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## Practical aspects of the Reach Regulation from a Competition Law point of view

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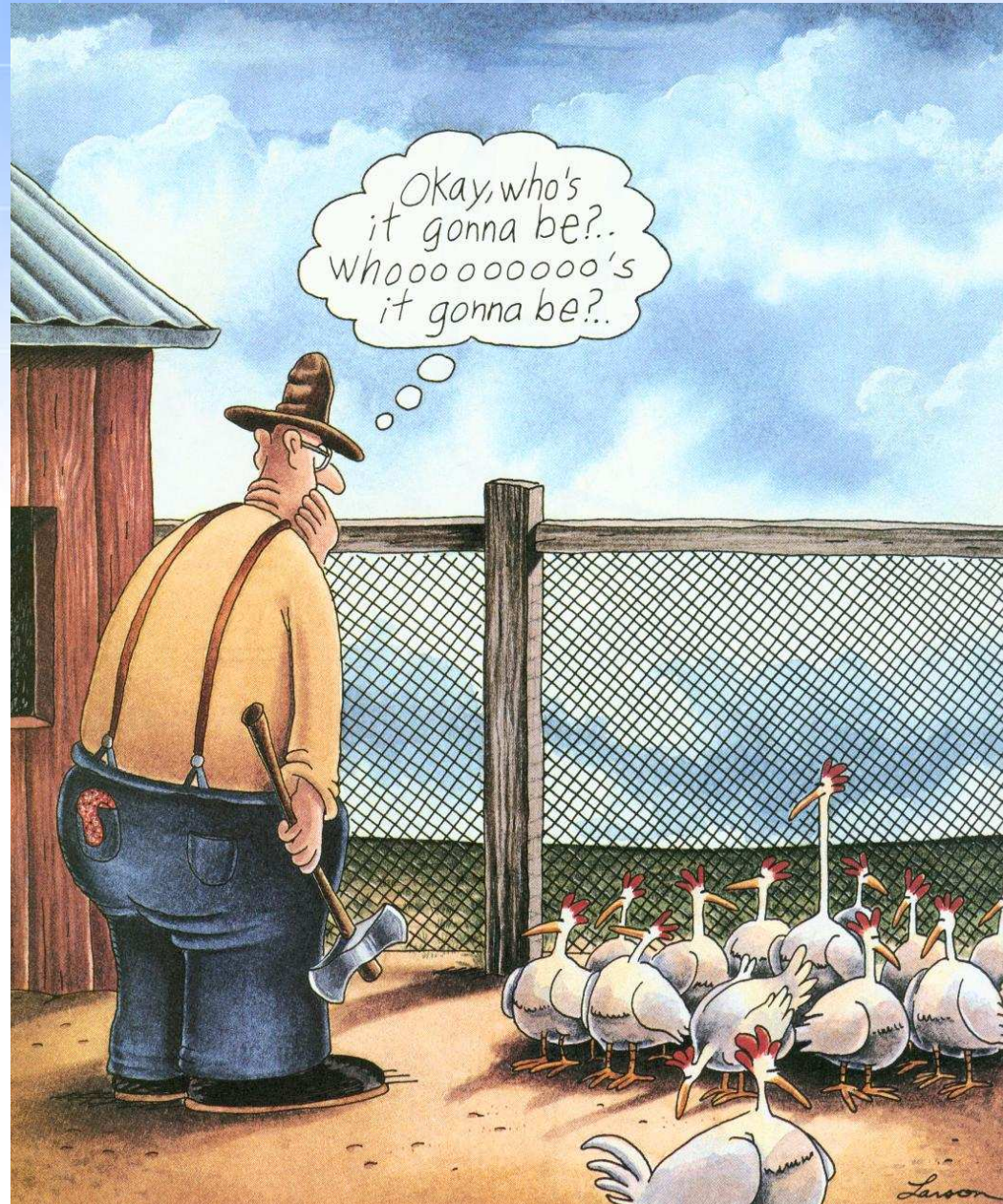
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## **I. The Reach Paradox**

- **Inducement to cooperation and information exchange**
- **... In a field characterized by a relatively small number of players having drawn significant attention from competition authorities**
- **Need for increased attention from undertakings in this context**





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# Why Large Companies Will Always Be In Antitrust Spotlight



EU Assumption on Fines: "Generally speaking, account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognize that their conduct constitutes an infringement."

# Significant risks and responsibility for market players

- Principles set out in REACH Regulation
  - **Recital 48:**  
*« This Regulation should be without prejudice to the full and complete application of the Community competition rules »*
  - **Article 25(2):**  
*«The sharing and joint submission of information in accordance with this Regulation shall concern technical data and in particular information related to the intrinsic properties of substances. Registrants shall refrain from exchanging information concerning their market behaviour, in particular as regards production capacities, production or sales volumes, import volumes or market shares. »*
- Little assistance provided to enterprises in practice:
  - Few basic guidelines provided in ECHA Guidance on data sharing paper
    - No illegal activity
    - Proportionality: exchange limited to what is strictly necessary
    - Precautionary measures to avoid exchange of illegal information

## II. Relevant Competition Law rules

- Article 81 EC prohibits conclusion of restrictive agreements
- Article 82 EC prohibits abuse of single or dominant position

### III. Key issues raised by REACH

- A. Exchange of information
- B. Cooperation between competitors
- C. Risk of exclusion / unfair burden imposed on certain enterprises

# A. Exchange of Information

- Reach encourages exchange of information
  - Recital 33:  
*« Joint submission and the sharing of information on substances should be provided for in order to increase the efficiency of the registration system, to reduce costs and to reduce testing on vertebrate animals. One of a group of multiple registrants should submit information on behalf of the others according to rules which ensure that all the required information is submitted, while allowing sharing of the costs burden. A registrant should be able to submit information directly to the Agency in certain specified cases. »*
  - Recital 54:  
*« A system should be established in order to provide for the establishment of Substance Information Exchange Forums (SIEF) to help exchange of information on the substances that have been registered. SIEF participants should include all relevant actors submitting information to the Agency on the same phase-in substance. They should include both potential registrants, who must provide and be supplied with any information relevant to the registration of their substances, and other participants, who may receive financial compensation for studies they hold but are not entitled to request information. »*



## A. Exchange of Information (Cont'd)

- Concrete instances where Reach will result in information exchange:
  - Pre-registration of existing substances
  - Formation of Substance Information Exchange Forums
  - Operation of SIEF
  - Operation of a consortium
  - Verifications needed to see whether a substance has already been registered

## A. Exchange of Information (Cont'd)

- Legal test for exchange of information:
  - Information exchange as conduct for agreement on prices or outputs: cartel
  - Information exchange as a stand-alone practice
    - UK Tractor case: reduction of predictability of competitors' conduct
  - Statistically few stand-alone cases of illegal information exchange schemes

## A. Exchange of Information (Cont'd)

- Practical tips in relation to information exchange



## A. Exchange of Information (Cont'd)

- Practical tips in relation to information exchange (Cont'd)
  - Information exchanged under REACH typically not regarded as problematic:
    - Technical or scientific information
    - Information not directly relevant for coordination of conduct
  - Avoid exchange of information beyond what is strictly necessary
  - If sensitive information, appoint independent third party



## A. Exchange of Information (Cont'd)

- Example of non public information which cannot be exchanged:
  - Information on prices
  - Information on production costs
  - Individual data on sales, stocks and costs of supply
  - Information on development projects for technology, investments, production and marketing
  - Information on territories and clients

## A. Exchange of Information (Cont'd)

### Type of Information

- Individual prices, forward looking production volumes, etc.
- Aggregate prices, aggregate production volumes etc.
- Sales forecasts, production forecasts
- Methods and procedures
- Compliance best practices
- Employee motivational tips

**LEVEL  
OF RISK**

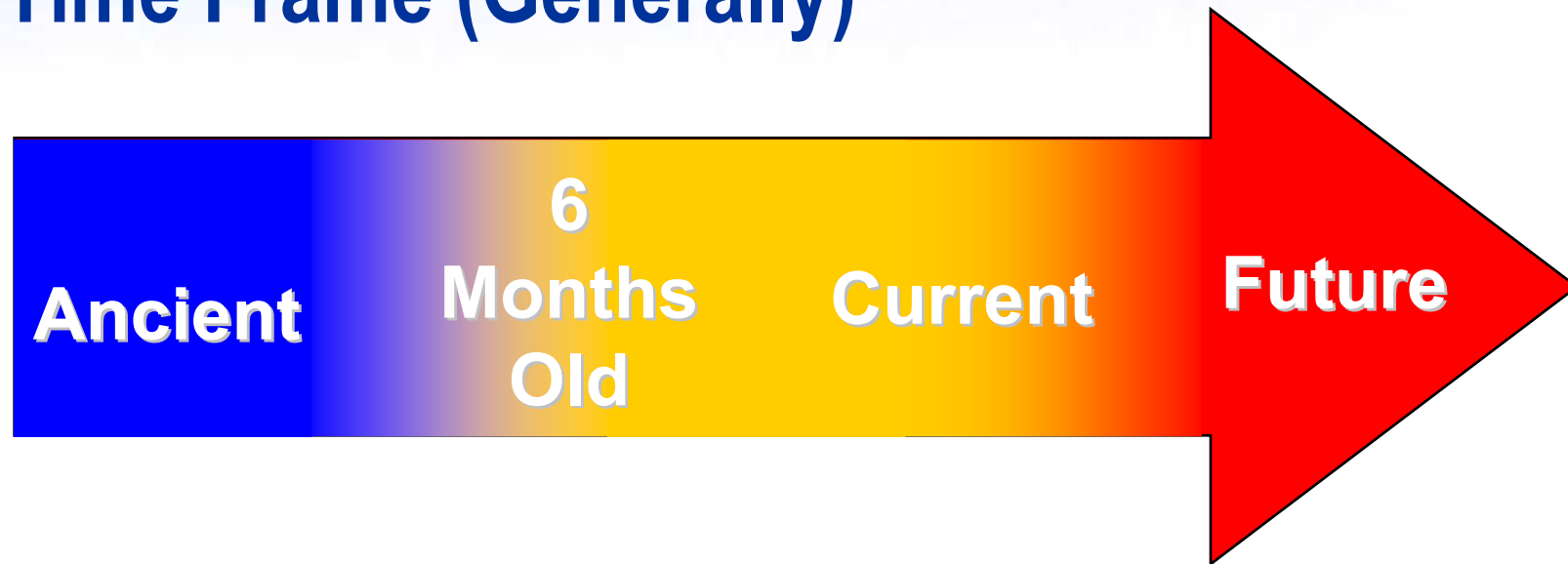
**HIGH**

**SAFE**

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## A. Exchange of Information (Cont'd)

### Time Frame (Generally)



## A. Exchange of Information (Cont'd)

# How Obtained

- **Directly from competitors**
- **From third party who obtained it from**
  - **Competitors**
  - **Employees**
- **From your own employees**
- **Publicly available information**

**LEVEL  
OF RISK**

**HIGH**

**SAFE**

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## A. Exchange of Information (Cont'd)

# What is “publicly available” information?

- Information collected and published by a government agency?  
*Yes*
- Information collected from competitors by a private industry association? *No, if collected directly from competitors and not otherwise available*
- Information about competitors that is purchased from a shipping agent and not otherwise available from a public (i.e., government) source? *No*
- Information obtained from a competitor that eventually will be reported to a government agency? *If prior to submission to government, no*



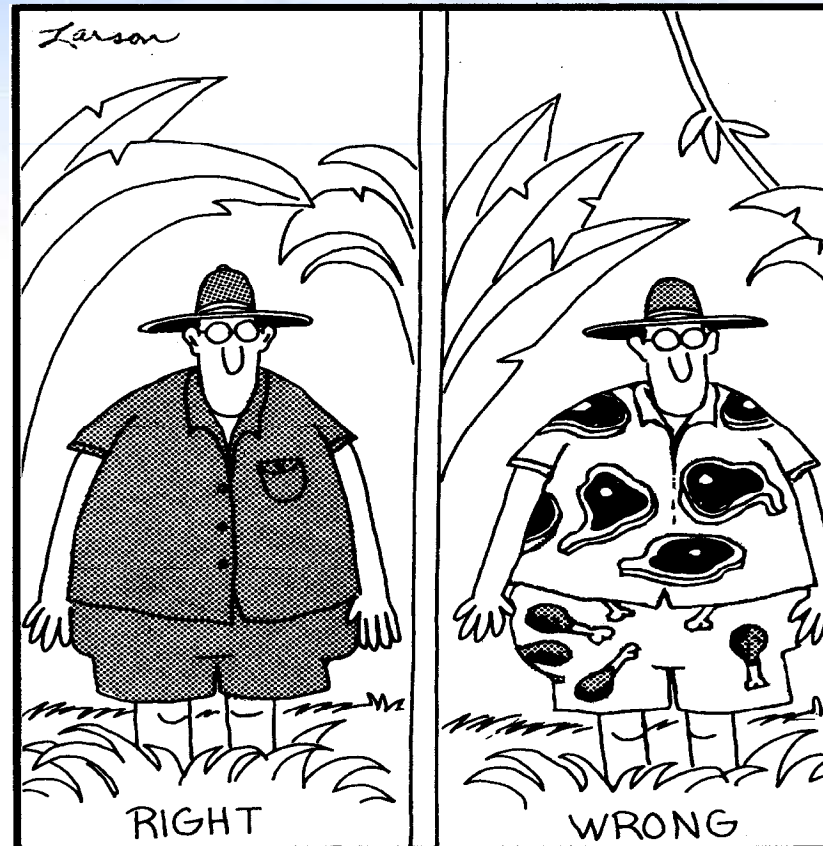
## **B. Cooperation between competitors**

### **The Importance of How The Information Is Used**

- Information exchange can be evidence of agreement to fix practices where followed by greater conformity in rivals' practices or changes in practices of "mavericks"
- Uncertainty about how rivals are using information

## B. Cooperation between competitors (Cont'd)

### Take Steps to Avoid Being a Target. . .



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## B. Cooperation between competitors (Cont'd)

- Article 25(2) of REACH Regulation:

*« The sharing and joint submission of information in accordance with this Regulation shall concern technical data and in particular information related to the intrinsic properties of substances. Registrants shall refrain from exchanging information concerning their market behaviour, in particular as regards production capacities, production or sales volumes, import volumes or market shares ».*



## C. Risks of exclusion

- REACH cannot result in exclusion of competitors
- Risk of Article 82 EC violation
- Commission's new focus is to promote open standards when possible  
Neelie Kroes, European Commissioner for Competition Policy said on 10 June 2008: « *Allowing companies to sit around the table and agree technical development for their industry is not something that the competition rules would usually allow. So when it is allowed, we have to look carefully at how it is done* ».
- Need to state clearly any disagreement with conduct of consortium

## D. Sanctions - Fines

### Introduction

- New Guidelines published on OJ C 210 of 1.9.2006
  - But applicable to cases where SO is sent after their publication
- Objectives of new guidelines :
  - Enhance transparency;
  - Ensure consistency;
  - Provide some degree of legal certainty;
  - Ensure sufficiently deterrent fines



## Key improvements

- Abolish initial step of classifying infringements;
- Increase the impact of duration on the level of fines;
- Better reflect the economic importance of the infringement, in particular in case of large markets and/or companies with large market shares on such markets;
- Increase deterrence for recidivism.

# New system for setting fines

- **Step 1: Basic amount =**
  - Proportion of value of sales on the affected market (max 30%, depending on gravity)
  - x number of years of participation
  - + Entry fee (general deterrence): 15-25% of the value of sales
- **Step 2: possible adjustment factors :**
  - Aggravating or attenuating circumstances
  - Multiplier (specific deterrence),
  - 10% threshold
  - Leniency Notice (OJ C 45 of 8.12.2006)

## Value of sales

- Commission will have regard to:
  - “the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the geographic area within the EEA”.
- Special rule for cases where geographic scope extends beyond territory of EEA
- Value of sales of last full business year of participation in infringement



## Proportion of the value of sales and duration

- Up to 30% depending on gravity, i.e:
  - Nature of the infringement
  - Geographic scope of the infringement
  - Implementation of the infringement
  - Combined market share of undertaking concerned
  - Variable amount for cartels will “generally be set at the higher end of the scale”.
- How is duration fixed?
  - Periods of less than 6 months counted as half years; longer than 6 months as full years.

## Entry fee

- The “entry fee” is based upon a percentage of between 15 and 25 % of the value of sales;
- Applied once whatever duration;
- For cartels entry fee “will” be applied; for other types of infringements entry fee “may” be applied.

# Adjustment factors (1)

- Aggravating factors :
  - Role of leader/instigator
  - Refusal to cooperate or obstruct Commission's investigations;
  - Repeat offenders : take account also of decisions of NCA's; increase up to 100%; increase for multi-recidivism

## Adjustment factors (2)

- Mitigating factors
  - Termination of infringement as soon as Commission intervenes;
  - Negligence;
  - Limited role in infringement;
  - Effective co-operation outside scope of leniency notice;
  - Intervention by public authorities.

## Adjustment factors (3)

- Special increase for deterrence : so-called “multiplier” in case of companies with large turnover beyond relevant sales (e.g. multi-product firms);
- Improper gains.



## Adjustment factors (3)

- Legal maximum of 10% of total turnover applied before leniency
- Leniency Notice
- Inability to pay