

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 & WIDMAIER¹
with the collaboration of the members of the project group² formed for this project

→→ **Appendix B**

**Model Agreement on the Preliminary Phase (Preliminary Agreement)
for Negotiations on the Formation of a Consortium pursuant to
REACH Requirements**

Frankfurt, June 2007

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² See listing of the members in the attachment labelled "Members of the Project Group and Contact Persons of the relevant Law Firm".

Note

This Model Preliminary Agreement, which is a supplement to the Model Consortium Agreement, was developed on the basis of the practical and legal experience of the aforementioned law firm and the Project Group. Consideration was given to the practical need for brief and simple provisions. Thereby, other conceivable (more) detailed provisions were omitted. Consequently, the Model Preliminary Agreement cannot and does not reflect all possible constellations and problems occurring under actual conditions. Therefore, the model may not be used as a standardised form for a consortium agreement. Rather, it is to be used as a guideline and sample. In each specific case, a separate review must be conducted to determine whether the provisions of the relevant model agreement are appropriate under practical and legal aspects and whether any other provisions are required and suitable.

This Model Preliminary Agreement is based upon Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 and on the European law in force (legislation and court rulings). Adjustments may be necessary in order to comply with the national law applicable according to Section II par 9.3 of this Model Preliminary Agreement.

Preliminary Agreement

between

Manufacturer 1, 2 etc..

[optional: and

Importer 1, 2 etc.]

[optional: and

Only Representative]

[optional: and

Downstream user 1, 2 etc.]

– jointly: the “parties” –

Kommentar [1]: The texts found in brackets “[...]” are options or alternatives within the framework of the Agreement.

Kommentar [2]: An “Only Representative” pursuant to Article 8 REACH Reg. can be appointed by a manufacturer who is domiciled outside the European Community. This manufacturer will then have the same obligations as an importer and will as such be able to participate in a consortium.

Kommentar [3]: Manufacturers of preparations and/or other downstream users who are not subject to registration requirements will presumably participate in a consortium only as an exception. Since manufacturers and/or importers intend to clarify in the preliminary phase i. a. whether or not to invite downstream users for participation in the consortium, it appears that the participation of downstream users in the Preliminary Agreement will usually not be necessary.

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I.

Preamble

- The aforementioned parties are manufacturers [*optional*: or importers as well as only representatives] [*optional*: or downstream users] of the substance ... [*designation of the substance with its substance name, inclusive of CAS- and EINECS-number*] [*optional*: according to the substance specification in **Annex 1**] [*optional*: of substances in the category ... [*designation of the category with its substance name*]] – hereinafter “the substance” – with registered head offices in the European Union.

Under the provision of the **REACH Reg.** manufacturers [*optional*: and importers as well as only representatives] are under an obligation to register the substance within the prescribed deadlines. They will [*optional*: have] pre-register [*optional*: **pre-registered**] the substance according to Article 28 REACH Reg. The substance has phase-in status according to Article 3 par. 20 REACH Reg.

- The REACH Reg. expressly prescribes sharing of technical data (Title III REACH Reg.) and joint submission of data by multiple registrants.

Taking the above into consideration, the parties agree as follows:

II.

Agreement

1. Definitions

- Affiliate*: a corporation which controls, is controlled by or is under common control of a regular member, with “control” meaning a combined voting stock of at least 50 %, whether via direct or indirect **ownership**.
- Core data**: data which must in any case be jointly submitted by the members of the consortium according to Article 11 par. 1.2 REACH Reg. Such data are:
 - classification and labelling of a substance as specified in Annex VI Section 4 REACH Reg.;
 - summaries of the information generated through application of Annexes VII to XI if required under Annex I;

Kommentar [4]: Generally, an exact designation of the substance or the category is not possible prior to conclusion of the Preliminary Agreement. Rather, it is subject to the negotiations on the consortium agreement in the preliminary phase. During this preliminary phase there is only an obligation to indicate the chemical name of the substance or the substance group as well as the information according to Article 28 par. 1(a) REACH Reg., which have to be specified at pre-registration. If, however, the exact specification is known and undisputed among the parties, it can be the basis of the Preliminary Agreement. Hence, a clear line of demarcation vis-à-vis manufacturers/importers of other substances can be drawn – even if they have nominally pre-registered the same substance and if they are member to the same (pre-)SIEF.

Kommentar [5]: This option allows one to refrain from testing through read across etc. and may help to avoid vertebrate testing and costs. There is no legal obligation to this form of data sharing.

Kommentar [6]: Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 (REACH Reg.).

Kommentar [7]: Experience shows that consortia are/will be negotiated prior to REACH Reg. entering into force (01.06.2008) and thus before pre-registration becomes possible and SIEF obligations arise. After pre-registration, SIEF obligations must be considered. If negotiations of consortia start only then, the model agreement in Appendix D (Preliminary Agreement on the Communication in a SIEF) may be recommendable. In such a Preliminary Agreement on the Communication in a SIEF, the form of cooperation (e. g. a consortium) will be negotiated on after substance identity has been established.

Kommentar [8]: According to this definition, a minority share cannot lead to rights and duties of an “affiliate”. Corporations holding minority shares of a regular member can only be integrated into a consortium through membership.

Kommentar [9]: The term “core data” is not a term derived from REACH Reg. In this Agreement, the term is used for the data indicated in the definition.

- robust study summaries of information generated through application of Annexes VII to XI if required according to Annex I;
- testing proposals if required for application of Annexes IX and X.

(3) Moreover, this Agreement adheres to the definitions in Article 3 REACH Reg.

2. Declaration of Intent for Consortium Formation

(1) The parties intend to form a consortium for the performance of their duties under REACH Reg. related to the substance and in particular related to registration. In a preliminary phase, which is to be regulated by the present Agreement, the parties wish to establish the basis for formation of a consortium. [optional: The Model Consortium Agreement published on the website ... provides the background for this Agreement.] This Preliminary Agreement does not constitute a binding obligation to participate in a consortium.

(2) The parties are entitled to include other manufacturers, importers or downstream users of the substance in the cooperation specified under the present Agreement. Obligations under Articles 11, 19, 27 and 30 REACH Reg. remain unaffected.

3. Decision Preparation

The parties shall provide all information required for the decision whether or not a consortium under the Model Consortium Agreement (and its Annexes) should be formed. [optional: The parties shall provide all information required for the decision whether or not a consortium under the Model Consortium Agreement (and its Annexes) should be formed to the Institute ... as competent neutral trustee.]

4. Competition Law Compliance

(1) The parties are aware that activities under this Agreement could represent a matter to which Articles 81 and 82 EC Treaty apply. The parties explicitly agree to observe Articles 81 and 82 EC Treaty, Article 25 par. 2 REACH Reg. and the Code of Conduct attached in Annex 2.

(2) It shall be examined on an individual-case basis whether a trustee appointed by the parties has to carry out the exchange and the evaluation of information or data, if those information or data are relevant to competition (law).

Kommentar [10]: It is recommended that the parties agree on the Model Consortium Agreement (published on ...) as a basis.

Kommentar [11]: Insert here the website this model is published on.

Kommentar [12]: The sole purpose of the preliminary phase is to determine whether or not the formation of a consortium is feasible; consequently, none of the parties can be obliged to participate in the consortium at that point. Parties who during the preliminary phase become aware that they will not participate in a consortium have the possibility to disassociate themselves pursuant to par. 8.3.

Kommentar [13]: Within the scope of contractual freedom, the parties may also include other parties subject to a registration requirement (or downstream users) into the cooperation. In such case, the Preliminary Agreement shall be amended accordingly, thereby involving all those previously participating as well as the new participants. Articles 11, 19, 27 and 30 REACH Reg. do not require the integration of every interested party into the negotiations for the formation of a consortium. Vis-à-vis the interested party, there exists only an obligation to jointly submit the core data (opt-out options remain) or to place the relevant studies at its disposal in return for the pro-rata refund of the costs. However ... [1]

Kommentar [14]: Only in exceptional cases will this option be a reasonable tool to protect the interests of the parties. This is due to the fact that consortia will generally be negotiated according to this Model Agreement before SIEF obligations enter into force at ... [2]

Kommentar [15]: Pursuant to Article 25 par. 2.2 REACH Reg., registrants shall refrain from exchanging information concerning their market behavior, in particular concerning production capacities, production or sales volumes, import volumes or market shares.

Kommentar [16]: Code of Conduct according to Annex 4 of the Model Consortium Agreement.

Kommentar [17]: The risk of a violation of cartel law is avoided or significantly alleviated if the exchange according to par. 2.3 is anyhow carried out by a trustee for the protection of the parties. Thus, the clause under par. 4.2 is only relevant if the parties exchange ... [3]

5. Confidentiality, Rights to Information

- (1) The parties shall maintain confidentiality vis-à-vis third parties concerning all information made available to them in the context of the cooperation and labelled as confidential, unless REACH Reg. or other laws contain an obligation to disclose the respective information. Affiliates as well as external experts, other competent externs and trustees as specified in par. 6.4 or 5 below are not “third parties” within the meaning of this provision. Confidentiality shall also be maintained for information commonly regarded as business secrets. The aforementioned obligations do not apply if the recipient can prove that such information has been available to the public before receipt by the respective party or that such information became public through no fault of the recipient.
- (2) The parties agree to disseminate information to persons other than the staff specified under par. 6.3 only to the extent absolutely necessary for setting up the consortium. This provision also applies to the staff of the parties’ Affiliates. The parties are responsible for their Affiliates’ compliance with subparagraphs 1 and 2.
- (3) The rights of the parties to the information made available by them shall remain unaffected. The remaining parties are under obligation to use the information exclusively within the scope of the present Preliminary Agreement. Particularly, they must not use the information commercially.
- (4) In the event of non-compliance with the duties according to subparagraphs 1 to 3, the parties are entitled to exclude the breaching party from any further cooperation. The obligation to render compensation for damages in accordance with the legal provisions shall remain unaffected. [optional: In the event of non-compliance with the obligations specified under subparagraphs 1 to 3, the party shall pay a contractual penalty in the amount of ... [insert amount] [optional: in the amount of ... % of the expenses incurred for information relating to the breach] to the other parties whose information is affected. The contractual penalty shall not apply if evidence is provided by the member that such violation was not caused by fault (including minor negligence) on his/her part.]

Kommentar [18]: In particular, it must be considered that pursuant to Article 119 par. 1(e) REACH Reg. the results of toxicological and ecotoxicological studies must be published. Under Article 119 par. 2, study summaries will also be published if non-disclosure has not been requested. Furthermore, for example, Article 22 par. 1(e) REACH Reg. lays down an obligation to submit to the agency any new knowledge on the risks of the substance.

Kommentar [19]: E.g. US TOSCA stipulates the obligation to inform EPA on new knowledge of risks (...reporting).

Kommentar [20]: The members might have a reason to keep the cooperation, as such, secret. If so, a suitable provision must be added here.

Kommentar [21]: The ECJ commonly regards “business secrets” in need of being protected any and all operational or business information meeting the following criteria: The information is only known to a closed group of persons; the holder wishes to keep the information secret; the holder has a legitimate interest in non-disclosure of the information (see Fluck, *Transparenz, Schutz von Unternehmensdaten und Zwangskonsortien im geplanten REACH-System*, in: Rengeling (Ed.), “Umgestaltung des Europäischen Chemikalienre ... [4]

Kommentar [22]: This restriction seems appropriate in order to ensure the greatest possible degree of confidentiality.

Kommentar [23]: Occasionally, there are reservations against agreeing upon contract penalties. However, the contract penalties serve to protect all those involved rather than serving the purpose of sanctions. The advantage of contract penalties: The buf ... [5]

Kommentar [24]: The amount of the contract penalty agreed upon should meet the following criteria: In the specific case, it should be commensurate with the economic value of the exchanged information. Furthermore, it should encourage the parties to treat the inform ... [6]

Kommentar [25]: By reversal of the burden of proof in respect to fault, as a consequence, all those involved will be encouraged to the greatest possible diligence in respect to their obligation to maintain confidentiality. Another option would be to impose here liab ... [7]

6. Organisation

- (1) This Agreement or the cooperation contemplated herein shall not constitute or be deemed to constitute a legal entity between the parties nor make a member agent

or representative of another member. The parties shall not act jointly in external legal relations.

- (2) Coordination of the cooperation shall be undertaken by ... [*designation of the party*].
- (3) The parties shall assign staff for the cooperation. The names of the staff shall be listed in Annex 3.
- (4) The parties may include external experts called in by the staff designated under subparagraph 3. Such experts shall be subject to the obligations under par. 5.1.
- (5) Subparagraph 4 equally applies to any trustee commissioned for the purpose of ensuring compliance with competition law.
- (6) [*optional: The working language is*]

Kommentar [26]: It seems appropriate to also determine a coordinator in the preliminary phase, who "holds the reins" and probably assumes the function of the lead company in the event that a consortium is formed. This task can also be assigned to a consultant or to the secretariat of a product-specific association.

Kommentar [27]: This restriction concerning staff involved seems appropriate in order to ensure the greatest degree of confidentiality.

Kommentar [28]: International consortia will probably prefer the English language.

7. Expenses

- (1) Each party shall cover its own expenses for the cooperation unless otherwise expressly agreed upon among the parties on an individual basis.
- (2) [*optional: ... [name of the party referred to in par. 6.2] shall obtain a refund of expenses incurred for coordination activities from the other parties upon presenting verification of such expenses.*]

8. Duration of the Preliminary Agreement

- (1) The Preliminary Agreement is of unlimited duration. It shall end upon the conclusion of a consortium agreement between all or some of the parties or upon final agreement to not set up a consortium.
- (2) If the consortium agreement is not concluded or if a party does not become a member of the said consortium, the obligations specified in par. 4 of the present Preliminary Agreement shall continue to apply for a period of 12 years following initial registration of the substance by any party.
- (3) A party can withdraw from the Preliminary Agreement through a unilateral declaration to the other parties. In this case, subparagraph 2 shall apply, accordingly, to the departing party.

Kommentar [29]: The continuation of the confidentiality obligation over time is suitable and appropriate in order to exclude unauthorized use of information in the event of the consortium failing, or premature withdrawal of participants. The 12-year period is oriented towards the 12-year period stated in Article 25 par. 3 REACH Reg., stipulating that the agency may issue test data (vertebrate animal data) after a 12-year period free of charge.

9. Final Provisions

- (1) The legal relationships between the parties relative to the cooperation in the preliminary phase shall be governed exclusively by the present Preliminary Agreement; no other arrangements are in existence.
- (2) Any changes or amendments to the Preliminary Agreement must be in writing so as to be effective.
- (3) As a supplement, this Agreement is subject to the laws of *[insert country]* without giving effect to any its rules on conflict of laws.

Kommentar [30]: This will be a difficult issue in negotiations concerning international consortia since every participant is usually only familiar with the legal system in his/her own country. If appropriate, the law valid at the registered office of the "Coordinator" pursuant to Section II par. 6.2 could be agreed upon.

- (4) *[optional: In case of a dispute arising out of this Agreement, the parties to the dispute shall first attempt (in good faith) to reach an amicable settlement. Should such amicable settlement fail, the dispute shall be definitively decided in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce in Paris valid at the time of the dispute. The award shall binding on the members. The arbitration tribunal shall be comprised of three arbitrators. Each party to the dispute designates one arbitrator; the two arbitrators thus chosen shall then designate a third arbitrator who acts as chairperson. The chairperson shall have a university law degree. The arbitration costs shall be paid by the members involved in equal measure. Any out-of-court costs shall be borne by the party responsible for having incurred said costs. [optional: The arbitration tribunal shall decide on the regulation of the cost of arbitration including out-of-court costs incurred by the parties in accordance with the outcome of arbitration.] The language of the proceedings shall be ... [insert language in accordance with par. 6.6]. The venue of arbitration shall be ... [insert the venue in accordance with par. 9.5]].*

Kommentar [31]: An arbitration agreement is advisable in particular in the event of an international consortium, which is why reference has been made to the ICC Rules of Arbitration.

- (5) Place of jurisdiction for any disputes among the parties is ... *[name of place]*.

Kommentar [32]: In international consortia, the jurisdictional venue may be a crucial issue in negotiations. In the event of a dispute, it may be expedient to agree on the court competent for the "Coordinator's" registered office (Section II, par. 6.2 of the Preliminary Agreement) as the competent jurisdictional venue. In any event, there should be consistency with the applicable law.

Party (Company/Representative)	Place	Date
.....
.....

.....

etc.

Annex 1: Substance Specification

Annex 2: Code of Conduct

Annex 3: List of staff members involved in the preliminary phase

ATTACHMENT:**Members of the Project Group and Contact Persons of the relevant Law Firm**

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**[optional: Annex 1:
Substance Specification]**

(Supply the data necessary for exact identification of the substance to be registered by the consortium. Please note that every member of the consortium must independently inform the Agency concerning the identity of the substance to be registered, observing Annex VI Section 2 REACH Reg. There may be need for reconciliation.

If a group of substances is the subject of the consortium, all substances belonging to the group which are manufactured or imported by the consortium are to be stated here.)]

Annex 2:³
Code of Conduct

I.

The parties shall not enter into any agreements concerning coordination of conduct that restrict or affect competition within the meaning of Article 81 EC Treaty; they shall observe the prohibition on abusing a dominant market position pursuant to Article 82 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 to 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,

³ Model Agreement Section II par. 4.1.

- 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 or 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 in so far 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.

II.

The members of the consortium shall act in compliance with the following checklist:

DO	DON'T
Application of competition law	
Arts. 81 and 82 EC Treaty may be applicable to the foundation and activities of a consortium.	Do not assume that conflicts with competition law are excluded simply by the fact that the consortium complies with the provisions of the REACH Reg.
Consultation in Matters of Competition Law	
An in-house legal expert or the company compliance officer or an external legal counsel should be consulted whenever there are uncertainties relating to compliance with competition law.	Do not assume that the Code of Conduct deals with all competition law issues exhaustively. Essentially, compliance with Arts. 81 and 82 EC Treaty can be determined only on the basis of market impact in each individual case. The Code may therefore be regarded only as a source of general conduct recommendations.
All consortium meetings/discussions, which are not in compliance with the Code of Conduct, shall be stopped until a legal expert becomes involved.	
Activities of the consortium	
Cooperation within the scope of the consortium should be restricted to the initially defined goals and purposes of the cooperation.	Pursuant to Articles 81 and 82 EC Treaty the following activities are prohibited within the scope of the consortium: <ul style="list-style-type: none"> - Coming to arrangements on prices, markets and customers (see Article 81 par. 1 (a) to (e) EC Treaty); - Joint boycotting of other companies; - Unjustified unequal treatment of trade partners; - The abusive exploitation of a dominant market position.

Exchange of Confidential Information

A trustee shall be involved for the exchange of confidential information.

The exchange of confidential information concerning market behaviour is inadmissible, specifically as it relates to:

- production capacities,
- production or sales volumes,
- import volumes,
- market shares,
- price policy,
- distribution and marketing terms,
- marketing strategies,
- information regarding supplier relationships.

Documentation on Cooperation

Minutes of all meetings of the consortium shall be kept, which shall detail the subject of the meeting.

The contents of the minutes shall be reviewed by an in-house legal expert or the company compliance officer prior to sending them to all participants of the consortium.

All meetings, which are not in compliance with the Code of Conduct, shall be stopped until a legal expert becomes involved.

Annex 3:⁴**List of staff members involved in the preliminary phase**

(Note:

State the name of staff members .../telephone, fax, email)

⁴ Model Agreement Section II par. 6.3.

Seite 4: [1] Kommentar [13]

Within the scope of contractual freedom, the parties may also include other parties subject to a registration requirement (or downstream users) into the cooperation. In such case, the Preliminary Agreement shall be amended accordingly, thereby involving all those previously participating as well as the new participants. Articles 11, 19, 27 and 30 REACH Reg. do not require the integration of every interested party into the negotiations for the formation of a consortium. Vis-à-vis the interested party, there exists only an obligation to jointly submit the core data (opt-out options remain) or to place the relevant studies at its disposal in return for the pro-rata refund of the costs. However, the contacts established in a SIEF offer the chance to meet and integrate other potential members.

Further, cartel law does not require the integration of every interested party into the negotiations on the formation of a consortium. It need not be established whether cartel law contains such extensive restrictions of contractual freedom. Eventual obligations to open the consortium vis-à-vis third parties under cartel law can still be met at a later point in time (e. g. through inclusion of third parties into the consortium).

Seite 4: [2] Kommentar [14]

Only in exceptional cases will this option be a reasonable tool to protect the interests of the parties. This is due to the fact that consortia will generally be negotiated according to this Model Agreement before SIEF obligations enter into force and thus before the choice of contracting parties becomes limited by the REACH Reg..

Seite 4: [3] Kommentar [17]

The risk of a violation of cartel law is avoided or significantly alleviated if the exchange according to par. 2.3 is anyhow carried out by a trustee for the protection of the parties. Thus, the clause under par. 4.2 is only relevant if the parties exchange their information directly among each other.

Seite 5: [4] Kommentar [21]

The ECJ commonly regards “business secrets” in need of being protected any and all operational or business information meeting the following criteria: The information is only known to a closed group of persons; the holder wishes to keep the information secret; the holder has a legitimate interest in non-disclosure of the information (see Fluck, *Transparenz, Schutz von Unternehmensdaten und Zwangskonsortien im geplanten REACH-System*, in: Rengeling (Ed.), “Umgestaltung des Europäischen Chemikalienrechts durch Europäische Chemikalien-Politik”, 2003, p. 123).

Seite 5: [5] Kommentar [23]

Occasionally, there are reservations against agreeing upon contract penalties. However, the contract penalties serve to protect all those involved rather than serving the purpose of sanctions. The advantage of contract penalties: The burden of proof for a specific damage and for the causation of conduct resulting in the damage (etc.) ceases to apply and, consequently, the participants will be put under pressure to comply with their contractual obligations – in this case, to maintain confidentiality. It has to be decided on a case-to-case basis, whether an agreement on contract penalties is appropriate in a preliminary agreement.

Seite 5: [6] Kommentar [24]

The amount of the contract penalty agreed upon should meet the following criteria: In the specific case, it should be commensurate with the economic value of the exchanged information. Furthermore, it should encourage the parties to treat the information with great diligence; however, it should not be out of proportion. As a general rule, misuse of studies should not happen in the preliminary phase, as studies have not yet been prepared and thus have not yet been placed at the disposal of the parties. Since a benchmark referring to a clear economic value is still missing in the preliminary phase, it will be difficult to fix a blanket amount in the preliminary agreement during the preliminary phase. Thus, here, the optional clause (percentage of the expenses incurred for information relating to the breach) suggests itself. According to practical experience, 50 % would be adequate; however, the party demanding the contract penalty would have to prove the expenses.

Seite 5: [7] Kommentar [25]

By reversal of the burden of proof in respect to fault, as a consequence, all those involved will be encouraged to the greatest possible diligence in respect to their obligation to maintain confidentiality. Another option would be to impose here liability regardless of fault.