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Attorney-Client Work Product – Privileged and Confidential

MEMORANDUM

6 March 2020

To: [REDACTED]

[REDACTED] [REDACTED]

Re: **Interpretation of the terms “plastic” and “chemically modified” under SUPD**

You have asked us to assess the interpretation by European Chemicals Agency (“**ECHA**”) and the European Commission (“**Commission**”) of the following terms within the context of Directive (EU) 2019/904 on the reduction of the impact of certain plastic products on the environment¹ (“**SUPD**”):

1. “Plastic”, in particular whether cellulose fibres are outside the scope of the definition of “plastic” in Article 3(1) of the SUPD, and
2. “Chemically modified” within the definition of ‘not chemically modified substance’ under Article 3(40) of REACH².

I. EXECUTIVE SUMMARY

Definition of “plastic” (in the context of cellulose fibers)

By reference to other EU law provisions and general principles of interpretation of EU law, the definition of “plastic” in the SUPD can be read to exclude cellulose fibers. Regenerated cellulose fibers, such as viscose and lyocell, for which the chemical structure at the end of the process is the same as in the beginning of the process would therefore be outside the scope of the SUPD.

Specifically, regenerated cellulose is recognized as a material different from “plastic” under EU food contact legislation (Annex I to Regulation 1935/2004). At the same time, the definition

¹ O.J. L 155/1, 12.6.2019.

² 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 (Text with EEA relevance)Text with EEA relevance (O.J. L 396 30.12.2006, p. 1).

of “plastic” under the EU food contact legislation is identical to the definition of “plastic” under the SUPD (Article 3(2) of Commission Regulation (EU) 10/2011).

Additionally, the Court of Justice of the EU held that EU law provisions must be interpreted in accordance with their everyday meaning, in the absence of a clear indication of an intention to the contrary. It can be held that the everyday meaning of “plastic” does not cover regenerated cellulose fibers.

Definition of “chemically modified” (in the context of Article 3(40) of REACH)

“Chemically modified” should be interpreted by reference to the chemical character of the substance at the beginning and the end of “*a chemical process or treatment*”. If it is the same as at the beginning then it should not be treated as “chemically modified,” as the chemical structure has not changed. This interpretation is also supported by other EU legislation, for example, the Common Customs Tariffs Regulation (Regulation 2658/87) (particularly, with respect to applying the definition to viscose).

If the legislator had intended that the chemical structure of the substance should be unchanged during any chemical treatment, the definition in Article 3(40) of REACH would have made that distinction. The narrow interpretation of “chemically modified” risks that the SUPD objectives will not be fulfilled.

II. BACKGROUND – RELEVANT LEGAL FRAMEWORK

Single-use plastic products are defined in point 2 of Article 3 as “*a product that is made wholly or partly from plastic and that is not conceived, designed or placed on the market to accomplish, within its life span, multiple trips or rotations by being returned to a producer for refill or re-used for the same purpose for which it is conceived*”.

Plastic is in turn defined in point 1 of Article 3 as being a “material consisting of a polymer as defined in point 5 of Article 3 of Regulation (EC) No 1907/2006, to which additives or other substances may have been added, and which can function as a main structural component of final products, with the exception of natural polymers that have not been chemically modified” (emphasis added).

Recital 11 of the SUPD further provides that “[s]ingle-use plastic products can be manufactured from a wide range of plastics. Plastics are usually defined as polymeric materials to which additives may have been added. However, that definition would cover certain natural polymers. Unmodified natural polymers, within the meaning of the definition of ‘not chemically modified substances’ in point 40 of Article 3 of [REACH], should not be covered by this Directive as they occur naturally in the environment. Therefore, for the purposes of this Directive, the definition of polymer in point 5 of Article 3 of Regulation (EC) No 1907/2006 should be adapted and a separate definition should be introduced. Plastics manufactured with modified natural polymers, or plastics manufactured from bio-based, fossil or synthetic starting substances are not naturally occurring and should therefore be addressed by this Directive.”

Article 3(40) of REACH defines ‘not chemically modified substance’ as “a substance whose chemical structure remains unchanged, even if it has undergone a chemical process or treatment, or a physical mineralogical transformation, for instance to remove impurities” (emphasis added).

III. LEGAL ASSESSMENT

A. Definition of “plastic” (in the context of cellulose fibers)

The definition of “plastic” under the SUPD is identical to the definition of “plastic” under EU food contact legislation, specifically under Commission Regulation 10/2011 (Article 3(2) defines plastic as “*polymer to which additives or other substances may have been added, which is capable of functioning as a main structural component of final materials and articles*”).

It is noted that the EU food contact law provisions are clearly differentiating plastic from materials such as regenerated cellulose. Under the EU food contact legislation, regenerated cellulose is considered and regulated as a distinct material and product from plastics. Specifically, Annex I to the Regulation 1935/2004 on materials and articles intended to come into contact with food³ (the “Food Contact Materials Regulation”) identifies 17 groups of materials and articles, for which specific measures may be adopted under Article 5 of that Regulation. Annex I separately lists plastics⁴, regenerated cellulose⁵, silicon⁶ and rubber⁷. These materials are all polymers but they are not considered to be plastics, and are regulated by different pieces of legislation under this framework.

Accordingly, given that the definition of “plastic” is identical under EU food contact legislation and under the SUPD, and given that regenerated cellulose is recognized and regulated as a material other than plastics, it follows that the cellulose fibers (particularly such as viscose and lyocell, for which the chemical structure at the end of the process is the same as in the beginning of the process) are also to be understood to be outside the definition of “plastic” under the SUPD.

Additionally, it must be analysed whether any “material consisting of a polymer” is plastic. A strict reading of the definition of “plastic” could be interpreted as all polymers as defined in point 5 of Article of the REACH Regulation are plastics. We consider that there are strong arguments to argue that this is not the case, and that only those materials, made of polymers, that are plastics in the natural, everyday meaning of the word, should be considered against this definition.

The Court of Justice of the EU has held that “*in the absence of working documents clearly expressing the intention of the draftsmen of a provision, the Court can base itself only on the scope of the wording as it is and give it a meaning based on a literal and logical interpretation*”, and that terms should be interpreted “*by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purpose of the rules of which they are part.*”⁸

³ OJ L 338, 13.11.2004, pp. 4-17.

⁴ Para 10 of Annex I of the Food Contact Materials Regulation.

⁵ Para 12 of Annex I of the Food Contact Materials Regulation.

⁶ Para 13 of Annex I of the Food Contact Materials Regulation.

⁷ Para 5 of Annex I of the Food Contact Materials Regulation.

⁸ Case F-II/08 Moiling v Europol [2009] FP-IA-I-OO 159, paragraph 69 and the case-law cited), and Case C-1371/11 I Partena ASBL v Les Tartes de Chaumont-Gistoux SA [2012] nyr, paragraph 56 and the case-law cited.

In the everyday meaning, plastic is defined as “*any of numerous organic synthetic or processed materials that are mostly thermoplastic or thermosetting polymers of high molecular weight and that can be made into objects, films, or filaments*”⁹ (emphasis added).

Cellulose, or regenerated cellulose, would not fit the everyday meaning of “plastics” because they do not melt, are not “thermoplastic” or “thermosetting” polymers. It can be concluded, on the basis of this interpretation, that cellulose or regenerated cellulose does not appear to fall under the definition of “plastic” in the SUPD.

Further, the SUPD definition refers to a “*material consisting of a polymer*”. In other words, plastic is not only a polymer as it is defined in the REACH Regulation, but a material consisting of a polymer. The word “material” is not further defined under the SUPD, and it can be held that any such material should meet the general understanding of a plastic.

B. Definition of “chemically modified” (in the context of Article 3(40) of REACH)

ECHA has provided limited guidance on the meaning of “chemically modified.” For example, the Guidance for Annex V exemptions from the obligation to register¹⁰ (“**Guidance for Annex V**”) provides that “*Chemical modification includes but is not limited to hydrogenation, neutralization, oxidation, esterification, and amidation*”.¹¹ The Guidance for Annex V notes that “*it needs to be assessed [...] whether the substance has been chemically modified during or after extraction according to Article 3(40).*”¹² However, it is explained in the accompanying footnote that “*some of the processes mentioned under Article 3(39) [of REACH] may change the chemical structure and thus result in a chemical modification*”¹³ (emphasis added). Accordingly, if the chemical structure at the end of “*a chemical process or treatment*” is the same as at the beginning then it should not be treated as “chemically modified” as chemical structure has not changed.

Article 3(40) of REACH does not explicitly provide that chemical structure should be unchanged during any chemical process undertaken. The draft Guidance for Annex V¹⁴ stated that “*Whenever one of the constituents of the final isolated substance which occurs in nature undergoes a chemical reaction during its processing, the substance must be regarded as having been chemically modified*”¹⁵ (emphasis added). However, this reference to the “*chemical reaction during its processing*” has been purposely removed from the final Guidance for Annex V. Accordingly, the narrow definition of “chemically modified” is not supported.

⁹ <https://www.merriam-webster.com/dictionary/plastic>.

¹⁰ Version 1.1, dated November 2012; available at: https://echa.europa.eu/documents/10162/23036412/annex_v_en.pdf/8db56598-f7b7-41ba-91df-c55f9f626545.

¹¹ *Ibid.*, page 27.

¹² *Ibid.*, page 20,

¹³ *Ibid.*, footnote 8.

¹⁴ Available at: https://ec.europa.eu/environment/chemicals/reach/pdf/8_draft_guidance_5.pdf.

¹⁵ *Ibid.*, page 14.

Further guidance can be taken from Note 1 of Chapter 54 of Annex I to Council Regulation 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff¹⁶ (“**Common Customs Tariffs Regulation**”). It provides that “*Throughout the nomenclature, the term ‘man-made fibres’ means staple fibres and filaments of organic polymers produced by manufacturing processes, [...] by dissolution or chemical treatment of natural organic polymers (for example, cellulose) to produce polymers such as cuprammonium rayon (cupro) or viscose rayon, or by chemical modification of natural organic polymers (for example, cellulose, casein and other proteins, or alginic acid), to produce polymers such as cellulose acetate or alginates*” (emphasis added). The Common Customs Tariffs Regulation distinguishes between chemical treatments and chemical modification (as does Article 3(40) of REACH). The legislator has identified viscose being the end result of a chemical treatment and not an as example of chemical modification. By analogy and for the consistency, legitimate expectations and legal certainty purposes, the same interpretation should be applied in respect of Article 3(40) of REACH when discussed in the context of SUPD.

The reference to the Classification Codes (i.e. CN Code) derived from the Common Customs Tariffs Regulation are also referred to, for example, by Ramboll, which is assisting the Commission with the preparation of the guideline on SUPD.¹⁷ Ramboll is leading the project entitled “Study to support the development of implementing acts and guidance under the SUPD”. For example, Part 3 of the Second Survey asks input on “*methodologies for the measurement and reporting of consumption reduction of single-use food containers and cups for beverages*”¹⁸ and this questionnaire uses CN Codes for product identification under SUPD. Accordingly, it is reasonable to expect a consistent approach in the interpretation of SUPD and the Common Customs Tariffs Regulation.

The legal texts of REACH, SUPD, as well as of the Common Customs Tariffs Regulation do not require that the chemical structure of the substance does not change during the process, as long as the chemical structure is unchanged at the end of any “*a chemical process or treatment*”.

Based on the legal principle “*where the law does not distinguish, nor the interpreter must distinguish*,”¹⁹ neither the Commission nor ECHA should go beyond what the legal text envisages in the SUPD. For example, the Advocate General Henrik Saugmandsgaard Øe noted in his opinion in Case C-220/17 that “*the Court of Justice cannot, in exercise of its interpretative powers, stand in the place of the legislature by introducing distinctions into that directive which the legislature has not made*.”²⁰ Similarly, Advocate General Jean Mischo noted in Case C-395/00 that “*it is not for the Court, under the pretext of interpretation, to usurp the role of the legislature by introducing into the provision in dispute distinctions which the legislature has not made. [...] The ancient Roman adage ‘Ubi lex non distinguit nec nos distinguere debemus’ remains as relevant as ever*.”²¹ Accordingly, neither the Commission nor ECHA should go beyond what the legal text envisages in Article 3(40) of REACH. Further, if assessed in line with objectives pursued by the SUPD, a stricter interpretation of Article 3(40)

¹⁶ O.J. L 280, 31.10.2019, p. 1–104 (as amended, for example by Commission Implementing Regulation (EU) 2019/1776 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff).

¹⁷ <https://ramboll.com/projects/germany/reducing-impact-of-plastic-products-eu>.

¹⁸ <https://surveys.ramboll.com/servlet/com.pls.morpheus.web.pages.CoreRespondentCollectLinkAnonymous>.

¹⁹ Also known as “*Ubi lex non distinguit, non distinguere debemus*”.

²⁰ Case C-220/17 *Planta Tabak-Manufaktur Dr. Manfred Obermann GmbH & Co. KG v Land Berlin*, ECLI:EU:C:2019:76, at para 70.

²¹ Case C-395/00 *Distillerie Fratelli Cipriani SpA v Ministero dello Finanze*, ECLI:EU:C:2002:209, at paras 62 and 63.

of REACH than that intended by the legislators would prevent the objective of the SUPD being fulfilled, which aims to “*reduce the impact of certain plastic products on the environment, in particular the aquatic environment, and on human health.*”²² When interpreting a provision of EU law, the EU Courts will “*consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part.*”²³ In respect of viscose and lyocell, it could be used as a biodegradable alternative to some of the products listed in the Annex to the SUPD.

Based on the above we conclude that the proposed interpretation of Article 3(40) of REACH in the context of the SUPD by the Commission is not warranted and is inconsistent with the approach, for example, followed in the Common Customs Tariffs Regulation (particularly, in respect of applying the definition to viscose). If the legislator had intended that the chemical structure of the substance should be unchanged during any chemical treatment, the definition in Article 3(40) of REACH would have made that distinction.

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²² Article 1 of the SUPD.

²³ Cases C 402/07 and C 432/07 *Sturgeon and Others*, EU:C:2009:716, paragraph 41; See also Case C 306/05 *SGAE*, EU:C:2006:764, paragraph 34 and *Wendelboe and Others*, 19/83, EU:C:1985:54, paragraphs 13 to 15.