

12.11.2020

## COMPLIANCE & INVESTIGATIONS

### **“SCIP”: NEW NOTIFICATION OBLIGATION FOR SUPPLIERS OF PRODUCTS CONTAINING SUBSTANCES OF VERY HIGH CONCERN (“SVHCS”) FROM 5 JANUARY 2021**

Beachwear, batteries, bathroom flooring – besides their initial letter, these articles have one thing in common, in particular: They could all contain substances of very high concern and therefore be subject to the new notification obligation for suppliers that takes effect in January 2021. And this applies to a large number of other products as well.

#### **Who is affected?**

Next year, manufacturing companies face new compliance requirements right from the word go. The European Chemicals Agency (“ECHA”) has created the “SCIP” database and thereby also the basis for a new notification obligation.

The new notification obligation applies to countless products. Ultimately all companies which, as producers, importers, distributors or other actors (“suppliers” within the meaning of Article 3, point (33) Regulation (EC) No 1907/2006 concerning the registration, evaluation, authorisation and restriction of chemicals [“REACH” Regulation]), place products containing more than 0.1% by weight of substances of very high concern (“SVHCS”) on the market within the European Economic Area are affected by this. These are substances that are, among other things, carcinogenic, mutagenic or toxic to reproduction, persistent (difficult to degrade), liable to bioaccumulate (accumulating within living organisms) or “endocrine disruptors” (substances having an adverse effect on the hormone system). The individual substances to which the notification obligation applies can be found on the candidate list published on [ECHA's website](#). These are in many cases plasticisers, flame retardants, paints or similar products, which are mainly used in plastic applications, fabrics or foams. As can be imagined, the areas of application are legion.

Information on products exceeding this threshold is to be made available to the “SCIP” database by the persons responsible for them within the company. The information requirements include information that allows the identification of the product, information on the concentration of the “SVHC” contained in the product and information on possible safety risks when using the product.

#### **All about “SCIP”**

Companies that might be affected by this will rightly ask themselves first of all where this obligation comes from, followed by the really crucial question: What needs to be done?

But first an overview of the background to the notification obligation:

The new notification obligation has its origin in the European Union’s “Waste Framework Directive”. It may initially come as a surprise that a notification obligation pertaining to chemical substances is based on waste legislation. However, a look at the meaning and purpose of the notification obligation provides clarity in this respect:

The new notification obligation is part of the EU’s waste package from 2018 and is supposed to improve the recycling of products containing hazardous substances. The transparency created for the consumer is to provide an incentive to replace substances that are subject to the notification obligation with non-hazardous substances in

the long term. For this reason, the intention is to make the database accessible to the general public so that both waste management companies and consumers can have unrestricted access to the information to be provided by companies.

The German legislator has now anchored the new notification obligation in the German Chemicals Act (*Chemikaliengesetz*, "ChemG") by means of a new section 16f, instead of in the German Circular Economy Act (*Kreislaufwirtschaftsgesetz*, "KrWG") as initially planned. Finally, the new notification obligation ultimately also tightens the already existing notification obligation pursuant to Article 33(1) REACH Regulation, a European regulation that likewise concerns chemicals law. Violations of Article 33(1) REACH Regulation have long been subject to heavy fines of up to EUR 50,000.

The new legislation was adopted at the end of October 2020, almost simultaneously with the launch of the "SCIP" database on 28 October 2020. The establishment of the database by ECHA can likewise be traced back to the Waste Framework Directive. "SCIP" stands for *Substances of Concern In articles as such or in complex objects (Products)*.

Now that the basis for the new notification obligation has already been created with the revision of section 16f ChemG and the establishment of the database, only one thing is missing: the data. And this must be provided by the companies concerned from 5 January 2021 onwards. This leads to the question: What needs to be done?

### **What needs to be done?**

Companies should first of all check whether the new provision applies to them at all. The key questions that companies must answer here are whether they are suppliers within the meaning of Article 3, point (33) REACH Regulation and whether their products contain more than 0.1% by weight of substances of very high concern. If the new provision does apply to them, they should have a closer look at the substances in their products. If a substance listed as an "SVHC" is identified and the concentration of this substance exceeds the said threshold of 0.1% by weight, the relevant "SCIP" notification must be prepared.

The preparation of the required datasets in the form of an "SCIP dossier" can be extremely time-consuming for manufacturers of complex products, in particular. It is no longer a question of a small amount of additional red tape, as complex products are themselves composed of a large number of individual components to which a notification obligation applies.

The "referencing" feature has been developed to facilitate this process. This enables a manufacturer of a complex product to refer – at least for the individual components – to data that have already been submitted, for example by its upstream supplier. This referencing option does not however release the manufacturer from its own responsibility to ensure that these data are complete and correct. This may in some cases trigger a need for an additional contractual liability agreement to be concluded between the supplier and the manufacturer.

Another feature designed to ease the process is aimed primarily at distributors. In some cases, they do not have to submit a separate dossier for a product either, but can refer to their supplier's dossier relating to the exact same product ("Simplified SCIP Notification"). The notification is then carried out by submitting the specific "SCIP" number that the supplier receives after filing a notification for the product. This obviously presupposes that the supplier has passed the identification number on. Here, too, it may make sense to conclude a contractual agreement to ensure that the notification process runs smoothly and the identification number is passed on, and to avoid liability risks. There is no statutory obligation to pass the identification number on.

Difficulties may however arise not only in passing information on, but in obtaining it in the first place. Since manufacturers outside the European Economic Area are not obliged (or authorised) to submit information, the respective importers are themselves responsible for obtaining the relevant information from the non-European producers. Once again, consideration should be given to laying down a corresponding contractual provision.

Checking the areas of application, analysing products, preparing dossiers, identifying simplified procedures, entering into additional contractual provisions, drawing up notifications and submitting them – all this has to be done before 5 January 2021.

### **Greater transparency**

The aim of all this is to ensure greater transparency. The data submitted by companies can be viewed by consumers and waste operators from February 2021 onwards. They will most likely be happy to have this opportunity – as will competitors, too, no doubt. The database currently provides for such in-depth information to be provided about components containing "SVHC" that it no longer appears possible to fully guarantee the

protection of one of the most important intangible assets – corporate know-how.

The legislator is also aware of this problem, and the ordinance to be issued on the basis of section 16f(2) ChemG is intended to remedy it. This ordinance is to specify how the notification obligations are to be fulfilled, and subject to what conditions, taking the database requirements developed at EU level into account. This is another component that requires clarification and that has nonetheless not had the effect of delaying the start of the notification obligation. Affected companies must therefore get to grips with the notification obligation and comply with it while still ensuring that their trade and business secrets are protected.

## **Conclusions**

Notification and registration obligations are widespread in the European Economic Area. Not only the aforementioned REACH Regulation, but also the German Electrical and Electronic Equipment Act (*Elektro- und Elektronikgerätegesetz, "ElektroG"*) and the German Packaging Act (*Verpackungsgesetz, "VerpackG"*) lay down notification or registration obligations that are based on EU law.

There are still a large number of outstanding questions about how these obligations will be implemented in practice, and not much time to answer them.

So it is all the more surprising that the legislator has unflinchingly adhered to the deadline for introducing the notification obligation and issued the relevant national regulations only a few weeks beforehand.

Somewhat less surprising is the fact that calls for the deadline to be postponed are growing ever louder. Nonetheless, the new notification obligation will come into force at the beginning of next year and affected companies should be prepared for this.

## EXPERTISE

**Commercial**

**Compliance & Investigations**

**Environmental**

**Product liability and safety**

## EXPERTS

**Dr. Marc Ruttloff**

**Linda Rampf**