



## EUROPEAN COMMISSION

Directorate-General for Competition

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

Environment Directorate-General

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### COMPETITION ISSUES IN THE CONTEXT OF REACH SIEFs

#### Background on SIEFs and Consortia

Pursuant to REACH, companies that manufacture or import chemical substances in quantities above one tonne per year have a duty to submit a registration dossier to the European Chemicals Agency (ECHA) in order to provide information on the properties and the uses of those substances. They also have to make an assessment of the hazards and potential risks presented by the substance they manufacture or import. Registration applies to substances on their own, in mixtures and, in certain cases, to substances contained in articles.

Companies that intend to register the same substance must form a so called “Substances Information Exchange Forum” (SIEF). SIEFs provide a platform to facilitate data sharing between the companies, and hence to avoid duplication of studies, to save costs and reduce animal testing, and to agree on the classification and labelling of the substance concerned. Members of the SIEF also need to make the results of existing studies available to other participants, react to requests for information by others and work collectively to identify and carry out additional studies, should such studies be needed. All this work is intended to lead to a single joint submission for each substance, with a minimum use of additional animal testing. The data sharing requirement under REACH is also intended to reduce the costs of submitting a registration dossier.

Joining a SIEF is a **legal obligation** for all registrants of pre-registered substances, if there is more than one company registering a specific substance. Potential registrants must get active in their SIEFs already now if they intend to register by 31 May 2018.

In addition to potential registrants, downstream users and any person or organisation holding data relevant to a substance can participate in the SIEF if they have identified themselves as a data holder and are willing to share their information.

The REACH Regulation does not prescribe a specific legal form for the SIEFs – therefore, they are managed independently by industry and in principle, the Commission and ECHA are not involved in their functioning.

Within each SIEF, members should appoint a lead registrant who must act with the agreement of the other co-registrants and submit the lead dossier of the joint submission. The lead registrant also usually coordinates the activities within the SIEF. A lead dossier is a complete dossier that includes the classification and labelling of the substance, (robust) study summaries and proposals for further testing, if applicable.

Currently leading companies of a particular SIEF form consortia within SIEFs in order to exchange information and jointly develop the required dossiers. This has shown benefits as the tasks of a lead registrant are often seen as too complex or demanding for a single

company. Within the consortia, the members often meet face to face and share information directly in order to work together to meet their legal obligations under REACH.

The current practice has also shown that SIEFs and the consortia are usually managed by specialised consultants or law firms. They are also responsible for internal communication and finances (implementing the internal policies on fees for joining the SIEF or on how to get access to certain data from the lead registrants or any services related to the SIEF).

### **Competition law and SIEFs**

Recital 48 of REACH stipulates that “*this Regulation should be without prejudice to the full and complete application of the Community competition rules*”. The two main such rules are contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU):

- **Article 101 TFEU** prohibits agreements between two or more independent market operators which restrict competition. This provision covers both horizontal agreements (between actual or potential competitors operating at the same level of the supply chain) and vertical agreements (between firms operating at different levels, i.e. agreement between a manufacturer and its distributor). Only limited exceptions are foreseen from this general prohibition. The most flagrant example of illegal conduct infringing Article 101 TFEU would be the creation of a cartel between competitors (which may involve price-fixing and/or market sharing).

- **Article 102 TFEU** prohibits undertakings holding a dominant position in a market from abusing that position.

In the specific context of SIEFs in REACH, these TFEU provisions could cover a variety of conduct and practices that, shortly put, would either ultimately lead to explicit price coordination between competitors who are setting up a common registry, or allow the SIEF lead registrant to obtain some kind of competitive advantage over the other (potentially smaller) registrants/competitors. Some situations of concern would be where the competitors use the SIEF settings to exchange sensitive business information allowing them, for instance, to align prices, as well as situations where the SIEF leader imposes an excessive cost burden on smaller competitors.

### **FAQs:**

#### **Information exchange**

The REACH Regulation requires the sharing of information between companies “in order to increase the efficiency of the registration system, to reduce costs and to reduce testing on vertebrate animals” (Recital 33); it also mentions that SIEFs are aimed to “help exchange of information on the substances that have been registered” (Recital 54).

#### ***Q.1) What are the implications of the competition rules as regards the exchange of information between members of a SIEF?***

The members of a SIEF are usually competitors, and to avoid falling foul of Article 101 TFEU, they should therefore not exchange any information that could allow them to predict each other's business strategy and to align their market behaviour (*John Deere – Case C-7/95 P [1998] ECR I-3111*).

#### ***Q.2) What kind of information exchange between members of a SIEF would be prohibited under the competition rules?***

Commercially sensitive information that should not be exchanged would include prices and pricing policies, details of customers and sources of supply, figures on the costs of production or distribution and the volume and value of sales, and future plans of individual companies concerning technology and investments. This list is not exhaustive, and what would be considered anti-competitive would depend on individual circumstances.

***Q.3) What measures should be taken within a SIEF to reduce the risk of members being found to have exchanged commercially sensitive information?***

It is advisable that the rules governing SIEFs should provide for detailed agendas and minutes of all meetings to be kept. Participants should be reminded that they are bound by competition law, and guidance should be given as to the types of information that should not be exchanged between the members of the particular SIEF in question. In practice, members of SIEFs should be advised to restrict the scope of their exchange of information strictly to what is required for REACH activities.

**Excessive pricing**

***Q.4) Is a company acting as a Lead Registrant allowed to impose excessive prices for the Letter of Access ("LoA")?***

Depending upon the circumstances, a Lead Registrant may be considered to be in a dominant position as to the provision of the LoA on a particular product. This is not in itself unlawful, but applying Article 102 TFEU, a firm that enjoys such a position has a special responsibility not to allow its conduct to impair competition in the Internal Market. The concept of abuse is an **objective** one and there is no need to prove fault or subjective intent on the part of the dominant firm to abuse its position.

If a dominant firm charges excessive prices for essential inputs such as the LoA, this could be considered abusive within the meaning of Article 102 TFEU. In order for prices to be considered excessive, (i) the difference between the costs actually incurred by the Lead Registrant and the price actually charged for the LoA must be excessive; and (ii) the price must be either unfair in itself, or unfair when compared to the prices charged for comparable LoAs (the *United Brands*<sup>1</sup> test). The fact that the potential registrants consider the price charged to be high does not demonstrate that it is excessive within the meaning of the EU case law on Article 102 TFEU. Finally, excessive prices for LoAs might lead to the exclusion of smaller competitors (foreclosure) or might discourage new entrants on the relevant product market.

***Q.5) May the existing members of a SIEF oblige a new member to pay for past testing that is not relevant to its own application?***

Depending upon the circumstances, this could constitute excessive pricing and could breach Article 102 TFEU, in that the price charged could be considered unfair because the price charged would not relate to expenditure incurred to acquire test results that are needed by the new member.

In addition, Articles 27(3) and 30(1) of REACH, which outline data-sharing obligations for both non-phase-in and phase-in substances state that "Registrants are only required to share in the costs of information that they are required to submit to satisfy their registration requirements." Therefore, if the price charged for data by existing registrants includes costs

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<sup>1</sup> Case 27/76 *United Brands*, paragraph 252

of studies that are not required by the new registrant, the new registrant can bring this issue to the attention of ECHA.

## **Remedies**

***Q.6) If I consider certain practices in the context of a SIEF to be anticompetitive, to whom could I report them?***

As far as competition enforcement is concerned, national law and EU law operate in parallel. If the practices in question have an effect on intra-EU trade, EU competition rules will be applicable (for further information, please consult the *Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, OJ C 101 of 27.04.2004).

The European Commission, National Competition Authorities and national courts are all empowered to apply EU competition rules. The main rules on procedure, including those on case allocation between the Commission and National Competition Authorities, are set out in Council Regulation 1/2003<sup>2</sup>.

If, having regard to these procedural rules, it appears that the European Commission is well placed to act, any complaint should be made on Form C. An explanation and link to Form C can be found at the following address:  
[http://ec.europa.eu/competition/contacts/antitrust\\_mail.html](http://ec.europa.eu/competition/contacts/antitrust_mail.html)

It should be noted that unlike national courts, the European Commission does not have the power to award damages to firms that are victims of a breach of the competition rules.

For more information on EU Competition law, please refer to the Directorate General for Competition's website at: [http://ec.europa.eu/comm/competition/index\\_en.html](http://ec.europa.eu/comm/competition/index_en.html)

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<sup>2</sup> Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 04.01.2003, p.1-25.