CHEMICALWATCH

REACH consortia without breaching competition law

In this third article in our series on REACH consortia, we examine some of the competition (antitrust) concerns regarding REACH consortia formation and membership. Previously we have examined pre-SIEF and pre-consortia issues (*CW European Business Briefing* Nov 2008) and consortia formation issues (*CW European Business Briefing* Dec 2008/Jan 2009). As REACH consortia become established and registration compliance strategies are agreed upon, companies should ensure that they also achieve competition law compliance from the outset.

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EU fines for anti-competitive behaviour are notoriously heavy

Competition law and REACH

All REACH and REACH related activities (including consortia formation and/or other forms of co-operation between REACH actors) must comply with applicable competition/antitrust law. This, of course, includes EU competition law but to the extent that REACH activities may have effects in other regions/countries, such as the USA and China, the competition/antitrust laws of these jurisdictions should also be considered. For the purposes of this article, however, we shall focus on EU competition law compliance.

Competition law compliance in REACH-related activities may be particularly challenging because there is a fundamental tension between some of the REACH requirements and competition/antitrust law obligations. Indeed, while REACH requires data sharing and joint submission of data for REACH registration purposes between competitors, EU competition law prohibits anticompetitive agreements and/or collusion between competitors. Also, there is the time pressure of submitting registration dossiers of high volume substances. The complexity of REACH requires the intervention of a multitude of persons who may not all be trained in, or aware of, their competition law obligations.

However, there will be no excuse. Whether a company breaches competition law obligations knowingly or not is irrelevant for competition law compliance purposes and ignorance of the law is no defence. Further, should a company infringe EU competition law in a *bona fide* attempt to ensure compliance with REACH, this may not, in itself, constitute a sufficient and/or valid defence. Perhaps it may constitute an attenuating circumstance but it would not grant immunity.

Key competition law aspects

Generally, EU competition law infringements relate either to Article 81 of the EC Treaty or to Article 82 of the EC Treaty:

* Article 81(1) EC Treaty

Under Article 81(1) EC Treaty, agreements or concerted practices between companies which have as their "object or effect" the prevention, restriction or distortion of competition and which may affect trade between Member States are prohibited and are automatically void. This prohibition includes all agreements which actually or potentially restrict competition. Where trade between Member States is not affected, national competition law is likely to apply.

As such, compliance with Article 81(1) should be considered in relation to all REACH consortia agreements as well as any other written or oral REACH related agreements or concerted practices. It should also be considered vis-à-vis all forms of collusion between parties including tacit agreements, coordination of commercial behaviour and/or common course of action between parties which may be orchestrated or arranged for REACH purposes or in connection with REACH activities.

There are exemptions to the prohibition set out in Article 8(1), notably Article 81(3)) or applicable Block Exemptions Regulations. However, the motivation on the justification of these exemptions will often require an exhaustive and detailed analysis that companies may find difficult to manage internally and may not be able to afford for each and every REACH related agreement they are in.

Even bona fide attempts to comply with REACH may not constitute a defence for violating EU competition law

Article 82 EC Treaty

Under Article 82 EC Treaty, any abuse by one or more companies in a dominant position which may affect trade between Member States is also prohibited. The European Court of Justice has previously accepted that abuse of a collective dominant position of market power constitutes a breach of Article 82. Therefore, relevant REACH consortium members which collectively and/or unilaterally hold market power and abuse their market position may be held in breach of Article 82. In particular, competitors in a market with sufficient market share to hold a dominant position are under a "special responsibility" to ensure that the market structure is not further weakened by their actions. Furthermore, where a highly concentrated market structure exists (such as an oligopoly and/or a duopoly), competitors with significant market share should take all reasonable steps to ensure third party entrants into the market (such as potential manufacturers/importers) and/or other smaller, existing competitors in the market are not denied access to the market and/or suffer as a result of anticompetitive behaviour.

Penalties

In the past, competitors within the chemical industry in particular have been targeted by EU competition authorities and have been the subject of antitrust investigations and penalties for breach of EU competition law. Breach of EU competition law, as the chemical industry is acutely aware, can result in large fines (see box).

REACH consortia and competition law

With regard to REACH consortia, there are certain key issues that companies should be particularly sensitive to concerning competition law compliance, and in particular consortia membership and data sharing issues:

Membership and participation

One of the underlying competition law concerns regarding consortia membership is that if a company is denied membership to a REACH consortium, *de jure* or *de facto*, this exclusion may make it so costly and difficult for that company to achieve registration, that it will have a foreclosure effect and make the company unable to gain/retain market access. This may come from membership conditions that are set up or applied in a way that is discriminatory, or to other conditions such as restrictions in the scope of the consortia. For example, limiting a consortium to a certain number of substances and/or uses of a substance may appear legitimate in theory, but may have discriminatory effects in practice.

On the membership front, the unexpected number of substances that have been pre-registered and even more so the unexpected number of pre-registrants, will represent a particular challenge for companies seeking to form consortia for registration purposes. It would be impossible to transform a SIEF of hundreds or sometimes thousands of often unknown members into a consortium. This will necessarily increase the temptation for the most important players, in particular if they are already structured in some form of trade association, industry or interest group to work in a smaller circle, but it will be difficult to do so without raising antitrust concerns.

Objective, transparent and non-discriminatory

In order to reduce the risk of inadvertently and/or unintentionally denying consortium membership to a legitimate applicant in breach of competition law, consortium members should consider the following basic rules:

- Members should ensure that membership criteria are objective, transparent and non discriminatory and are in no way underpinned by an underlying anti-competitive motive.
- While SIEFs are formed with every manufacturing or importing "legal entity" who pre-registers a given substance, consortia membership criteria can be made on the basis of groups of companies (with affiliates of members having free access to the data acquired by the member), provided again that this does not unduly discriminate against smaller companies and/or new entrants. If necessary, sharing data in proportion to volume may correct inherent discriminations and prevent anticompetitive effects.
- Consortium discussions and consortium membership, should not systematically be opened to all SIEF members. In those cases where there are a significant number of pre-registrants and/or SIEF participants that may wish to join a consortium, limiting the number of members that will negotiate the consortium agreement will be a necessity and can be justified provided that the membership conditions remain objective, transparent and non discriminatory, and that all those who meet these criteria have a real opportunity to join the consortium on fair, transparent and non-discriminatory terms.
- In most cases it will be for the consortium's steering committee or equivalent body to approve or reject an application for consortium membership and these decisions should be taken with care. Given the importance of membership, it is also advisable to build in a right to be heard, or an appeal mechanism into the membership application procedure so that a rejected applicant is able to present his case and challenge the decision and/or the membership criteria.
- In order to mitigate the effects of restricted membership criteria or consortium membership rejection, members should also consider offering the rejected applicant a letter of access to the consortium's data in order to facilitate their REACH compliance.
- Consortium members should also ensure that its creation and existence is carried out in a transparent and open manner to afford potential members the opportunity to join. This can be done by communicating within the SIEF and in publications such as *Chemical Watch* (*Chemical Watch*).
- Finally, in order to enable a third party to make an informed decision regarding whether or not it wishes to join a consortium, that party should have access to relevant consortium documentation, such as minutes of previous consortium meetings and relevant documentation relating to other consortium affairs. They

EU penalties

- In 2008 members of a cartel concerning aluminium fluoride, a chemical used to lower the smelting temperature of aluminium, were fined **€4,970,000**.
- In 2006 members of the 'bleaching agent cartel' (hydrogen peroxide and perborate) were fined **€388,128,000**.
- In 2006 members of a cartel concerning certain types of synthetic rubber (butadiene rubber and emulsion styrene butadiene rubber) were fined **€519,050,000**.

should have sufficient time to review these and take the decision to join the consortium without penalties.

Membership categories

Although this is not merely an antitrust issue, another inherent tension in consortium membership will be the place reserved for different categories of members, eg manufacturers, importers and downstream users. In principle, each category of member should be able to join a consortium on fair terms.

In particular, downstream users should have access to REACH consortia in order to meet their legitimate objectives of contributing and/or purchasing data and assessments and/or developing a data package that covers the particular quality, use or exposure of the substance they need. However, different rules can be applied to different categories of members, provided that their respective contributions are financially proportionate, acceptable from an antitrust standpoint and transparent.

Costs

Consortium membership requirements must also be fair and objectively justifiable particularly as concerns costs. For example, a REACH consortium agreement may provide for late entry fees for new/late consortium members to compensate for the "sweat equity" of the founding members. However, this late entry fee should be objectively justified to newcomers. An entry fee should not be set artificially to discriminate newcomers, in particular if they were not offered an opportunity to participate in the consortium work from the outset. Entry fees – as well as other costs, such as risk premiums – should be employed with extreme care, in particular in oligopolistic situations.

Data sharing

Information exchange between competitors is the other issue which requires particular care vis-à-vis competition law. Indeed the European Commission and courts have already held that data sharing and exchange may lead to excessive transparency facilitating or ultimately leading to collusion in breach of EU competition law (UK Tractor case T-34/92). Therefore, consortium members must consider the sensitivity of the data they shall exchange and possible anticompetitive effects of that exchange/disclosure.

An inherent tension in consortium membership will be the categorisation of members... each should be able to join on fair terms.

As explained in our last article, REACH consortia agreements set out the process for data exchange and analysis, for the generation of new data and for their submission to the European Chemicals Agency (ECHA) for registration purposes. In principle, disclosure of the data strictly required for REACH registration purposes may not, in itself, raise competition compliance concerns as it will not include information relating to: market behaviour such as, pricing, discounts, promotion policies client preferences, nor production capacities, production volumes, sales volumes, import volumes or market shares.

Also, in those cases where disclosure of sensitive information such as production and import volumes is required, for example, in order to apportion costs for the REACH data generated by members within a consortium on a proportionate basis, use of an independent trustee can serve to contain and restrict the exchange of such information and prevent disclosure in breach of competition law.

Other information will often need to be shared in order to complete registration of a substance, for example, information on uses, exposure scenarios, classification and labelling. From an antitrust standpoint, the question is whether exchanging that information may affect technical development, markets, sources of supply and other issues. If so, and to limit the possible risk of actual or potential anti-competitive effects from these exchanges, consortium members should limit disclosure to that information strictly required for registration purposes and/or disclose it to an independent third party (such as a technical specialist or trustee) for compilation on a no-name basis. For example, information on uses could be restricted to those in publicly available literature.

Antitrust training needed

To ensure competition law compliance, the underlying principles of transparency and non-discrimination should characterise the dealings of REACH consortia both externally and internally and under no circumstances must there be an underlying anti-competitive motive behind such dealings. Considering the number of substances and SIEF participants and also the number of persons that will necessarily be involved in consortium dealings, antitrust compliance vigilance is always a must.

In practice, we would advise companies to not solely rely on their generic antitrust policies and training programmes but to organise specific antitrust training for all company staff involved with SIEF and consortia. This training should go beyond the provision of general principles, and generic do's and don'ts; it should use concrete SIEF/consortium situations to explain what can and cannot be done, and sets forth standing and reporting procedures for company staff, should they be faced with anti-competitive behaviours.

For further information on this issue, please contact Mayer Brown

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Mayer Brown is a global law firm with extensive experience in the field of chemicals regulation.

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