article 33(2) related to 18,500 suppliers using the App "Scan4Chem". More than half of those requests remained unanswered and the answers that were received often showed a poor quality (see above). Despite the possibility of technical problems in some cases (e.g. spam filters), such findings highlight the fact that many suppliers are not (fully) aware of and not fully prepared for fulfilling their legal duties and the numbers cited here give an idea of the extent of the problem.

The low response rate issue extends further, as empirical data indicates that absence of a reply has a negative effect on consumers' request behaviour, i.e. they lose confidence in their information rights and refrain from submitting further requests.[9] The lack of consumer requests in turn reduces the incentive for suppliers to engage in SVHC communication and substitution. Under these circumstances, Article 33 cannot create the intended market effects.

In this respect, it remains to be seen whether the SCIP database established by ECHA under the Waste Framework Directive (WFD) and based on Article 33(1) of REACH will make a difference. In fact, the challenges to ensure compliance of suppliers with the duty to notify the Agency of SVHCs at concentrations in articles above 0.1% w/w pursuant to the WFD are structurally related to those challenges in fulfilling duties of Article 33 of REACH. Therefore, at least in the short term, one may not expect that "no SCIP entry" for a particular article equals "no SVHC presence above the threshold". Transparency gains on the part of the consumers are consequently likely to be limited for a transitional period of several years.

In order to improve the situation and maintain the confidence of the consumers, communication requirements towards consumers should be strengthened by supporting

[8] Nearly half the companies that participated in an LIFE AskREACH survey and had previously received a consumer request stated that usually they do not have the necessary information to provide an immediate response, see the LIFE AskREACH baseline report (public version), p. 29.

[9] Schenten, Brenig, Führ and Bizer, Environ Sci Eur (2020) 32:114, p. 9.

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and extending suppliers' duty to provide information on SVHCs in articles. To answer the consumer request, suppliers must have established a functioning supply chain communication pursuant to Article 33(1) and be prepared for such consumer requests. The Commission should foster this with further measures given the shortcomings mentioned above. Such measures could, among others, be chosen from the following options:

- Extension of the communication obligation according to Article 33(1) to consumers, i.e. an obligatory duty to always proactively inform consumers when SVHCs are present above 0.1% in an article.
- Extension of the supply chain communication according to Article 33(1) to an obligation for the supplier to always report to any recipient of an article, whether or not the minimum concentration level is exceeded
- Extension of the obligation to respond to requests from consumers according to Article 33(2) also in cases where SVHCs are not present above 0.1%: That could contribute to solving the issue of low response rates to the extent that it clarifies that "no SVHC presence above the threshold" is no longer a valid justification for not responding.
- Equivalent measures in the context of legislation other than REACH, e.g. via a "digital product passport" as foreseen in the Green Deal and the accompanying strategies[10] or a Full Material Declaration scheme[11].
- Capacity building for article suppliers and their supply chains

Shorter period to respond to consumer requests

With the current response period of up to 45 days, the incentive for consumers to make an Article 33(2) request is quite limited. After more than 10 years of REACH, the supply

[10] COM(2021) 118, 3.
[11] Cf. the recommendations at Proactive Alliance, 2021 on the design of reporting standards for substances in articles.

chain actors should be in the position to establish effective Article 33(1) communications, so that the response period could be substantially reduced. This can also be applied to retailers, which are part of the information flow stipulated by Article 33(1). As the direct link to consumers, retailers also have the greatest incentive to keep SVHC information accurately up-to-date. The larger retailers in most cases rely on enterprise resource planning (ERP) systems capable of identifying and tracing every article in stock. The same applies to wholesale traders distributing articles to smaller shops which they can provide with SVHC data, based on the article numbers.

Considering the obligation to notify SVHC in articles by electronic means to the SCIP database, the interplay between Article 33 of REACH and the related provisions in the WFD create a – at least implicit – "duty to organise" (a legal approach also captured in Art. 36(1) REACH). Notwithstanding the deficits on the implementation of SCIP outlined above, this strives for replacing the outdated "snail mail" response period of 45 days by an approach in line with the age of digital solutions, i.e. an immediate automated provision of the SVHC article information. Consumer feedback from the use of the smartphone App "Scan4Chem" developed in the LIFE AskREACH project clearly highlights the necessity for such developments to allow consumers to make informed purchasing decisions at the point of sale.

Shopping online at marketplaces

The rise of online marketplaces hosting third-party sellers puts EU consumer protection at risk by blurring the boundaries between the intermediary IT-platform as such, the retailers and fulfilment centres or service providers. Opaque distribution channels often leave consumers unclear where to address the 'right to know' request. For instance, for users of the "Scan4Chem" App it is plausible to assume they are entitled to request SVHC information for articles of interest from large online platforms. However, it is unclear whether the operators of these platforms are to be regarded as "supplier of an article" under the REACH definition with regard to the articles sold via the marketplace.

If this is not the case, the company offering the product via the platform would have to be contacted by the consumer, which constitutes an additional effort. Furthermore, suppliers' headquarters are often located outside the EU and are therefore not subject to the REACH Regulation. In contrast, the platform operators would have the market power to demand the SVHC data from the marketplace users. The platform operators also have the technical possibilities to make SVHC data available online as is done with other product information.

To enhance transparency for the consumer, a thorough assessment is required of the extent to which platform operators can be considered article suppliers, for instance if they physically store and dispatch articles to consumers. One option in line with the objective of Article 33 would be to add these actors to the definition of "supplier of an article" according to Article 3(33) of REACH.

The described challenges for consumers increase when the third-party seller distributing articles via the (EU) online marketplace is based outside of the EU. Consequently, another option that is less intrusive from the perspective of platform provider would be to specify the suggested "retailer fiction" to the extent that it applies only for articles offered by third-party sellers for which the online marketplace creates the EU market.

Establishing an information requirement similar to Article 48 of the CLP Regulation pursuant to which "any advertisement for a substance classified as hazardous shall mention the hazard classes or hazard categories concerned" could also be considered. This could take the form of a duty to display on the product page at the web store or online-catalogue whether SVHCs are (not) present at concentrations above 0.1%.

Development and implementation of a unique product identifier

One major challenge for LIFE AskREACH is to properly identify articles subject to a right-to-know request allowing for a targeted response by the supplier. To this end, the system supports identification of the Global Trade Item Number (GTIN), a globally used standard for the identification of products, assigned by the organisation GS1.

Scan4Chem identifies articles by reading the specific barcode that translates the GTIN. However, suppliers sometimes assign the same GTIN to whole groups of articles, e.g. as in the case of fast changing collections. Additionally, and more importantly, specimens of the same article may originate from different production batches. For each batch, there can be different actors and process steps in the supply chain. This, in turn, may result in differing chemical compositions of articles, which may or may not trigger the Article 33 information obligations. However, the "GTIN Management Standard" states that only changes to the article formulation that affect the legally-required declarable information on the packaging of an article require a new GTIN.[12] The use of proprietary barcodes is also common with large brands. Consequently, GTINs have proven to be an imperfect tool for identifying individual articles.

The development and implementation of a governance framework for unique product identifiers, capable of taking into account additional article information such as product batch levels would significantly improve SVHC communications. Experience in this regard gathered by the ECHA SCIP team should be considered. Such a framework would align well with the policy objective of a "digital product passport".

[12] See https://www.gs1.org/1/gtinrules/en/.

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ANNEX II

LIFE AskREACH Consortium

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DARMSTADT UNIVERSITY OF APPLIED SCIENCES RESEARCH GROUP SOFIA	THE SWEDISH CHEMICALS AGENCY
INSTITUT NATIONAL DE L'ENVIRONNEMENT INDUSTRIEL ET DES RISQUES	GLOBAL 2000
BALTIC ENVIRONMENTAL FORUM-LATVIA	VKI-THE AUSTRIAN CONSUMER ASSOCIATION
EUROPEAN ENVIRONMENTAL BUREAU	ARNIKA
BUY RESPONSIBLY FOUNDATION	BALTIC ENVIRONMENTAL FORUM-GERMANY
ZELENA AKCIJA	ZERO
NATIONAL OBSERVATORY OF ATHENS	LUXEMBOURG INSTITUTE OF SCIENCE AND TECHNOLOGY
SWEDISH CONSUMERS' ASSOCIATION	THE DANISH CONSUMER COUNCIL
BALTIC ENVIRONMENTAL FORUM-LITHUANIA	SAFER CHEMICALS ALTERNATIVE - ALHEM

THE DANISH ENVIRONMENTAL PROTECTION AGENCY

"The Danish Environmental Protection Agency is a LIFE AskREACH project partner, but abstain from this letter, as the Danish opinion on the REACH regulation is expressed only by the Danish Ministry of Environment during the REACH-revision process."

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