

Results of the project:

Model Agreements for Consortia and other Forms of Data Sharing according to REACH Reg.

compiled by the law firm of **REDEKER SELLNER DAHS & WIDMAIER**¹
with the collaboration of the members of the project group² formed for this project

→→ **Appendix A II**

European Competition Law

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I. Introduction

The following briefly outlines the general principles of EC competition law and its relevance for companies, which have to comply with the obligations resulting from the REACH Regulation.³ As pointed out in detail in the introduction to the Model Agreements and in Appendix A I, the REACH Reg. establishes a detailed set of rules on data sharing in order to avoid multiple conduct of studies and, thus, to reduce costs of registration for the industry and administration. In order to fulfil these obligations deriving from the regulation companies that are obliged to register may choose various forms of cooperation, which are, as such, not prescribed by the law. The Model Agreements in Appendixes B to G have been developed in order to facilitate these forms of cooperation.

Legal or contractual data sharing or cooperation pursuant to REACH usually takes place between competitors, who manufacture or import the same substance. For this reason the competition law prohibition of agreements or concerted practices which restrict competition (Article 81 EC Treaty) must be observed in all phases of data sharing and cooperation. The REACH Reg. does not derogate from the obligations under competition law in favour of undertakings subject to it. This is expressly clarified in Recital 48 of the REACH Reg. It also follows from Article 25 par. 2 REACH Reg.,⁴ which distinguishes between the sharing of technical data, and in particular information related to the intrinsic properties of substances, by the registrants – prescribed by the law – on the one hand and exchanging information concerning their market behaviour – prohibited by competition law – on the other hand.

The provision of Article 25 par. 2, however, does not resolve the problems resulting from the conflict between cooperation of registrants to share data and the prohibition of restrictions of competition in Article 81 EC Treaty. It is, hence, essential for companies which are obliged to register under REACH to draw their attention to competition law when organising their practical compliance with REACH. The following explanation shall provide a first assistance in this respect.⁵ For the same purpose the code of conduct of *dos and don'ts* under competition law in annex to the Model Agreements B to G has been drawn up. However, it has to be

³ Regulation (EC) No. 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals ... (REACH Regulation), OJ L 396, 30.12.2006, p. 1 – hereinafter referred to as REACH Reg.

⁴ Articles without specifying the title of the relevant statute are to be considered as referring to the REACH Reg.

⁵ The *Technical Guidance Document on Data Sharing (RIP 3.4)*, currently being drafted by a consortium which has been commissioned by the Commission and which *inter alia* analyses legal obstacles to data sharing and establishes possible solutions in this respect, will also contain an annex on *EC Competition Law* (current status: *Final Draft Guidance Document RIP 3.4 (Review 02 May, 2007)*). See also *Scheidmann/Rosenfeld, Forming Consortia for REACH Registration: Contractual and Competition Law Issues*, JEEPL 2005, pp. 173–183.

pointed out that legal certainty can only be ensured in view of the individual case taking due regard to the relevant decisions of competition authorities and courts.

II. Principles of EC Competition Law

1. Article 81 EC Treaty

Conflicts with Article 81 par. 1 EC Treaty may relate to both legal and contractual data sharing. Pursuant to Article 81 par. 1 EC Treaty, all agreements between undertakings, decisions by associations of undertakings and concerted practices (hereinafter summarized as agreements) which may affect trade between Member States and which have as their object or effect the restriction of competition within the common market are prohibited. Article 81 par. 1 EC Treaty contains a non-conclusive list of such agreements, namely those which fix prices or any other trading conditions, limit or control production, markets, technical development or investment, share markets or sources of supply, and apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The terms of Article 81 par. 1 EC Treaty are, in general, interpreted broadly. Both horizontal and vertical restrictions of competition fall under the provision. It is, hence, not relevant in this context, whether only manufacturers/importers cooperate or downstream users participate, too.

For Article 81 par. 1 EC Treaty to apply, it suffices that an undertaking changes its market conduct in accordance with an agreement with a competitor or that the uncertainty as to the conduct to expect of the competitor on the market is eliminated or, at the very least, substantially reduced following contacts between them.⁶ Coordination of market conduct may result from implied intent as well as tacit collusion.⁷ Furthermore, it is sufficient that competition is only potentially restricted.⁸ It cannot, thus, be argued that, due to the fact that registration is a barrier to market access a cooperation ‘only’ takes place prior to market access and has therefore no relevance with respect to competition law.

⁶ CFI Joint Cases T-25/95 etc. *Cimenteries CBR* (2000) ECR II-491 paras 1849 and 1852, Joint Cases T-2002/98 etc. *British Sugar* (2001) II-2035, paras 58–60.

⁷ *Whish*, Competition Law, 5th ed., p. 92; *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, 2. Aufl., § 9 Rn. 3; *Mäger*, in: ders. (Hrsg.), Europäisches Kartellrecht, Kap. 1, Rn. 80.

⁸ *Whish*, Competition Law, 5th ed., p. 127; *Bunte*, in: Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, Bd. 2, 10. Aufl., Art. 81 Rn. 19 ff.; *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, 2. Aufl., § 10 Rn. 64. See further Commission Guidelines on the application of Art. 81 par. 3 of the Treaty, OJ C 101, 27.04.2004, p. 97, No. 11, Ref. 9.

The concept of concerted practice under Article 81 EC Treaty is distinct from that of mere parallel behaviour, i. e. adjusting to market conduct of other competitors unilaterally and autonomously. However, it may be difficult to draw the line between a mere parallel behaviour and concerted practice in connection with the sharing of data which is also relevant for data sharing pursuant to REACH.

Article 81 par. 1 EC Treaty furthermore stipulates that intra-community trade is affected ('inter-state trade' clause) which, according to the community courts, comprises all cross-border economic activity. If the economic activity in question does not cross border the relevant national competition law is applicable. As far as Germany is concerned, this, however, does not make a difference, since Section 1 of the German Act against Restraints of Competition (ARC) revised by the 7th Amendment of the ARC of July 2005 corresponds with Article 81 EC Treaty. The prohibition of restrictive agreements under German as well as European law, notwithstanding the 'inter-state trade' clause, have the same content. For the question whether cooperation of companies within REACH gives rise to concerns under competition law, it is, hence, not necessary to distinguish between German and European competition law.

According to Article 81 par. 3 EC Treaty, the provisions of Article 81 par. 1 are (only) declared inapplicable if the agreements or concerted practises contribute 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 do not impose restrictions which are not indispensable to the attainment of these objectives and do not eliminate competition in respect of a substantial part of the products in question.⁹ The burden of proof is to be carried by the companies involved (Article 2 Reg. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty).¹⁰

The Commission has outlined the interpretation and practical application of Article 81 EC Treaty in a number of notices (communications, guidelines). Furthermore, Article 81 EC Treaty is supplemented by a number of regulations, especially Reg. 1/2003 and the so-called Block Exemption Regulations. An overview of the existing legal framework is accessible via the website of the Directorate General for Competition of the European Commission (http://ec.europa.eu/comm/competition/index_en.html).

⁹ See Commission Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.04.2004, p. 97, No. 9.

¹⁰ OJ L 1, 04.01.2003, p. 1.

2. Article 82 EC Treaty and Merger Control

It is even possible that undertakings come into conflict with the prohibition of abuses of a dominant position of Article 82 EC Treaty. This subject is treated supra III. 3. in more detail. However, the prohibition of abuses of a dominant position only plays a minor role within the framework of cooperation of registrants within REACH. The following will, thus, focus on Article 81 EC Treaty.

Generally, neither European nor German merger control law applies to the formation of consortia or other forms of cooperation, since they do not lead to a structural change of the markets concerned and therefore do not require prior notification to the competent authority.¹¹

3. Consequences of an Infringement of Competition Law

According to Article 81 par. 2 EC Treaty, any agreement or decision prohibited pursuant to Article 81 par. 1 is automatically void. In addition, third parties may claim for damages pursuant to Section 33 ARC and Section 823 par. 2 German Civil Code (BGB) in conjunction with Article 81 par. 1 EC Treaty. Furthermore, fines may be imposed by the competent competition authority (Article 23 Regulation 1/2003). The activities of the competition authorities to combat cartels have increased tremendously in the past years.¹² Fines are not subject to deduction for depreciation¹³ and can, under German Law, be imposed on the undertaking as well as the individual persons acting on its behalf.¹⁴

4. Facts based analysis

The assessment under Articles 81 and 82 of the Treaty has to be based on the market and competitive conditions in each individual case. Thus, the competition law requirements for admittance of competitors to a consortium may vary depending on whether a substance is manufactured by a large number of companies, and, as a consequence, several consortia may

¹¹ The relevant provisions are Article 1 Regulation 139/2004 and Section 37 par. 1 ARC. Whether a consortium has to be notified to another national competition authority must be examined in each individual case. This, however, seems rather unlikely given the various forms of cooperation.

¹² In recent years the European Commission has imposed record fines of several hundred million Euro on undertakings of diverse sectors, including the chemical industry. See European Commission/Directorate-General Competition, Competition: Commission action against cartels – Questions and answers, MEMO/07/136 of 18 April 2007, for a summary of the relevant rulings.

¹³ *Müger*, in: ders. (Hrsg.), *Europäisches Kartellrecht*, Kap. 1, Rn. 134.

¹⁴ *Mestmäcker/Schweitzer*, *Europäisches Wettbewerbsrecht*, 2. Aufl., § 21 Rn. 16.

be formed for the same substance, or whether only a few producers manufacture the same substance.

Likewise, the sharing of usage data for joint preparation of a chemical safety report depend on whether standardised uses or otherwise generally known uses are concerned, or whether the data relate to niche applications where there is great competitive interest in keeping them secret.

Individual cases must be assessed on the basis of decision-making practices of the Commission and the Community Courts and of the relevant Secondary law. Within this context, it is necessary to analyse whether Articles 81 and 82 EC Treaty are not applicable because the impact of an agreement on intra-Community trade or on competition is no appreciable. In its so-called *de minimis* notice¹⁵ and its guidelines on the effect of trade concept contained in Articles 81 and 82 EC Treaty¹⁶ the Commission has defined with the help of market share thresholds when an appreciable restriction of competition can be denied.¹⁷ In practice, market shares of participating companies of a cooperation for the purpose of data sharing, however, will usually exceed above these thresholds.

The Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements¹⁸ and the relevant block exemption regulations provide further guidance for an assessment under competition law. Regulation 823/2000 on agreements between liner shipping companies (consortia),¹⁹ for example, expressly exempts consortia from the provision of Article 81 EC Treaty that are aimed at reducing costs through joint capital-intensive activities.²⁰ Regulation 1617/93 on certain agreements regarding air traffic²¹ and

¹⁵ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ C 368, 22.12.2001, p. 13.

¹⁶ OJ C 101, 27.4.2004, p. 81.

¹⁷ According to the *de minimis* Notice, there is appreciable effect if the aggregate market shares held by the parties to the respective agreement do not exceed 10 % on any of the relevant markets affected by the agreement in the event of horizontal agreements, or if the market share held by each of the parties to the agreements does not exceed 15 % on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets. According to the guidelines on the effect of trade concept contained in Articles 81 and 82 EC Treaty an agreement has no appreciable effect if the joint market share of the parties does not exceed 5 % on any of the relevant markets within the Community and if, in the case of horizontal agreements, the total annual revenue of the participating companies is less than € 40 million.

¹⁸ OJ C 3, 06.01.2001, p. 2.

¹⁹ Commission Regulation (EC) No. 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 100, 20.04.2000, p. 24.

²⁰ See Commission Press Release IP/05/477, 25.04.2005.

²¹ Commission Regulation (EEC) No. 1617/93 of 25 June 1993 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports, OJ L 155, 26.06.1993, p. 18.

Regulation 358/2003 on certain agreements in the insurance sector²² additionally permit the sharing of certain competition-relevant information. Regulation 2658/2000 governing specialisation agreements²³ and Regulation 2659/2000 on research and development agreements²⁴ also provide important indications for the assessment.

Nevertheless, none of the above mentioned regulations and communications can provide conclusive legal certainty respecting data sharing and cooperation of registrants within REACH and the competition law issues linked thereto in each individual case. Annex *EC Competition Law* to RIP 3.4, too, is not capable of giving such legal certainty, although it does contain a number of practical recommendations to reduce the risk of possible infringements of competition law.

III. REACH versus Competition Law – potential risks

Cooperation of companies that are obliged to register involves risks relating to competition law.²⁵ The registration obligation pursuant to the REACH Reg. having the effect of a barrier to enter the market means substantial costs for the companies concerned.²⁶ Therefore, participation in a consortium for the purpose of joint registration provides for significant rationalisation benefits and efficiencies that play an important role in market performance. For the same reason, participation in a consortium may exert a substantial influence on companies' decision to continue or discontinue producing a certain substance. In particular, this applies to small and medium-sized enterprises, which have lower resources than large corporations. Not being admitted to a consortium may lead to substantial competitive disadvantages or to exiting the market, and therefore is relevant under competition law. Competition law can afford opening of contractual cooperation to other competitors, i. e. those who not yet participate.

Moreover, the formation of a consortium poses problems under competition law to the extent that it institutionalises cooperation of competitors for a longer period of time. A consortium could thus become a platform which enables the exchange of confidential information or the

²² Commission Regulation (EC) No. 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ L 53, 28.02.2003, p. 8.

²³ Commission Regulation (EC) No. 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, OJ L 304, 05.12.2000, p. 3.

²⁴ Commission Regulation (EC) No. 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, OJ L 304, 05.12.2000, p. 7.

²⁵ See in more detail *Scheidmann/Rosenfeld*, Forming Consortia for REACH Registration: Contractual and Competition Law Issues, JEEPL 2005, pp. 173–183.

²⁶ Commission Press Release IP/05/495, 27.04.2005.

conclusion of agreements which restrict competition. At the same time, however, sharing of confidential information may be a precondition for joint registration (e. g. data on the use of substances for the chemical safety report).

For the same reasons participation in a SIEF is not beyond any competition law concerns although it is mandatory. Under no circumstances shall the cooperation of competitors necessary for data sharing be misused as a forum for agreements which restrict competition. Nevertheless, REACH Reg. expressly initiates such a forum for the exchange of information and even precludes opting out of the participation in a SIEF (Articles 29 and 30). Even though, the information to be exchanged within a SIEF is only meant to avoid multiple testing and to save costs this information does not lack market relevance due to the function of registration as a market access. Also the determination of the sameness of a substances within a SIEF can lead to a conflict with competition law. In many cases this specification process may afford that parties enter into a non-disclosure and non-use agreement. Consensus on a certain degree of purity as well as the type of impurity owed to the manufacturing process may have the object or effect to exclude an ‘unpleasant’ competitor, who produces for technical reasons the same substance with a lower degree of purity, from the relevant SIEF and the contractual cooperation respectively. If the excluded producer does not have a cost-saving alternative for data sharing in another SIEF the exit of the market for the relevant substance may be the consequence.

The close relationship with competition law is particularly apparent in the Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements:²⁷ in these guidelines, the Commission describes agreements that are not, as a rule, covered by Article 81 EC Treaty since they do not contain any provisions relating to the coordination of competitive behaviour. This concerns

- cooperation between non-competitors,
- cooperation between competing companies that cannot independently carry out the project or activity covered by the cooperation (concept of a working group),
- cooperation concerning an activity, which does not influence the relevant parameters of competition,

unless

²⁷ Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 06.01.2001, p. 2, No. 24.

- a company with considerable market power is involved, and
- the cooperation is likely to cause foreclosure problems vis-à-vis third parties.

These last two conditions, however, cannot be easily denied with respect to consortia since successful realisation of a consortium usually requires involvement of a lead company that has substantial market power in the regular case. In addition, as already stated, the exclusion of companies from a consortium results in competitive disadvantages and market exits as a consequence of high registration costs. Also, the concept of a working group mentioned above is not fully applicable as the REACH Reg. establishes an individual registration obligation of each company concerned whereas only certain data may be jointly registered.

Competition law issues linked to the various forms of cooperation are dealt with in the Introductions to the Model Agreements (see Introduction to the Model Agreements III. 1.d, 2.d, 3.d, 4.d, 5.d, 6.d). The following therefore focuses on the key issues of cooperation such as the exchange of information and organising the cooperation.

1. Prohibition of Cartels

The cartel prohibition of Article 81 par. 1 EC Treaty particularly concerns agreements on prices, customers, sales and the sharing of markets or sources of supply. Such agreements within the scope or on the occasion of a consortium are therefore unlawful. Corresponding precautionary measures or clarifications must thus be provided concerning the work of a consortium (see Introduction to the Model Agreements III. 1.d, 2.d, 3.d, 5.d). This also includes careful documentation of the consortium activities in order to establish evidence that the consortium is not used as a forum or as a means of achieving agreements which restrict competition.²⁸

2. Exchange of Information

In addition, Article 81 EC Treaty prohibits the exchange of confidential information relevant to competition. In view of the numerous substances subject to registration requirements and the amount of information required for registration, it is difficult to set limits here. In this respect, the provision of Article 25 par. 2, sentence 2 of the REACH Reg. is important, but it

²⁸ Non-published recommendations from SPORT (*Strategic Partnership on REACH Testing*) respecting this are in place: Competition Compliance and Consortia Guidance Document, worked out by Cefic exclusively as guidance for the SPORT test phase.

only lists clear-cut cases of unlawful information exchange (e. g. concerning production capacities, market shares). In principle, no data may be exchanged which permit an insight into a company's competitive behaviour. This includes data on customer relationships, sales and marketing conditions, marketing strategies, information about relationships with prior suppliers and about participation in invitations to tender. According to EC competition law rules on the exchange of information within the scope of market information systems, data must only be exchanged irregularly. In addition, the exchange should not relate to current information that allow for conclusions being drawn, how the competitor might act in the future.²⁹ As far as the exchange of information is limited to technical data with no relevance to market conduct and information on intrinsic properties of substances, a conflict with competition law can, in principle, be ruled out, as otherwise it would be impossible to comply with the mandatory of cooperation under REACH.

On the other hand data sharing concerning data on substance use within the scope of risk assessments pursuant to Article 13 is problematic unless standardised uses are concerned that are described in publicly available documents (e. g. in the scope of HERA or technical explanatory leaflets or publicly available substance safety sheets).

In order to avoid a conflict with Article 81 EC Treaty the exchange of confidential information between members of a consortia can be exercised via a neutral third party as an intermediary (trustee).

Concerning the legal obligation to jointly report core data, Article 11 par. 3, Article 19 par. 2 respectively, provides an exception in cases where submitting the information jointly would lead to disclosure of business secrets. In these cases the information may be submitted separately. It can be concluded that the exchange of business secrets that infringe competition law also falls under these provisions.

Moreover, registrants ought to strictly obey the requirements of REACH Reg., since, as a matter of principle, lawful conduct shall not constitute an infringement of the law and therefore cannot found the imposition of fines. This concludes, inter alia, a clear definition of the objectives and working methods of the consortium.

²⁹ ECJ Case C-7/95 *John Deere v Kommission* (1998) ECR I-3111; see for the similar criteria of German competition law *Bundesgerichtshof* (BGH) Case *Aluminium-Halbzeug*, published in: *Wirtschaft und Wettbewerb/Entscheidungssammlung zum Kartellrecht* (WuW/E) BGH 1337; BGH Case *Baumarkt-Statistik* WuW/E BGH 2313; *Gehring*, in: Mäger (Hrsg.), *Europäisches Kartellrecht*, Kap. 2 Rn. 76 ff.

3. Cooperation and Access Restrictions

Whether or not a consortium established by several companies should be open to other competitors depends on the market conditions in each individual case. In principle, it can be assumed that there is no obligation to leave the consortium open to other companies.³⁰ However, the competition authorities consider access restrictions partly critical. Access restrictions become all the more problematic if the market power of the participating companies is high. The German Federal Cartel Office, for example, approved the formation of the B2B Platform ‘Cosivint’ by the firms DaimlerChrysler, Ford, General Motors and Renault/Nissan under the condition that access to the platform be kept open for all interested manufacturers and suppliers without discrimination.³¹ The Commission’s decision practice in the area of access restrictions is comparable.³² Therefore, the safest way to avoid possible disputes with the competition authorities in any case is to open a consortium to all interested companies without discrimination. However, a legal obligation to do so can only be assumed when the group of companies interested in the forming of a consortium is small and the alternative of forming another consortium does not exist, and if exclusion from joint registration would lead to unreasonable competitive disadvantages. In any case, a consortium may not be used to squeeze competitors out of the market by excluding them from the consortium, if an individual registration is unlikely due to lack of resources. This may affect small and medium sized companies in particular.

In this context, the question also arises as to whether access restrictions infringe the prohibition of abuses of a dominant position as defined under Article 82 EC Treaty. If the initiators of a consortium (e. g. the lead company) have a dominant market position, a claim for discrimination-free access to the consortium may be based on Article 82 EC Treaty. This requires that a consortium represents an ‘essential facility’. The registration obligation pursuant to REACH, which is jointly executed by a consortium, is indeed an access barrier for the marketing of chemicals subject to registration. However, according to the *Oscar Bronner* decision of the ECJ, an ‘essential facility’ exists only if the desired service is essential for the competitor and cannot be substituted.³³ A right to admittance arising from Article 82 EC Treaty may therefore only be assumed if market exit can only be prevented through participation in the consortium. This will probably occur only in very rare cases. The general principle of REACH Reg. of an individual registration obligation of every company concerned, too, argues in favour of the foregoing.

³⁰ For a comparative case of cooperation of undertakings in the form of internet market places, *Ahlborn/Seeliger*, *EuZW (Europäische Zeitschrift für Wirtschaftsrecht)* 2001, pp. 552 (557).

³¹ Federal Cartel Office (*Bundeskartellamt*, BKartA) Case *Cosivint* WuW/E DE-V 321.

³² Commission Case No. COMP/M.1969 *UTC/Honeywell/i2/MyAircraft.com*.

³³ ECJ Case C-7/97 *Bronner* (1998) ECR I-7791.

Concerning a SIEF the question discussed above does not arise, as the obligation to participate in a SIEF is provided for by the REACH Reg. without the possibility of opting out.

4. Cost-sharing

The question of cost sharing within a consortium is closely connected with membership. Whereas ‘per capita’ allocation would certainly be the least problematic solution in terms of competition law, it may not be compatible with the financial interests of participants. An allocation key, for example according to sales revenue, production volumes or market shares, would probably lead to sharing confidential information and should therefore be dealt with by an independent third party. By contrast, an allocation key on the basis of the tonnage ranges under the REACH Reg. (Article 12), should not raise concerns since allocation to the tonnage ranges must in any case be disclosed by the Agency to all SIEF members pursuant to Article 28 par. 1(c).

IV. Practical Recommendations

1. Training of Employees (compliance programme)

Training of employees on competition law issues can help to prevent infringements of competition law by companies and thus to avoid fines. Such compliance programmes are regularly run in many companies.

Within the framework of REACH, too, training of the employees concerned helps minimize the above-mentioned risks in the field of competition law. The cost of this training should pay out as in the majority of cases a larger number of registrations have to be submitted by each company and, thus, the necessary cooperation with other companies will cover a long period of time. As mentioned above there is no opting out from the obligation to participate in a SIEF in accordance with Articles 29 and 30. Furthermore, in many companies the implementation of REACH will be dealt with mainly by the product safety unit. The members of a product safety unit are usually not in touch ‘with the market’ like sales and marketing units and therefore lack the practical experience with competition law issues. Especially these employees therefore face the risk to infringe competition law when exercising the mandatory sharing of data under REACH.

Thus, a REACH related competition law compliance training is very advisable.

2. Strict compliance with REACH Provisions

The provisions of the REACH Reg. ought to be strictly complied with in all phases of the cooperation of registrants, since as a matter of principle compliance with legal provisions may not lead to an infringement of the law and may thus not justify the imposition of a fine.

Furthermore, the code of conduct of competition law *dos and don'ts* annexed to the Model Agreements B to G as well as the practical recommendations in annex *EC Competition Law* to RIP 3.4 should be taken into consideration.

In case of doubt legal advice is to be sought.

3. Establishing informal contact with Competition Authorities

The risks arising under competition law are of particular significance due to the reform of the rules governing the procedure of competition authorities by means of Reg. 1/2003, which came into effect on 1 May 2004. The notification of agreements of undertakings to the Commission in order to benefit from an exemption decision therefore is no longer possible. Legal certainty and effective protection against fines can generally not be achieved by this means. Reg. 1/2003 provides an individual exemption decision (positive decision) only in exceptional cases if this is in the common interest of the Community (Article 10 Reg. 1/2003). In light of the large number of consortia to be formed it seems unlikely that the formation of individual consortia will be regarded as such an exception by the Commission. Furthermore, the decision pursuant to Article 10 Reg. 1/2003 is only of a declaratory nature.

However, also under the new enforcement system the Commission provides informal guidance on issues that have not yet been clarified by the decision practice of the European Courts and the Commission and which have some economic significance for participating companies. Data sharing and cooperation of companies that are obliged to register pursuant to REACH may well be regarded as an 'unsettled' problem of competition law that has considerable economic significance for an entire industry. However, informal guidance by the Commission is not designed to cover a large number of similar cases and will therefore probably be granted by the Commission only in exceptionally individual cases. General guidance can be obtained by annex *EC Competition Law* to RIP 3.4, elaborated with participation of the European Commission, which gives practical recommendations, too.

A further possibility is to contact the German Federal Cartel Office (FCO) for informal guidance or to apply for a decision of the FCO according to Section 32 c ARC that there are no grounds for further investigation, as far as the ARC is applicable (Section 130 par. 3 ARC). The Commission and national competition authorities have the parallel competence to enforce European competition law. Hence, the FCO is competent to apply Articles 81 and 82 EC Treaty, which follows from Section 22 ARC. The FCO can therefore give informal guidance on European competition law and issue a decision according to Section 32 c ARC concerning European competition law (see Section 32 c ARC). Also under the new system of competition law enforcement the FCO is generally willing to give informal guidance in order to meet the practical requirements for legal certainty of companies. The possibility of an informal contact with the FCO should therefore be used in connection with cooperation pursuant to REACH. In order to do so it is, as the Federal Cartel Office regularly points out, necessary for the applicant undertakings to submit a self-assessment of the competition law issues in question, on the basis of which a coordination with the Federal Cartel Office can take place.

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