CEFIC LEGAL GUIDANCE FOR REACH COMPLIANCE in particular versus WTO rules

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Or why the non-functioning of the SIEF system could undermine application of REACH on imports from third countries and, we need legal compliance when acting in SIEFs and consortia

A. Analysis of the situation created by REACH after pre-registration :
The European Chemicals Agency (ECHA) has announced more than 2.7 million pre-registrations and some 150.000 pre-SIEFs (Substance Information Exchange Forum).

To date the SIEF-system, imposed by the REACH-Regulation (hereinafter REACH) and the massive number of pre-registration makes the co-operation quite difficult and burdensome. In some cases it has been noticed that companies proceed to work directly in consortia and to skip the SIEFs. This could, lead to a situation where companies in particular SMEs, and/or representatives of non EU manufacturers are de facto kept out of the process, leaving them little time to complete their registration work that they have to perform together with a view to make classification & labeling and joint submission of the Dossier to ECHA.

B. Why are the WTO rules relevant to REACH :
While it is perfectly understandable that companies want to move ahead and do not want to be slowed down, this situation could well undermine the REACH system in the longer term as regards its application to third countries.

Whilst REACH is de jure set up in a non-discriminatory way, its application in practice could well be found to have trade restrictive effects that could be challenged in the WTO, for example on grounds of being more restrictive than necessary to achieve a given policy objective. This could be found in violation of Article 2.2 of the WTO Technical Barriers to Trade Agreement[i].

At the same time practical difficulties for countries to comply with REACH could build strong support for a proposal made by Argentina in the Doha Round regarding a non-tariff barriers to trade (NTB) agreement for the chemicals sector that would significantly reduce the REACH obligations for third countries.

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The proposal states that *"The mandatory registration of chemical substances should be standardized in such a way that each Member's domestic regulations comply with internationally accepted standards. Once approved in the producer's country of origin, registration should be valid internationally, with no need for re-registration in third countries".*

This latter idea was a stated objective in the context of the Transatlantic Business Dialogue, which at international level may be achievable in the long term when the UN Strategic Approach to International Chemicals Management (SAICM) is implemented.

However, in the medium-term this proposal, if accepted, would provide other WTO members with a universal argument not to comply with REACH. Cefic sent to DG Trade at the European Commission the necessary arguments to counter this proposal, but if companies from third countries eg the non EU manufactures are encountering too many practical difficulties, this will increase the pressure on the EU to accept a chemicals NTB agreement with this provision.

C. Guidance to companies implicated in SIEFs/Consortia/using systems such as SIEFreach :
To avoid legal challenges of REACH in the WTO which may lead to lower obligations for exporters in third countries, it is therefore very important that the SIEF-system operates as foreseen in REACH. It is also important to comply with REACH Regulation itself.

It is important to always bear in mind that
under Article 29 of REACH and other regarding SIEFs,
participants to a SIEF need to co-operate, pre-registrants "cannot be excluded".

- **When companies are working in SIEFs**

As mentioned in the above box, **one basic rule about SIEFs is that all pre-registrants in ECHA-IT are part of the pre-SIEF, and once the SIEF sameness and identity checks have been completed of a given SIEF. Co-operation must be organised.**

As mentioned in Cefic Reach Competition Law Compliance Guidance competitors **cannot misuse the SIEF process to unduly exclude competitors**. Other consequences may be that court and authorities may consider that companies having "excluded" one or more legitimate participants are in breach with REACH, and may be liable for this, including having to pay damages.

- **When company are forming consortium**

Equally even if it is perfectly legitimate to have a consortium comprising part of the participants of a SIEF provided this fulfils competition law is not breached (see also Cefic Competition Guidance), **consortium have to organise mandatorily co-operation with the other SIEF members,** and **the work of consortia cannot have as a consequence to totally exclude other SIEF members from the mandatory classification & labelling and joint submission** (for more Guidance see also the ECHA Guidance on data sharing*)*.

- **When companies are using SIEFs management / IT systems such as SIEFreach**

The massive number of pre-registrations and the need for companies to cooperate in SIEF to fulfil their obligations under REACH creates systemic difficulties to work together, this was not accompanied by any mechanism or tool put in place by the authorities, companies being left to individually arrange for this. Cefic has anticipated this and created together with national federations an IT system : SIEFreach. However, it has been the case that companies are still hesitant to join such a system while it can be seen as a solution enabler, in particular to smooth SIEF operations and communication.

Cefic highly encourages companies to use SIEFreach and not hesitate anymore. However, when doing so if some participants to a given SIEF are reluctant to join a SIEFreach given intranet for a SIEF, the other participants to that given intranet **should not misuse the IT system put in place by excluding those who have not joined from the mandatory co-operation under a SIEF.**

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[i] The WTO Technical Barriers to Trade Agreement takes into account the existence of legitimate divergences of taste, income, geographical and other factors between countries. For these reasons, the Agreement accords to Members a high degree of flexibility in the preparation, adoption and application of their national technical regulations. The Preamble to the Agreement states that “no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal, and plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate”. However, Members' regulatory flexibility is limited by the requirement that technical regulations “are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to trade”. (Article 2.2).

For a government, avoiding unnecessary obstacles to trade means that when it is preparing a technical regulation to achieve a certain policy objective - whether protection of human health, safety, the environment, etc - the negotiations shall not be more trade-restrictive than necessary to fulfil the legitimate objective. Unnecessary obstacles to trade can result when (i) a regulation is more restrictive than necessary to achieve a given policy objective, or (ii) when it does not fulfil a legitimate objective. A regulation is more restrictive than necessary when the objective pursued can be achieved through alternative measures which have less trade-restricting effects, taking account of the risks non-fulfilment of the objective would create.