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REVIEW

Strategic Environmental Assessment: The Term “Plans and Programmes” as Interpreted by the European Court of Justice

Thomas Bunge

Strategic Environmental Assessment in Air Quality Planning in Germany

Ulrike Weiland

Remedying Failures to Conduct EIA, Should Not Result in a Game of Snakes and Ladders.

Comment on CJEU Case C-261/18 of 12 November 2019

Attracta Uí Bhroin

Compliance Challenges of the Automotive Industry Concerning Obligations of Article 33 REACH

Simon Johannes Winkler-Portmann

Recent Developments

Market Opportunities for “More Sustainable Chemistry” Through the REACH Regulation

Tricky Relationships: Chemicals, Waste and Product Legislation

International Conference on Green Chemistry

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Editorial

Already the founding conference of elni in 1990 discussed the potential benefits of the ‘Environmental Impact Assessment’ (EIA). The ‘Strategic Environmental Assessment’ (SEA) might be seen as the younger sister of EIA; however in terms of scope bigger. The European Directive on SEA has been subject to a REFIT-process by the European Commission. The results were published at the end of November this year. The conclusion in general terms: The SEA Directive is fit for purpose. However, some Member States expressed their concerns with regard to the recent decisions of the CJEU. *Thomas Bunge* assesses the Term ‘Plans and Programmes’ as interpreted by the highest EU court. Air quality is also a neuralgic point in many cities throughout Europe. In this respect, *Ulrike Weiland* reports on SEA in Air Quality Planning in Germany.

Attracta Uí Bhroin from Dublin based Irish Environmental Network comments on a November 2019 CJEU ruling following the ‘Derrybrien case’ concerning EIA in Ireland. According to *Attracta*, the judgement has profound implications for several legal questions concerning, i.a., obligations to remedy and state liability.

Besides, the current issue of the *elni Review*, once more, features several contributions on the governance of chemical substances. *Simon Johannes Winkler-Portmann* analyses the compliance challenges of the automotive industry concerning obligations of REACH on the communication of ‘substances of very high concern’ (SVHCs). He thus assesses the effectiveness in terms of compliance of the sector’s governance approach to control chemical substances used in every single part of a vehicle, and develops options to overcome existing deficits.

The *Recent Developments* section starts off with *Silke Kleihauer* and *Leonie Lennartz* reporting on the results of a research project aiming to support ‘more sustainable chemistry’ in the textile supply chain, i.a. by broadening the view from the ‘reactive’ compliance position to a ‘proactive’ beyond compliance perspective. Thereby outlining, in addition, the highlights of a ‘Scenario Process’ together with actors from the textile chains, the piece also provides relevant methodological perspectives with a view to supporting transitions of industry sectors in the direction of sustainable development. The contributions by *Winkler-Portmann* and *Kleihauer / Lennartz* are also to be seen in the context of the

pervasive goal of creating more ‘Circular Economies’, which is pushed recently by normative impulses (e.g. recast of the Waste Framework Directive – WFD) and which increasingly is reflected in strategic approaches of companies. Against this background, *Henning Friege* et al. comment on the ‘tricky relationships’ of chemicals, waste and product legislation. Considering the interfaces and intersections of these frameworks they formulate eminent policy recommendations aimed to ensure that ‘Circular Economies’ are capable of avoiding the ‘recycling’ of problematic chemical substances present in (waste) raw materials. Finally, *Martin Wimmer* from the Austrian Ministry for Sustainability and Tourism outlines key findings of an ‘International Conference on Green Chemistry’ during the Austrian EU Presidency. The event discussed perspectives how to foster and better integrate into the legal frameworks the principles of ‘Green Chemistry’, which guide the design of chemical substances, products and processes to avoid hazards and reduce resource use – thus offering potentials for industries to ensure their compliance and also for ‘Circular Economies’.

Claudia Schreider, Julian Schenten and Martin Führ
December 2019

Compliance Challenges of the Automotive Industry Concerning Obligations of Article 33 REACH

Simon Johannes Winkler-Portmann

1 Introduction

In the last 15 years, the European Union has fundamentally renewed and expanded the regulation of chemicals. It inter alia integrated international treaties on substance use such as the Stockholm Convention on Persistent Organic Pollutants¹ into the legal framework (in this case the EU-POP Regulation²), regulated the use of biocidal products³, and harmonised the classification, labelling and packaging of chemicals⁴. As a central element, the REACH Regulation⁵ governs the complete supply chain for chemicals right through to the consumer with the aim of ensuring a high level of protection for human health and the environment.⁶

An important aspect of REACH is the transmission of information in the supply chain, inter alia on ‘SVHCs’ in ‘articles’. A ‘substance of very high concern’ (SVHC) meets one or more criteria laid down in Art. 57(a-f) REACH and is listed on the current ‘Candidate List of substances of very high concern for Authorisation’ as published on the website of the European Chemicals Agency (ECHA) according to Art. 59(10) REACH. By ‘article’, Art.3(3) REACH understands “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”. In 2015, the Court of Justice of the European Union ruled that this classification applies irrespective of whether such an object is isolated or as part of a complex product.⁷

Thus, articles remain articles even if they are assembled to a more complex object, a concept described as O5A rule (‘once an article always an article’).⁸ If an actor places such an article on the market⁹, he becomes a ‘supplier of an article’ according to Art. 3(33) REACH. As such he is obliged under Article 33(1) REACH for each article that contains an SVHC in a concentration of more than 0.1% weight by weight of that article to provide to the recipient “sufficient information, available to the supplier, to allow safe use of the article”. The supplier does not have to provide specific instructions if not necessary for a safe use, e.g. if exposure can be excluded throughout the entire life cycle of the article, including disposal.¹⁰ In any event, the SVHCs concerned must be named, as noted by the CJEU.¹¹ As the European Commission adds new substances to the Candidate List every 6 months, the reporting requirements do not remain static, but are rather dynamic. From initially 15 substances in October 2008 the list has steadily grown to currently 201 substances, with 10 added in this year alone. According to Art. 33(2) REACH, the supplier shall provide consumers with the same information upon request free of charge within 45 days.¹²

The automotive industry is especially challenged by compliance with these provisions due to the complexity of both the products and the supply chain. Modern vehicles feature a variety of models and variations and are made up of tens of thousands of individual parts.¹³ The automotive supply chain can be divided into three groups, as shown by Figure 1. At the centre are (1) the original equipment manufacturers (OEMs) who assemble the internally and externally produced components into the end

1 Stockholm Convention on persistent organic pollutants (POPs), 17 May 2004. Last amended at the Ninth Meeting of the Conference of the Parties to the Stockholm Convention in Geneva, Switzerland, from 29 April to 10 May 2019.

2 Regulation 2019/1021 of the European Parliament and of the Council of 20 June 2019 on persistent organic pollutants. OJ L 169/45, 25.6.2019.

3 Regulation 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products. OJ L167/1, 27.6.2012.

4 Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006, last amended by Regulation 2019/1243 of 20 June 2019. OJ L353/1, 31.12.2008.

5 Regulation 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 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, last amended by Regulation 2019/957 of 11 June 2019. OJ L 396/1, 30.12.2006.

6 Art. 1(1) REACH

7 Court of Justice of the European Union (CJEU), Case C-106/14: Judgment of the Court (Third Chamber), Reference for a preliminary ruling — Environment and protection of human health — Regulation (EC) No

1907/2006 (REACH Regulation) — Articles 7(2) and 33 — Substances of very high concern present in articles — Duties to notify and provide information — Calculation of threshold of 0.1% weight by weight. (10 September 2015), at paragraph 50.

8 CJEU, *supra* note 7, 18 and 53.

9 Placing on the market means “supplying or making available to a third party, whether in return for payment or free of charge” Art. 3(12) REACH. Import is also deemed as placing on the market.

10 European Chemicals Agency (ECHA), *Guidance on requirements for substances in articles*, Version 4.0, (June 2017), p. 26.

11 CJEU, *supra* note 7, 82.

12 Due to Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018, amending Directive 2008/98/EC on waste. OJ L 150/10, 14.6.2018, Art. 9(1,2), the information according to Art. 33(1) REACH will as of 5 January 2021 also have to be provided to the ECHA, which will create a database that waste treatment operators and, upon request, consumer can access.

13 K. Schneider, *Modernes Sourcing in der Automobilindustrie* 37 (1st ed., 2011).

product automobile.¹⁴ They source from a complex network of globally spread suppliers (2).¹⁵ The supply chain is organised highly hierarchical with the complexity of products increasing downstream from materials and small parts (e.g. seals) to complex modules such as gears.¹⁶ The actors usually only know the nearest members of the supply chain.¹⁷ The distribution from the OEM to the consumer is mainly carried out by authorised dealers (3), often affiliated to workshops offering after-sales services such as repairs and spare parts.¹⁸

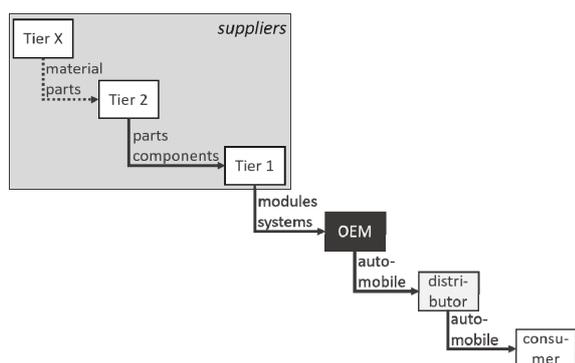


Figure 1: The automotive supply chain (own illustration based on Diez et al., *supra* note 16)

All actors of the automotive supply chain act as suppliers of articles in the sense of REACH. In this context, any constituent part from a transistor on a circuit board in the navigation system to a seat is an article. An automobile is therefore a very complex object consisting of a large number of articles and articles within articles. The transmission of information on SVHCs in those articles throughout the supply chain, from the material supplier to the OEM presents a great challenge.¹⁹ The long cycles for design development (3-5 years) and production (7 years) are especially challenging concerning the dynamic declaration requirements of the Candidate List updated every 6 months. Due to the comprehensive division of production these updates easily affect the whole supply chain, intensifying the challenge of the substance information transmission.²⁰ The complexity of these challenges illustrates that the

automotive industry has to take extensive measures to comply with the requirements of Art. 33 REACH.

2 Methodology

This examination compares the target state of the regulations from Art. 33 REACH with the status quo of the compliance measures in order to identify the delta in terms of compliance deficiencies. It also takes into account the incentives and impediments which influence the actors in the goal attainment. From these findings, the analysis concludes with recommendations for the relevant actors.

In that, this article builds on findings of a forthcoming publication by the author on the compliance of the automotive industry concerning REACH and CLP.²¹ Concerning the target state, the author analysed the compliance requirements in the legal text, complemented by relevant court decisions and guidelines provided by ECHA. In that, it is complemented by previous studies on REACH requirements, e.g. Ingerowski 2010²² and Führ 2011²³ and literature on the aspects of compliance management, e.g. Hauschka et al. 2016²⁴ and Moosmayer 2015.²⁵ On this basis, the author mapped out the required compliance activities in the form of exemplary process flows.

For the status quo, the author conducted guideline-based expert interviews with several automotive actors based on Gläser & Laudel 2010.²⁶ The interviews provided information on the current compliance activities and tools as well as on the incentives and impediments of the framework. In addition, the author analysed recommendations and guidelines of industry associations to unravel the industry's compliance strategy. To test the actual compliance readiness, the author sent out requests according to Art. 33(2) REACH for specific vehicle models to several OEMs which he then analysed in a qualitative manner according to an ex ante defined set of criteria. This includes whether the OEM answered within the legally defined time span of the 45 days, whether he named all SVHCs for all articles incorporated in the vehicle and which safe use information he provided if any.

As for the observation in this article, the following third paragraph describes the framework conditions. The fourth paragraph then lays out the current

14 H. Wolters, Modul- und Systembeschaffung in der Automobilindustrie: Gestaltung der Kooperation zwischen europäischen Hersteller- und Zulieferunternehmen 6 (1st ed., 1995).

15 K. Schneider, *supra* note 13, 32.

16 W. Diez, S. Reindl and H. Brachatz, Grundlagen der Automobilwirtschaft: das Standardwerk der Automobilbranche 91-94 (5th ed., 2012)

17 W. Diez, S. Reindl and H. Brachatz, *supra* note 16, 94.

18 W. Diez, S. Reindl and H. Brachatz, *supra* note 16, 89.

19 S. J. Winkler-Portmann, Probleme und Lösungsansätze in der Umsetzung einer wirksamen Compliance in globalen Lieferketten am Beispiel der Anforderungen aus der europäischen Chemikalienregulierung an die Automobilindustrie, 48-49 (forthcoming).

20 S. J. Winkler-Portmann, *supra* note 19, 50.

21 S. J. Winkler-Portmann *supra* note 19.

22 J. B. Ingerowski, Die REACH-Verordnung: Eine Bestandsaufnahme und Bewertung der Instrumente und Strategien des neuen europäischen Chemikalienrechts unter dem Aspekt des wirksamen Schutzes von Umwelt und Gesundheit vor chemischen Risiken (1st ed., 2010).

23 M. Führ (ed.), *Praxishandbuch REACH* (1st ed., 2011).

24 C. E. Hauschka, K. Moosmayer and T. Lösler (eds.), *Corporate Compliance: Handbuch der Haftungsvermeidung im Unternehmen* (3th ed., 2016).

25 K. Moosmayer (ed.), *Compliance-Risikoanalyse: Praxisleitfaden für Unternehmen* (1st ed., 2015).

26 J. Gläser and G. Laudel, *Experteninterviews und qualitative Inhaltsanalyse als Instrumente rekonstruierender Untersuchungen* (4th ed., 2010).

compliance activities of the automotive industry with a focus on measures for the transmission of material information in the supply chain. This provides the basis for the analysis in the fifth chapter, evaluating whether the current compliance activities are sufficient. The last paragraph draws a conclusion on the general state of compliance in the automotive industry and suggests solution approaches that extend the compliance activities and improve incentives provided by the governing framework.

3 Incentives and impediments for compliance activities

Compliance is usually associated with significant efforts, which is why affected parties are generally interested in circumventing the provisions wherever possible.²⁷ It is therefore up to the legislator and the supervisory authorities to provide framework conditions which incite the targeted parties to act.

Sanctions can provide such an incentive if they are likely to result in high costs. REACH itself does not determine any sanctions but instructs the EU member states in Art. 126 to define such penalties for non-compliance that are “*effective, appropriate and dissuasive*”. Germany, for instance, defines sanctions in the Chemicals Act (ChemG) and the Chemicals Sanctions Ordinance (ChemSanktionsV). According to §6(1)(17) ChemSanktionsV and §26(1)(11) ChemG, an administrative offence is committed if an actor does not provide the information according to Art. 33 REACH “*not at all, not properly, not completely, not in the prescribed manner or not in time*”. This offence is punishable by a fine of up to 50,000 Euros.²⁸ In France, the highest possible fine for the same offence is 15,000 Euros,²⁹ in Italy between 5,000 and 30,000 Euros.³⁰ The United Kingdom has a maximum sentence of two years imprisonment and an unlimited fine.³¹

The incentive effect of sanctions, however, arises only through effective enforcement leading to a high probability of detection.³² For this purpose, the monitoring authorities need appropriate financial and human resources and sufficient expertise.³³ Art. 125 REACH assigns responsibility for enforcement to the EU member states. The overall state of enforcement is assessed by the REACH-EN-FORCE (REF) projects carried out by the “Forum for Exchange of

Information on Enforcement”.³⁴ They conduct spot checks on the state of compliance with REACH in the member states and identify possible improvements for the enforcement.³⁵ The REF reports show that the rate of non-compliance findings depends largely on the expertise and experience of the monitoring authorities.³⁶ This puts them in a comparatively weak position, as companies usually possess a higher level of technical know-how.³⁷ When the authorities identify a non-compliance, they usually do not impose fines which would provide a compliance incentive.³⁸ Overall, the enforcement therefore acts not effectively and thus hinders the potential compliance incentive of the sanctions.

In addition, the actor constellation in the automotive supply chain hinders effective REACH compliance. First of all, there is an information asymmetry in which the upstream actors hold the substance information on which the downstream actors are dependent in order to comply with Art. 33 REACH.³⁹ The material composition provides a crucial competitive advantage for many companies, which is why they are reluctant to share this information out of fear of commercial re-use.^{40,41} At the same time, there is a power imbalance in which the OEMs set requirements, for whose implementation and eventual difficulties the suppliers alone are responsible. As a result, upstream actors are at times not reporting issues in order to avoid liability.⁴² Such lack of reporting creates a compliance risk that is transferred downstream in the supply chain as all downstream actors are dependent on correct information to ensure their own compliance. In addition, the automotive supply chain consists of companies of different sizes. While OEMs and larger suppliers have appropriate compliance departments, small and medium-sized suppliers often show little awareness and knowledge of REACH.⁴³

27 J. B. Ingerowski, *supra* note 22, 354.

28 § 26(1, 2) ChemG.

29 Millieu Ltd., Report on penalties applicable for infringement of the provisions of the REACH Regulation in the Member States, Annex II: Level of penalties (March 2010), p. 23.

30 Millieu Ltd., *supra* note 19, p. 25.

31 REACH Enforcement Regulations 2008, 2008/2852, Art. 11(5) and 12.

32 E. Pache and D. Rucireto, *Erläuterungen zum REACH-Anpassungsgesetz – Sanktionen*, in *Praxishandbuch REACH 510-520* (M. Führ, ed., 2011) paragraph 10.

33 J. B. Ingerowski, *supra* note 22, 358.

34 The “Forum” constitutes of delegates from EU and EEA member states according to Art. 76(1)(f) and 77(4) REACH.

35 ECHA, Forum REF-4 Project Report. Harmonised Enforcement Projects on Restrictions (8 February 2018), p. 4.

36 Bund/Länder-Arbeitsgemeinschaft Chemikaliensicherheit (BLAC), *Abschlussbericht zu REACH-EN-FORCE 4 in Deutschland* (May 2018), p. 6.

37 J. B. Ingerowski, *supra* note 22, 358.

38 ECHA, Forum REACH-EN-FORCE 3 – Final Report Inspection and enforcement of compliance with registration obligations by manufacturers, importers and only representatives in close cooperation with customs Report for the overall project including the data reporting for phase 2 of the project (December 2015), p. 7.

39 K. Bizer, *Ökonomische Anreize aus REACH in Praxishandbuch REACH 34-50* (M. Führ, ed., 2011), paragraphs 7 and 18.

40 K. Bizer, *supra* note 39, 14.

41 C. Jäger, *Zugang zu Informationen*, in *Praxishandbuch REACH 435-461* (M. Führ, ed., 2011), paragraph 2.

42 S. J. Winkler-Portmann, *supra* note 19, 66.

43 S. J. Winkler-Portmann, *supra* note 19, 67.

4 Compliance activities of the automotive actors

The automotive industry responds to the Art. 33 REACH requirements with a series of measures. A core element is formed by substance lists, in particular the GADSL (Global Automotive Declarable Substance List), a sector-specific global list of substances with bans and reporting obligations.⁴⁴ The OEMs use these substance lists as part of their supply specifications to build up pressure for REACH compliance in the upstream supply chain.⁴⁵ To react to the dynamic Candidate List, the automotive associations try to estimate in joint working groups and expert networks which substances might be regulated in the future and add them to GADSL if deemed relevant for the sector.^{46,47} The OEMs complement the GADSL with their own lists, e.g. to reflect their own sustainability goals.⁴⁸

Such material data is transmitted in the supply chain via the International Material Data System (IMDS). The rules for the system are set by the IMDS Steering Committee which gathers OEMs and suppliers. The IMDS' basic approach is that substance information is entered into the system at the point where it is generated. Each supplier has to enter his product in the IMDS and can access the information provided by his own suppliers for this purpose. The process begins where an actor first combines substances into a material.⁴⁹ The system operates on material data sheets (MDS), which represent the substance composition of materials.⁵⁰ Up to 10 % by weight of a material can be hidden to protect business secrets by either entering the substances into the system and then marking them as confidential ('confidential substance') or by not declaring them at all ('wild card').⁵¹ IMDS rules do not allow the concealment of declarable or prohibited substances.⁵² The MDS for materials can, by referencing, be further combined to semi-components and components of a growing complexity, resulting in a tree structure of the product.⁵³ For certain electrical and electronic components, such as printed circuit board assemblies (PCBAs), there are exceptions to this procedure, which are granted by 'IMDS Recommendation 019'.⁵⁴

The IMDS Steering Committee decided in September 2019 to withdraw this 'REC019', has however not yet presented concrete details or a clear timeframe for the deactivation. As it is still intact and thereby part of the compliance framework of the automotive industry, it remains relevant for this observation. For those, suppliers can, instead of creating separate MDSs for each product, resort to standardised MDSs provided by the system that map a typical material composition.⁵⁵ To verify whether the standardised material data sheets correspond to the actual product, PCBA suppliers are supposed to check the SVHC share internally and in the upstream supply chain at the level of the homogeneous material, e.g. a specific ceramic. It does not align to the article definition of Art. 33 REACH, as the supplier does not have to map the complete article structure of the product, but can already combine information for articles of the same material. This data acquisition must be proven to a customer upon request.^{56,57} This option would however not present an adequate alternative to 'normal' MDS if not presented in the same format and level of detail. The OEMs complement and vary the general IMDS conditions by their specific contractual obligations for suppliers concerning IMDS entries.⁵⁸ As IMDS only provides for the transmission of material information for parts in the supply chain, the OEMs mirror the data in their in-house systems for further analyses of the full vehicle.⁵⁹

OEMs and suppliers as well as the respective associations try to raise awareness and capabilities for REACH compliance in the supply chain by providing training and informative material on the legal requirements and the used tools.⁶⁰ A joint REACH compliance strategy is presented by the 'Automotive Industry Guideline on REACH' (AIG). This guideline is prepared by the TF-REACH, a task force formed by members of the European associations of OEMs and suppliers.⁶¹ The guideline explains the legal requirements in TF-REACH's view, allows stakeholders to identify their own obligations through flowcharts and recommends measures to address them.⁶²

5 Effectiveness of the compliance activities

GADSL and the IMDS represent powerful tools for the compliance of the automotive industry with Art. 33 REACH. For instance, supply contracts

44 S. J. Winkler-Portmann, *supra* note 19, 53.

45 S. J. Winkler-Portmann, *supra* note 19, 53.

46 S. J. Winkler-Portmann, *supra* note 19, 61.

47 Global Automotive Stakeholder Group (GASG), *Global Automotive Declarable Substance List (GADSL) Guidance Document* (February 2018), p. 4-5 and 8.

48 S. J. Winkler-Portmann, *supra* note 19, 55.

49 IMDS Steering Committee, *IMDS Recommendation 001 - General Rules and Guidelines for IMDS Material Datasheets* (August 2012), p. 3.

50 IMDS Steering Committee, *IMDS Benutzerhandbuch 12.0* (9 May 2019), p. 32.

51 IMDS Steering Committee, *supra* note 49, 16-18.

52 IMDS Steering Committee, *supra* note 49, 18.

53 IMDS Steering Committee, *supra* note 50, 41-42.

54 IMDS Steering Committee, *IMDS Recommendation 019 - Electric/Electronic (E/E) Components and Assemblies* (2.11.2011), p. 1.

55 TF-REACH, Annex N to the AIG: Practical Application of the O5A Principle (September 2018), p. 3.

56 TF-REACH, *supra* note 55, 4.

57 IMDS Steering Committee 2011, *supra* note 54, 1-2.

58 IMDS Steering Committee, *IMDS OEM Acceptance Criteria* (November 2007).

59 S. J. Winkler-Portmann, *supra* note 19, 58.

60 S. J. Winkler-Portmann, *supra* note 19, 59.

61 TF-REACH, *Automotive Industry Guideline On REACH Version 4.0* (13.6.2018), p. 7.

62 TF-REACH, *supra* note 61, pp. 25-35, 37-81.

referring to GADSL indirectly apply the information obligations of REACH to suppliers who are not under REACH jurisdiction. It also represents a forward-looking approach by trying to include substances that are in discussion for future regulation. A possible deficit however is the sector-specific orientation, which impedes the compliance probability of international suppliers which are only indirectly supplying the automotive sector (e.g. suppliers of screw producers).⁶³ Also, the GADSL is only updated once a year in February, responding in delay to the updates of the Candidate List every six months.⁶⁴

The IMDS is not necessarily affected by this, as it also identifies SVHCs on its own.⁶⁵ The database generally provides an efficient and effective approach by requiring data entries from those actors who also supervise the corresponding production processes and thus know the material changes. However, the exceptions in the form of REC019, wildcards, and OEM-specific MDS specifications create vulnerabilities.

Recommendation 019 allows incomplete reporting of articles in articles for PCBAs. If the supplier of a PCBA follows the REC019 and collects the material data in the supply chain, he would also be able to report in a legally compliant manner on each article in an article.⁶⁶ Instead he is however asked to refer to MDS which exclusively display the entire product grouped with typical components based on standardised MDSs (e.g. 'PCB capacitor surface (8c)').⁶⁷ An article within this article, e.g. a specific condenser on the circuit board, cannot be determined. Also the actual substance composition, including possible appearance of SVHCs, is not reported. MDSs produced according to this recommendation therefore represent only a typical product and not the specific product of the supplier.⁶⁸ In addition, suppliers do not always collect material information from the supply chain as they can use the standardised MDS.⁶⁹ This was also considered by the Steering Committee in its decision to remove REC019.

The TF-REACH takes the position in the AIG that the name and position of the SVHC containing articles not necessarily have to be indicated as this does not contribute to the effectiveness of the safe use information. It also argues that the effort to create the complete structure across the entire supply chain, up to the point at which an actor creates the smallest article, would be disproportionately high for this low

benefit.^{70,71} The CJEU however ruled contradicting to this interpretation by stating that the duty refers to the presence of SVHCs in an article and that the transmission of that information on that specific article along the supply chain to the consumer must not be interrupted.⁷² At the moment, this duty is not fulfilled by a supplier of a PCBA following Rec019 and all his downstream supplier of articles, thereby breaking with Art. 33 REACH. The court also contradicts a disproportionality, since the mere mention of the SVHC in articles as a minimum requirement does not mean an excessive burden.⁷³

Even under the assumption of providing compliant information, the IMDS Recommendation 019 would still slow down the reaction to candidate list updates, as the supplier has to crosscheck the standard dataset with the actual substance data manually.⁷⁴ A similar risk is presented by the wildcards function in IMDS. As the substance composition is not stored in the database, the system is not able to check whether they unjustifiably conceal a regulated substance.⁷⁵ The compliance therefore relies on the data creator checking after each candidate list update whether wildcards conceal SVHC. This check requires a great deal of time and organisational effort due to the complex products and the long supply chains of the automotive industry and can only ensure compliance for 6 months until the next Candidate List update. The wildcard therefore creates a permanent high dependency on the willingness of upstream actors to continuously review and update the information.⁷⁶ This risk is particularly evident for spare parts placed on the market sometimes ten years and longer after end of production of the respective vehicle. For those, it can be challenging to impossible to determine whether they are affected by Candidate List updates. Even by the IMDS rules requiring actors to archive the complete substance data of wildcards for 30 years, they cannot protect against information getting lost e.g. due to actors ceasing business.^{77,78}

The OEM specific rules for IMDS entries also entail weak points. PSA and Renault e.g. require suppliers to create a single MDS for a part with several colour variations, by dividing the weight of the corresponding colour material by the number of variations.^{79,80} The weight of the substances in the

63 S. J. Winkler-Portmann, *supra* note 19, 82.

64 GASG, *supra* note 47, 6.

65 IMDS Steering Committee, *supra* note 50, 53.

66 S. J. Winkler-Portmann, *supra* note 19, 83.

67 IMDS Steering Committee, *supra* note 54, 2 and 11.

68 S. J. Winkler-Portmann, *supra* note 19, 84.

69 S. J. Winkler-Portmann, *supra* note 19, 85.

70 TF-REACH, *supra* note 55, 2 and 4.

71 TF-REACH, *supra* note 61, 67-68.

72 CJEU, *supra* note 7, 79-80.

73 CJEU, *supra* note 7, 81.

74 S. J. Winkler-Portmann, *supra* note 19, 85.

75 IMDS Steering Committee, *supra* note 50, 36-37.

76 S. J. Winkler-Portmann, *supra* note 19, 86.

77 IMDS Steering Committee, *supra* note 49, 17.

78 S. J. Winkler-Portmann, *supra* note 19, 86.

79 Regles PSA pour le renseignement IMDS par les fournisseurs / PSA rules for IMDS reporting by the suppliers (July 2019), p. 14.

80 RNES-B-00043 v.1.0 IMDS Documentation Rules for Suppliers (December 2016), p. 33.

colours in the MDS therefore does not correspond to the actual components which does not allow to calculate whether SVHCs in individual colours exceed the limit value of 0.1%. In addition, it is impossible to identify colour variants to be substituted due to possible substance bans, since the whole part appears problematic (or falsely unproblematic due to the incorrect calculation). Toyota, on the other hand, instructs its suppliers to use the data of the colour variant which has the highest proportion of regulated substances.⁸¹ As in this case the information on other colour variants is missing, it remains unclear which substances they contain and whether they be subject to declaration. If the legal requirements change, the supplier must also re-evaluate which variant contains the most substances subject to declaration.

But also the OEMs' internal processes show deficiencies. By submitting random consumer request according to Art. 33(2) REACH to nine OEMs on randomly selected vehicle models and analysing the replies, the author identified significant compliance gaps.⁸² Some of the OEMs provided completely false answers. One of the OEMs responded unrelated to REACH, ignoring the reference to the provision in the request. Two others stated that the "*product*" did not contain any SVHCs above the limit, thereby misinterpreting the legal definition of article. This statement can definitely be refuted, because most metal parts contain lead above 0.1 % w/w, as also noted by an online portal of one of the OEMs which was not mentioned in the reply.^{83,84} The problems may result from missing awareness of the customer service for REACH or ineffective communication procedures within the companies that resulted in the responsible department not being asked to provide the requested information.⁸⁵ The information provided by the other companies was also not fully accurate. A particular shortcoming was the SVHC specification with none of the companies reporting the SVHC at the article level.⁸⁶ One OEM only indicated that certain SVHC were present in the full vehicle. Six others at least approached the article level by reporting SVHC for certain components in the vehicle. One OEM stated for the SVHC lead simply that it was included in almost all parts of the vehicle. The components were often described in a way that cannot be understood by consumers (e.g. 'Engine Unmoving No.2' or simply part numbers).⁸⁷ In both cases the consumer cannot identify if a part with which he comes into contact is affected. Two OEMs organised the components by

areas within the vehicle, at least partially enabling to locate SVHC containing components.⁸⁸ In addition, the safe use information proved to be inadequate. Only two OEMs provided substance-specific safe use instructions. Three other OEMs did not provide any form of safe use advice, while the rest simply referred to the user manual, one without explicitly excluding exposure under normal conditions of use.⁸⁹ The study thereby shows that although these companies create and provide information, they are not completely reaching the regulatory requirements. Thus, the study showed that none of the considered OEMs is fully compliant with Art. 33 REACH, by providing the information either "*not at all*", "*not properly*", "*not completely*" or "*not in the prescribed manner*" according to § 6(1)(17) ChemSanktionsV and § 26(1)(11) ChemG.⁹⁰

6 Conclusions and solution approaches

The previous section has shown that the automotive industry has not yet reached full compliance with Art. 33 REACH obligations. Despite the powerful tools that have been developed, there remain a number of compliance deficiencies in the supply chain resulting from loopholes in the framework. Also, the internal processes of the OEMs seem to be ineffective to adequately answer Art. 33(2) REACH requests. This negative overall impression is underpinned by the associations pursuing an insufficient compliance strategy which does not follow the CJEU confirmation of the O5A rule and results in inadequate recommendations.

The automotive actors can counter the identified gaps and remaining risks by extending the current measures. Concerning the internal processes for preparing the information in accordance with Art. 33 REACH, the priority should be to align the structure of the information provided to the legal requirement of an SVHC nomination for each article. The IMDS tree structure, in which the SVHCs are specified above the limit value, offers an optimal form of provision. This requires an optimized designation of parts in order to be able to identify products. The often-existing online portals offer an efficient way of providing information. The portals have to be continuously updated to correspond to the current candidate list. For professional recipients, the OEM could provide a specific link or barcode directing to the correct database entry. For customer requests according to Art. 33(2) REACH, the OEMs should train their customer service so employees correctly identify an Art. 33(2) request and direct it to the responsible department. This process could be optimised by

81 Toyota's IMDS Frequently Asked Questions Version 5.0 (October 2010), p. 6.

82 S. J. Winkler-Portmann, *supra* note 19, 74-81.

83 S. J. Winkler-Portmann, *supra* note 19, 77-78.

84 BMW, REACH Communication Product Name F45 (04/2018).

85 S. J. Winkler-Portmann, *supra* note 19, 79.

86 S. J. Winkler-Portmann, *supra* note 19, 74.

87 S. J. Winkler-Portmann, *supra* note 19, 78.

88 S. J. Winkler-Portmann, *supra* note 19, 80.

89 S. J. Winkler-Portmann, *supra* note 19, 78-79.

90 S. J. Winkler-Portmann, *supra* note 19, 81.

making Art. 33(2) requests a categorisation option of the contact form on the website.

To provide the required informational groundworks, the material data transmission in the supply chain requires improvement. For the IMDS, the Steering Committee should establish the basic rules that (1) each part is to be represented in the IMDS in the same way as it is used in production and (2) a separate MDS is to be created for each product.

For the 1-article-1-entry rule, deviating OEM specifications such as combined entries for colour variations should no longer be permitted. Also, the Steering Committee should shortly present specific steps and a timeframe how the Recommendation 019 should be repealed. This must not remain at simply forbidding the future use of standardised MDS, but also include a plan to address existing MDS created according to REC019.

Report-as-produced on the other hand requires the clear naming of parts in the IMDS. Also, the wild card function should be fully replaced by the confidentiality option so that the system itself can warn when the confidential substances become regulated.⁹¹ To ensure that CBIs remain protected, the integrity and security of the IT system must be ensured by appropriate encryption. If the IMDS Steering Committee cannot agree on these rule changes, each OEM should consider whether he will lead the way as a compliance pioneer by implementing the rule changes in his own supply contracts.

Through their informative communication, the associations can help to ensure that the actors take a consistent line in pursuing effective compliance measures. To this end, the positions in the AIG, *inter alia* concerning products in products, should be adapted to the decision of the CJEU judgment. A REACH compliance culture in accordance with current standards⁹² must also be pursued which emphasizes forward-looking action and develops a self-image that encourages the responsible individuals in the organizations to ensure compliance with the legal requirements.^{93,94} To ensure that all supply chain actors set up the necessary processes and personnel competencies to meet the requirements, automotive stakeholders could attach mandatory REACH compliance provisions to the existing automotive quality management standard IATF 16949.⁹⁵

Governance by the legislator and the supervisory authorities has the mandate to adapt the framework conditions in such a way that they provide sufficient incentives to take on the burden of such measures. A particularly important task is the optimization of the execution. The current ineffective monitoring and prosecution of violations of the law is a disadvantage for those who make serious compliance efforts. At European level, it is up to the Commission to increase the pressure on the Member States to establish effective framework conditions. It can draw on the expertise and knowledge of ECHA and the Forum for this purpose. As early as 2013, the Forum recommended strengthening cooperation between supervisory authorities and increasing human and financial resources.⁹⁶

The role of the consumer holds a high incentive potential. With REACH, the legislator already intended to form a responsible consumer who creates market pressure to reduce SVHC.⁹⁷ The majority of consumers is however currently not aware of the 'right to know' under Art. 33(2) REACH or has not yet used it to make a request to companies.⁹⁸ The legislator and the authorities should increase this incentive potential by raising awareness and facilitating requests. A first step in this direction could be the mobile application developed as part of the European "AskREACH" project, which enables consumer enquiries by scanning the barcode.⁹⁹ Their success will depend in particular on the impact of the information campaign accompanying the project.¹⁰⁰ While automobiles are not a typical consumer product with a barcode, a possibly increasing general consumer awareness due to these apps could still have an impact on purchasing decisions for automotive products.

In conclusion, both the legislator and the supervisory authorities as well as the automotive actors are faced with further tasks to ensure a transmission of material information which is compliant with Art. 33 REACH.

91 IMDS Steering Committee, *supra* note 50, 38.

92 e.g. ISO 19600 Compliance Management Systems.

93 M. Wendt, *Compliance-Kultur - Grundlagen und Evaluierung*, in *Corporate Compliance: Handbuch der Haftungsvermeidung im Unternehmen* 273–296 (C. E. Hauschka, K. Moosmayer, T. Lösler, eds., 2016), paragraph 23.

94 Schieffer and Wauschkuhn, *Praktische Umsetzung der Compliance-Anforderungen im Unternehmen*, in *Compliance-Risikoanalyse: Praxisleitfaden für Unternehmen* 51-74 (K. Moosmayer, ed., 2015), paragraph 33.

95 S. J. Winkler-Portmann, *supra* note 19, 76.

96 ECHA, Forum REACH-EN-FORCE 2 Project Report. Obligation of downstream users - formulators of mixtures (27.7.2019), p. 27.

97 Recitals 56 and 117 to REACH.

98 J. Schenten, S. Fonseca and J. Schönborn, *Awareness and Communication on SVHCs in Articles. Surveys among Consumers and Article Suppliers* (July 2019), p. 33.

99 J. Schenten and J. Schönborn, *Consumer Smartphone Apps for Problematic Substances in Products Emergence and Potential Impacts* (December 2018), p. 5.

100 J. Schenten and J. Schönborn, *supra* note 100, 33.

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

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In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

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