Cefic REACH competition law compliance guidance

Could competition law apply to REACH activities? YES.

It is expressly stated in the REACH Regulation (hereinafter "REACH") that *"this Regulation should be without prejudice to the full application of the Community competition rules."* (Recital 48). Therefore, rules of competition law adopted at Community level (hereinafter "EC competition law"), but also at the national level, do apply to REACH and all related activities.

REACH is not a competition law free zone

This guidance on EC competition law is intended to help anyone involved in REACH activities, including consortia formation, to assess the compatibility of their activities with EC competition law. Companies involved in REACH should always ensure that their activities comply with EC competition law irrespective of the form of co-operation they choose.

Important Note: *Readers of this guidance should not presume that they know all there is to know about EC competition law just by reading this document. This guidance is designed to allow companies involved in REACH to make a preliminary assessment of their conduct under EC competition law. It does not intend to substitute the applicable EC competition law provisions, as these have been interpreted by the European Courts, the European Commission and the national competition authorities. It only gives general guidance and thus does not and cannot cover all the different competition scenarios that may arise from REACH. Seek legal advice if needed.*

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Brief introduction to EC competition law

EC competition law is not intended to prohibit legitimate activities of companies. Its objective is to protect competition in the market as a means of enhancing consumer welfare. Therefore, agreements between companies or decisions by associations or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited - Article 81 (1) of the EC Treaty.

Three basic points should be borne in mind:

1. regardless of the good intentions of companies and groups of companies, if the effect of activities is found to affect competition and markets unduly, this activity will be illegal;

2. Article 81 (1) can be violated by agreements (regardless of their form, whether express or implied, for example: a decision by a consortium, actions minuted as a follow-up of a meeting, exchanges of e-mails.....) as well as by concerted practices;

3. to violate Article 81 (1) it is not required that there is an actual effect on the market; the object to impede competition is sufficient to infringe the law.

EC competition law also prohibits the abuse of a dominant position (Article 82 of the EC Treaty). This may be conduct of one single company, or of a group of companies.

A competition investigation may be initiated either by a competition authority itself; or following a complaint by a third party, or following a leniency application to a competition authority of a party to the unlawful agreement that would like to cease its unlawful activity.

Companies engaged in conduct in breach of Article 81 or Article 82 may not only find that their agreements will be void and unenforceable, but are exposed to significant fines and, under certain Member States legislation, criminal sanctions. Furthermore, an infringement of EC competition law may expose the infringer to significant civil damage claims.

For more information on EC competition law, Articles 81 & 82 of the EC Treaty (see backcover), and the web site of the Commission Directorate General Competition or the web sites of the national competition authorities of the EU Member States (http://ec.europa.eu/comm/competition/index_en.html).

Management of activities DO & DON'T

✓ DO	✗ DON'T
REACH ACTIVITIES AND EC COMPETITION LAW	
DO pay attention to EC competition law as this may apply to REACH related activities	DO NOT presume that because you are strictly applying REACH, EC competition law will not apply
COMPETITION COMPLIANCE	
DO comply with EC competition law when acting under REACH DO always refer to EC competition law compliance, adopt a system, and strictly adhere to it DO avoid any misunderstanding by competition authorities about what you are doing	DO NOT misuse REACH activities to engage in anticompetitive conduct such as cartel activities DO NOT ignore, and thus DO know the most important EC competition law rules, as ignorance is not an excuse with competition authorities
ORGANISATION OF ACTIVITIES	
DO have an effective organisation (e.g. by signing appropriate agreements including rules for defining items such as membership, data sharing, cost sharing, adoption of an EC competition law compliance set of rules)	DO NOT work in a disorganised way. If you have rules or sign an agreement apply these in full and ensure they are followed
TYPE OF ACTIVITIES	
DO always apply EC competition law compliance to any type of REACH related activities : not only formal meetings, but also activities such as conference calls, use of IT systems, exchange of correspondence, e-mails, informal meetings	DO NOT engage in prohibited activities during social gatherings incidental to your lawful activities or otherwise; EC competition law rules will equally apply to these
WORKING UNDER REACH	
DO limit your activities to what is strictly required under REACH	DO NOT go beyond activities which are strictly required under REACH
OVERSIGHT AND SUPERVISION	
DO refer to this guidance when conducting activities and distribute it regularly to REACH participants, in particular to newcomers DO have an agenda and minutes which accurately reflect the discussions and matters; limit your discussions to the agenda topics and consult with legal counsel when necessary DO use an independent third party or trustee if necessary (e.g. to exchange individual tonnages from companies when determining the cost sharing of each participant)	DO NOT apply EC competition law compliance guidance infrequently but instead, apply it in your day-to-day activities in order for it to become routine good practice DO NOT deviate from agenda DO NOT draft agenda and/or minutes which do not reflect discussions or activities DO NOT organise the exchange of sensitive information via a company representative who will simply sign a secrecy agreement
RECORD KEEPING	
DO keep a written record of your REACH activities DO ensure retention of the agenda, minutes and other important documents	DO NOT believe that written communications are discouraged. On the contrary, if you are involved in an inquiry conducted by a competition authority your defence may rely heavily on accurate records prepared in the ordinary course of REACH activities which have far more credibility than after-the-fact oral explanations
NECESSARY VIGILANCE	
DO protest against any inappropriate activity or discussion (whether it occurs during meetings, conference calls, social events, or when working via electronic means – for example using a dedicated intranet). Ask for these to be stopped; dissociate yourself from these and have your position clearly expressed in writing, ideally in the minutes or in any case as soon as possible after the respective meeting or activity If a third party or trustee is used to facilitate the meeting, he/she should stay in the room, stop the inappropriate activity and record the incident	DO NOT pursue activities in breach of EC competition law
LEGAL ADVICE	
DO recognise and acknowledge that an issue or question may be complex and needs to be handled in a proper way	DO NOT presume that you know all about competition law rules just by reading this document. It is neither exhaustive nor a substitute for legal advice
DO ask for guidance at an early stage	DO NOT wait to seek appropriate legal advice and DO NOT ignore important questions as these will not be resolved by themselves
DO always remember that if you are uncertain DO NOT act. Ask and wait for the answer, before acting	

REACH DO & DON'T

Working in SIEF

Substance Information Exchange Forums (hereinafter "SIEFs") are provided for in REACH. The aims of the SIEFs are to: (a) facilitate data sharing for the purpose of registration, between potential registrants, thereby avoiding duplication of studies; and (b) agree classification and labelling (for more details, see Article 29 of REACH and related Guidance on Data Sharing available on the ECHA web site http://ec.europa.eu/echa/reach_en.html).

✓ **DO** ensure, that the issue of sameness and identity check are handled by applying objective and transparent criteria when discussing the SIEF's formation.

✓ **DO** ensure that, before any discussion on the issue of sameness starts with other undertakings, each undertaking individually identifies its own substance(s) and documents its reasons for this approach.

✓ **DO** ensure that any deviation from this approach, following discussions with other undertakings, is clearly and objectively justified and documented.

✓ **DO** ensure that the final decision on sameness is clearly and objectively justified and those reasons documented.

✗ **DON'T** misuse this process to unduly exclude certain competitors.

Consortium membership/participation

Formation of a consortium is one way for companies to organise their co-operation under SIEFs. There are several possible forms of co-operation that companies can choose, consortia being just one of these that is often referred to. A consortium does not need to be a 1:1 image of a SIEF and may only involve some of the participants of a particular SIEF. It may also cover some of the activities to be conducted under REACH, or alternatively, it may cover more than one SIEF.

However, it is generally advisable to open membership of consortia to undertakings that are registrants or potential registrants of the substance(s) to which the consortium relates:

(i) manufacturers and importers;
(ii) producers and importers of articles from which the relevant substance(s) are intended to be released;
(iii) only representatives of (i) and (ii).

In addition, the members of a consortium may consider inviting the following groups to participate in the consortium (this does not necessarily mean that such groups should ultimately be invited):

(iv) downstream users;
(v) data holders;
(vi) other third parties that may have an interest in being involved in a given consortium.

When preparing membership/participation conditions, it is important to have written rules (including a well documented "decision-making" process) which are:

- *clear and transparent, avoid ambiguity; and*
- *based on objective criteria, applied in a non-discriminatory way, with a straightforward admission mechanism.*

In addition, distinctions between different types of membership/participation may be made when relevant (e.g. full member, associate member, observer or expert).

✓ **DO** ensure that any distinctions between or within categories of members/participants as regards their rights are based on objective criteria. Nonetheless, there are limits to such distinctions, for example :

  ✗ **DON'T** base distinctions only on size/level of turnover. Note, however, that distinctions may be based on objective criteria, for example, between categories of consortium members that have greater obligations under REACH because they fall into higher tonnage bands;

  ✗ **DON'T** base distinctions purely on membership of a particular trade association, sector group or other body, as these are separate entities.

✓ **DO** ensure as a general rule that, where the membership of a consortium is limited, the rules of the consortium do not result in the total exclusion of access by non-members to data produced in the context of REACH. Such exclusion may, however, be justified in certain circumstances to be interpreted in the light of REACH and related obligations on data sharing and EC competition law.

✓ **DO** ensure that the final decision on membership is clearly and objectively justified and the reasons for this decision are documented, in particular in cases where membership is refused.

✓ **DO** ensure, as a general rule, that membership rules are sufficiently flexible to allow new members to join at a later date.

✓ **DO** base resolution of membership disputes, where possible, on arbitration by an impartial body which applies objective criteria.

Costs

✓ **DO** ensure that costs are carefully calculated using a coherent and objectively justified methodology that is well documented.

✓ **DO** ensure that costs are only recovered for necessary data.

✓ **DO** ensure that costs are divided according to a transparent methodology that is well documented and that is applied in a non-discriminatory way, taking into account all relevant objective factors such as the level of access and right of use.

✓ **DO** ensure that any sensitive information supplied for the purposes of cost calculations - such as production volumes - are not directly or indirectly exchanged between participants but are channelled through an independent third party or trustee (See also below).

Data sharing

✓ **DO** ensure that differences in levels of access or ownership rights are objectively justified.

✓ **DO** ensure that differences in levels of access or ownership rights are reflected in divisions of costs and undertakings are not required to pay for access to information that they do not require for registration.

✓ **DO** respond promptly to data requests made legitimately under the REACH data sharing rules (which may not necessarily imply "immediate communication" of the relevant data, since – among others – a process of negotiation may occur).

✓ **DO** ensure that, when choosing between alternative sources of data, choice is based on objective criteria related to the quality of the data, taking into account in particular its reliability, relevance and adequacy. The processes followed in order to define and apply these criteria must be carefully documented.

Discussions on business related issues

✗ **DON'T** discuss business related issues that ought to be decided individually by each company. This applies for example to:

- changes in sales, supply, purchasing and marketing strategy resulting from REACH, including company business plans;
- possible de-selection of substance or use. This is to be defined on an individual basis only and there should not be any "collective de-selection".

Exchange of information

Even if most of the information to be exchanged under REACH is unlikely to be problematic under EC competition law (because this information is mostly of a scientific or technical nature and does not enable competitors to align their market behaviour), certain information exchanged (such as volume information) can raise EC competition law issues. As a consequence:

✓ **DO** limit your exchanges of information to what is strictly necessary under REACH.

✗ **DON'T** exchange non-public sensitive information such as (non exhaustive list):

- Individual company prices, price changes, terms of sale, industry pricing policies, price levels, price differentials, price mark-ups, credit terms etc;
- Costs of production or distribution etc;
- Individual company figures on sources of supply, costs, production, inventories, sales, etc;
- Information as to future plans of individual companies concerning technology, investments, design, production, capacity, distribution or marketing of particular products including proposed territories or customers;
- Matters relating to individual suppliers or customers, particularly in respect of any action that might have the effect of excluding them from the markets.

✗ **DON'T** exchange technical information if this exchange is not necessary under REACH, especially if this exchange of technical information may provide competitors with the ability to align their market behaviour.

✓ **DO** reduce the frequency of exchanges.

✓ **DO** exchange tonnage bands instead of individual more specific volume information. If not feasible, and specific volume information or other sensitive data needs to be communicated, use precautionary measures, e.g. organise such exchange via an independent third party or trustee (See p.6).

Use of an independent third party or trustee

If under particular circumstances, participants to a SIEF or consortium need to use sensitive individual figures (e.g. for the exchange of information or cost allocation) it is recommended to do so via an independent third party or trustee.

Who could be an independent third party?
A legal or natural person not directly or indirectly linked to a manufacturer/importer or their representatives. This independent third party may be for example an accountant, an auditor, a consultant, a law firm, a laboratory, a European/international organization, a neutral company, etc. The independent third party will not necessarily represent any participants but can be hired by them, for example to support certain activities. It is advisable that the independent third party signs a confidentiality agreement that will ensure that the independent third party undertakes not to disclose the information it receives.

The following activities can be facilitated by a independent third party for EC competition law purposes:

- ***Produce aggregated anonymous figures***
  When participants need to refer to the aggregate of sensitive individual figures, the independent third party will request them to provide their individual input. The input will be collated and aggregated into a composite return that does not give the possibility of deducing individual figures (e.g. by ensuring that there will be a minimum of three participants). In addition, no joint discussion shall take place between this independent third party and the participants on the anonymous or aggregated figures. Questions should be addressed on an individual basis between each participant and the independent third party, who should not reveal any other data during such discussion.

- ***Calculation of cost allocation based on individual figures for cost sharing***
  Where participants decide that all or part of their cost sharing should be based on their actual and individual figures (e.g. sales or production volumes), the independent third party will send a questionnaire to each of the individual participants to collect the relevant confidential individual information. It will then send to each participant an invoice corresponding to its particular amount only.

- ***Companies need to send sensitive individual information to the authorities, without circulating it to the other actors***
  The independent third party would produce a non-confidential version of the same document for the remaining participants or the public that shall not contain sensitive information.

Meetings checklist

Actions	Completed ✓
Circulate the agenda in advance	
Stick to the agenda for the meeting discussions	
Have an accurate participation list (to be signed by each participant) and minutes	
Distribute this leaflet at the beginning of the first meeting (and to newcomers) and always refer to it and to EC competition law compliance at the beginning of each meeting	
Have detailed minutes	
Limit social contacts outside of meetings, and continue to abide by these guidelines at such social events, if any.	

EC competition law compliance tips for companies involved in the REACH process

- Widely voice in your own organisation the need for having EC competition law compliance for REACH activities as well and adopt a robust system that you apply effectively;
- Include EC competition law compliance in your REACH management process, and include REACH related aspects in your competition law compliance system;
- Make sure that the participants in the REACH process have received adequate EC competition law compliance training;
- Strictly limit the participation of marketing and business people in SIEFs and consortia.

Appendix - articles 81 & 82 of the EC treaty

Article 81

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   - any agreement or category of agreements between undertakings;
   - any decision or category of decisions by associations of undertakings;
   - any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 82

Any abuse by one of more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.
Such abuse may, in particular, consist in:
   (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
   (b) limiting production, markets or technical development to the prejudice of consumers;
   (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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