

ATC Position on
the impact of REACH on the disclosure of
Confidential Business Information and Intellectual Property

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ATC POSITION PAPER: IMPACT OF REACH ON DISCLOSURE OF CONFIDENTIAL BUSINESS INFORMATION (CBI) AND INTELLECTUAL PROPERTY (IP).

The Petroleum Additives Sector

ATC, the Additives Technical Committee, represents the European producers of lubricant concentrates and fuel additive formulations. Our member companies supply the vast majority of the wide range of additive formulations required to meet the full spectrum of lubricating and power generating needs for our highly mechanised society. These complex preparations (often containing 10 - 15 different substances) deliver both economic and performance benefits to users as well a broad range of benefits to man and the environment via proven improvements in fuel economy, lower fuel combustion emissions, extended equipment life, and reductions in waste lubricant volumes. Our customers use these preparations to blend and market finished lubricants and fuels.

Why protection of IP and CBI is necessary

Additive companies invest a significant amount of time, money and resource to develop information and products that they believe to be equal or superior to competitive products in order to stay in business, ensure a reasonable profit, and remain competitive. The competition that results from this process leads to less expensive and better products for the consumer and promotes technology advances.

If information on product composition and business relationships were to be available in the public domain, competitors can reap the economic rewards without expending money and human resources. This would provide significant advantages to competitors, but the medium-to-long-term result would be to deprive the company that invested heavily in the development of products a reasonable return on their investment

Without fair and adequate protection of proprietary information there is little incentive for conducting research and development to produce innovative products. Regions/countries that fail to offer suitable protection for proprietary information also run the risk of being denied access to technically superior products that confer benefits to health, safety and the environment.

Formulations Are IP

The key competence of additive suppliers is the ability to formulate unique additive packages that deliver the performance required by our customers at competitive prices. Each additive supplier has its own proprietary methods of achieving this. Therefore, we regard our formulation expertise and our specific formulations as our key intellectual property (IP). As currently written, the combination of a number of specific requirements within the REACH proposals would lead to the complete public disclosure of our formulations and the consequent loss of market value associated with the IP. This would

make it much easier for me-too products to be reverse engineered particularly by suppliers operating in regions with lower costs e.g. Pacific Rim, with consequent loss of business and competitiveness within the European Union.

Each of the fundamental REACH processes, including pre-Registration, Registration, Evaluation, Authorisation, Classification & Labelling database, and safety data sheets, require different information to be disclosed. Although complete formulation details are not disclosed in any one document or database, under REACH, competitors would be able to harvest this information from multiple publicly available sources (including information disclosed under existing legislation, such as the Dangerous Preparations Directive, 1999/45/EEC). The additive industry acknowledges that other stakeholders desire increased transparency but the pernicious erosion of protection is the cornerstone of our IP dilemma under the newly proposed regulation, especially as most of this information contributes nothing to the safe shipping, handling, storage and disposal of product. Attachment 1 provides an indication of how these formulation details can be harvested.

Supply Chain Relationships are CBI

Additive suppliers formulate products using both purchased chemicals and substances that they manufacture or import themselves. Many of these components find applications only in petroleum additives, whereas others have broader applications. This sector is highly competitive with relatively small numbers of additive suppliers and major customers. In nearly every instance, the supply chain is neither linear nor unidirectional, and is very complex as a result. Customers of additive formulators and many supply chain participants typically seek to isolate their upstream suppliers from any knowledge of, or contact with their downstream distribution agents, and customers. The new legislation must provide for the protection of these confidential business relationships. A simplified schematic of the supply chain is given in Figure 1 illustrating the real complexity of these relationships.

In this environment information about activities and relationships between component suppliers, formulators and customers are strictly managed as confidential business information (CBI). For example, specific knowledge about unique substances manufactured by an additive formulator for specific performance benefits in additive packages is of enormous value to competitors and must therefore be protected from both deliberate and/or inadvertent disclosure. Under the current REACH proposal, much CBI would have to be surrendered to the public. Attachment 2 summarises aspects of the petroleum additives supply chain and the roles and concerns of the main players with particular focus upon CBI retention.

Specific Examples of IP/CBI Disclosure under REACH

Attachment 3 illustrates selected scenarios in which the current REACH proposal would mandate release of formulation details and business information, thereby greatly reducing competitiveness in the petroleum additives sector.

Overall Impact of REACH

The availability of specific substance identifiers within public databases and the release of significant amounts of information that was previously protected would allow competitors to reverse engineer formulations. The dynamics of the whole business sector would be impacted with far reaching consequences: product diversity would diminish, margins would be eroded, short term incentives for innovation would be reduced, longer term investment in R&D and production facilities would fall sharply, and jobs would be lost. As a consequence, the proposals would inhibit the ability of the petroleum additives sector to meet future, ever increasing performance requirements of our customers, including the delivery of environmentally friendlier products that amongst other benefits can improve fuel efficiency and reduce emissions.

Changes Required to Make REACH Acceptable

The impact of REACH on the disclosure of IP and the release of CBI must, as a matter of urgency, be reviewed in totality, rather than by piecemeal analysis of individual requirements. This review should apply the following principles:

- Disclosure of specific formulation details in public documents or databases should be required only if essential for purposes of regulatory risk assessments. The current REACH proposal goes far beyond this and would lead to the irretrievable surrender of Intellectual Property Rights of petroleum additive suppliers.
- It must be possible to protect CBI, including supply chain relationships, market information (specific uses, volumes, vertebrate test data, etc) and specific associations between substances and manufacturers/importers.

It is clear from the above that the current definitions of information which is proposed to be not confidential (Article 116.1) and confidential (Article 116.2) are inadequate. They are also contradictory, in that some of the information listed as confidential in Article 116.2 would in reality be disclosed under Article 116.1 as well as by some of the specific REACH processes. In particular, the following information should be considered as confidential and therefore added to Article 116.2:

- The name and address of the registrant, downstream-user, applicant, and manufacturer or importer;
- The trade name(s) of the substance.

ATTACHMENT 1. REACH PROCESSES LEADING TO THE RELEASE OF INTELLECTUAL PROPERTY

PROCESS	DISCLOSURE	IMPACT
<p>1. Pre-registration (including SIEF participation)</p>	<p>All companies involved in the marketing or importation of a particular substance or category of substances are revealed.</p> <p>Annual volumes are revealed.</p>	<p>A Registrant will not be able to maintain his trade secret interest in a niche substance market. This would expose the Registrant's formulations to unfair competitive pressures.</p> <p>Competitors can ascertain the "depth" (and therefore value) of a pre-Registrant's market penetration with a substance.</p>
<p>2. Registration (including Consortia participation)</p>	<p>Test plans reveal the degree of ease or difficulty to support expansion of market activities.</p> <p>All uses must be disclosed.</p> <p>The Registrant reveals whether he is a manufacturer or an importer.</p> <p>Multiple downstream customers in the same industry will be revealed</p>	<p>A Registrant's future market plans (to either expand or withdraw a product) are revealed signalling critical business information to competitors.</p> <p>A Registrant may wish certain substance/use links to remain a trade secret. Third party anonymity during Registration will not provide relief.</p> <p>This reveals his strengths or weaknesses in formulation options to competitors.</p> <p>A Registrant, who is a supplier, may not want all his downstream customers for the same substance to be identified to each other and present in the same meeting for competitive reasons</p>

3. C&L Database	<p>A Registrant's commercial link to a substance would be publicly revealed.</p> <p>Generic and or trade names will be revealed together with Registration Numbers.</p>	<p>The Registrant's customer-business profile would become exposed by indicating new uses and formulation options otherwise hidden from the competition.</p> <p>A Registration Number reveals the specific substance and manufacturer/importer involved.</p>
4. SDS disclosures for preparations.	<p>Specific identity of dangerous substances present in preparations must be disclosed (SDS Section 2).</p> <p>Substance Registration Numbers must be revealed in CSRs and SDSs</p>	<p>Competitors will be provided with even more information than at present (e.g. registration numbers) to assist them to reverse engineer formulations.</p> <p>Any benefits associated with the legitimate masking of the identity of specific dangerous substances will be lost. Customers will undoubtedly ask for registration numbers of all constituents, i.e. including those which are non-hazardous.</p>
5. Evaluation activities within a consortium	Each Registrant must reveal his use(s) and volume(s) in order to develop the Test Plan and CSR.	Additional information about each Registrants product line formulations options is revealed.
6. Authorization	Registrants must reveal Authorization Numbers on product labels.	Information on product composition/ technology will be revealed without the need to have access to the SDS or the C&L database

ATTACHMENT 2: IMPACT OF REACH ON RELEASE OF CBI WITHIN THE PETROLEUM ADDITIVES SUPPLY CHAIN

PARTICIPANT/ROLE	CBI CONCERNS
<p>COMPONENT SUPPLIER</p> <ul style="list-style-type: none"> • Mainly medium to large speciality chemical companies • Manufacture substances for use in additives • Some substances are used only in petroleum additives (others have other end-uses) • Some made uniquely for individual formulators • Some components supplied direct to finished lubricant manufacturers rather than formulators 	<p>Suppliers may not wish to reveal the extent of their market influence especially when servicing multiple competitors with the same substance(s)</p> <p>Information about relationships with specific customers (e.g. matters of purity, assured supply volumes, and other joint business arrangements) must be kept confidential to protect mutual business advantage</p>
<p>ADDITIVE FORMULATOR</p> <ul style="list-style-type: none"> • A small number competitors (medium sized chemical companies) meet the vast majority of worldwide market needs for fuel and lubricant additive packages • Formulation expertise is key competence based on extensive R&D over many years • Supply unique formulations to meet customer performance specifications • Formulation are complex, often containing 10 – 15 different substances • Formulators manufacturer some key components/substances themselves 	<p>These competitors do not typically share proportionate fractions of markets due to differences in core competency. Such strengths and weaknesses are jealously protected.</p> <p>Formulators typically do not wish to reveal their customers or uses/business opportunities to upstream suppliers as this could place their own business in jeopardy.</p> <p>As the requirements to disclose formulation information increase, the recovery period for R&D investment becomes shorter. This will have a negative impact on investment in R&D.</p> <p>New formulation approaches are expensive to develop and commercialize. Hence, linkages with suppliers and customers for joint R&D must be kept confidential for the sake of continued innovation.</p> <p>Any unique performance benefits associated with specific</p>

	<p>components must be carefully controlled since new formulations have increasingly shorter market cycles for cost recovery today. This could lead to decisions not to deploy new technologies in regions where formulation details cannot be protected</p>
<p>CUSTOMER</p> <ul style="list-style-type: none"> • Manufacture finished fuels and lubricants using additive packages and purchased components • Mainly very large or large oil companies • Massive leverage/purchasing power • Conduct extensive R&D programmes often in collaboration with individual additive formulators 	<p>Customers are serviced by competing formulators/suppliers. Keeping these relationships confidential is crucial with respect to the customer's ability to compete with his own competitors.</p> <p>If supplier relationships are revealed, customers will have less opportunity to leverage suppliers. This could have a negative impact on competition.</p> <p>Customer/Supplier R&D programs are typically contractual and must abide by confidentiality terms to avoid breach. Disclosure in one region could lead to breach in another.</p>

ATTACHMENT 3. SPECIFIC EXAMPLES OF IP/CBI DISCLOSURE UNDER REACH

SITUATION	DISCLOSURE/IMPACT
<p><u>SCENARIO 1 (Importer Issues)</u></p> <ul style="list-style-type: none"> • A formulator imports an additive into the EU, which contains a purchased component that the vendor does not intend to register under REACH • The formulator is therefore required to register the substance • The component is critical in delivering an important performance requirement of additive formulations 	<ul style="list-style-type: none"> • The association of the formulator with the specific substance and/or the manufacturer would become public via the register. This information would be of value to competitors. • This would lead to the disclosure of other valuable market information including scope and breadth of uses, volumes, logistics, inferred pricing, processing options, purity, etc. • The assigned Registration Number could be used as a “tag” to rapidly search other documents/data-bases to obtain additional information about the use of the substance and other market circumstances of a proprietary nature. <p><u>OVERALL IMPACT:</u></p> <ul style="list-style-type: none"> • Disclosure of information (IP) which would help competitors reverse engineer products • Release of CBI leading to loss of marketing advantage and competitiveness

<p><u>SCENARIO 2 (Link between manufacturer/importer and a specific chemical)</u></p> <ul style="list-style-type: none"> • A formulator manufactures a substance for use only in petroleum additives • The formulator is required to pre-register/register the substance following either manufacture or import into the EU 	<ul style="list-style-type: none"> • The association of the formulator with the specific substance and/or the manufacturer would become public via the register. This information would be of value to competitors. • Niche uses and market opportunities otherwise not appreciated or explored by the competition will be revealed.
<p><u>SCENARIO 3 (Implications for Chemical Groups)</u></p> <ul style="list-style-type: none"> • For chemical groups, a formulator (either a manufacturer or importer) must still declare all specific uses for a member of the class, without regard to scale. • It is often the case that a Consortium consists of competitors sponsoring similar chemicals. • In the context of SIEF actions, all uses will be revealed for the Group in order to develop a comprehensive Risk Assessment and corresponding Test plan. 	<ul style="list-style-type: none"> • Competitors responsible for similar chemicals in a class may gain knowledge about niche market opportunities without having spent any significant resource to understand the business by their own independent means. • This information will be revealed even if the registrant has the means to participate “confidentially” by means of an independent third party.

<p><u>SCENARIO 4 (R&D Cost Recovery)</u></p> <ul style="list-style-type: none"> • Formulators expend significant capital in R&D in multiple regions, and may wish to significantly expand their business interests by marketing preparations containing a new substance in the EU. • Information will be disclosed via the registration process • Competitors may or may not already be participating in those markets disclosed under these circumstances. 	<ul style="list-style-type: none"> • A formulator's ability to deliver new product is very much dependent upon the ability to recover R&D costs as quickly as possible. Competitors will gain market intelligence about preparations via discussions about "substances" thereby threatening cost recovery. • Product life cycles are becoming progressively shorter as competitive pressures mount. Disclosure of knowledge about a market opportunity, or possible entry by another competitor will shorten the life cycle even further. • This dilemma will put further pressure on R&D which is already severely constrained by other business factors. As such, innovation will again suffer.
<p><u>SCENARIO 5 (Re-Branding Activities)</u></p> <ul style="list-style-type: none"> • Formulators must reveal <u>ALL</u> trade names associated with a given substance, along with the EINECS No., IUPAC name, use and volume information. • Formulators keep "Re-Brand" affiliations confidential as a matter of general practice, having done so for a very long time. 	<ul style="list-style-type: none"> • Trade name links with specific substance identifiers will pierce the veil of customer exclusivity arrangements and thereby upset the market place for no good reason. • Competitors will gain unfair market advantage by discovering previously hidden business relationships between competing suppliers.

FIGURE 1. SIMPLIFIED SCHEMATIC OF THE PETROLEUM ADDITIVES SUPPLY CHAIN

