

REACH-CLP-Biozid Helpdesk

Quick Guide from the German national helpdesk

"What am I and how can I prove it?"

Verification of SME status by micro, small and medium-sized enterprises to the ECHA

updated: June 2013

This Quick Guide is intended to offer practical help for micro, small and medium-sized enterprises within the meaning of the REACH Regulation, which are only required to pay reduced fees in accordance with the REACH registration obligations. It primarily deals with verification of status as a micro, small and medium-sized enterprise (SME) to the European Chemicals Agency (ECHA).

REACH-CLP-Biozid Helpdesk

National Helpdesk of the Federal Agencies

Three regulations – one helpdesk

established at the Federal Institute for Occupational Safety and Health

(Bundesanstalt für Arbeitsschutz und Arbeitsmedizin – BAuA)

Contents

1.	Introduction	2
2.	Determining the SME status	4
2.1	Staff headcount	5
2.2	Annual turnover and annual balance sheet total	5
2.3	Linked and partner enterprises	6
2.4	SME status for only representatives	10
3.	Verification of SME status	11
3.1	Verification of the annual turnover and annual balance sheet total	11
3.2	Verification of the enterprise size	12
4.	Final remarks	13

Disclaimer:

This document is intended to provide guidance for German enterprises in assessing their obligations in accordance with the REACH Regulation. It is for information purposes only and neither constitutes nor replaces specific legal advice or a legal opinion. Any legal recommendations, information and advice that it may contain are non-binding. Claims for liability of a material or immaterial nature made against the BAuA that arise through use or non-use of the provided information and/or through the use of incorrect or incomplete information are excluded in principle, unless they can be proven to have arisen due to intentional or grossly negligent behaviour on our part.

1. Introduction

In accordance with the REACH Regulation (EC) No. 1907/2006 (hereinafter referred to as REACH Reg.) and with the REACH Regulation on fees and charges (EC) No. 340/2008, amended with Regulation (EC) No. 254/2013, micro, small and medium-sized enterprises enjoy considerable discounts for many activities that are subject to charge, such as for registration (Article 6, 7 or 11 of the REACH Reg.), registration updates (Article 22 of the REACH Reg.), requests for confidentiality (Article 10 lit. a of the REACH Reg.) or authorisation (Article 62 of the REACH Reg.).

In order to benefit from these reduced fees and charges, many enterprises declare themselves to be SMEs, without having checked their status sufficiently. This is often due to the outlay required for a comprehensive check and also, a lack of knowledge regarding the SME verification requirements. In particular, special regulations on linked and partner enterprises cause further uncertainty, leading to SME status often being assumed where there is doubt.

The ECHA is, however, checking an increasing number of self-declarations from enterprises with SME status and, if a declaration is found to be wrong, levies the difference for the correct fee, as well as a relatively large administrative charge (*cf. Table 1*).

Due to the large number of wrong declarations, the ECHA has defined the following charging framework for these through *Management Board Decision MB/21/2012/D*.

Actual enterprise size	Administrative charge
Large (non-SME)	EUR 19,900
Medium	EUR 13,900
Small	EUR 7,960

Table 1 – Administrative charges for wrong declarations

The ECHA has also ruled that an enterprise that has declared its SME status wrongly but that, at the request of the ECHA, corrects its status within the defined time period and

provides appropriate evidence of this, only needs to pay an administrative charge equal to 50% of the actual charge.

If an enterprise corrects its SME status without the ECHA having made a request for verification, no administrative charge is due.

The ECHA also assumes that a wrong declaration has been made if the enterprise concerned is not willing or able to prove the declared SME status with the relevant documents.

In a worst-case scenario, this may result in the ECHA revoking the registration of a substance by withdrawing the registration number if the enterprise concerned does not provide evidence of its status and is not prepared to pay the estimated charges.

For this reason, enterprises must acquaint themselves with the definition of the relevant SME status so as to avoid a wrong declaration. The enterprises in question should also keep the required documents available so that they can be presented without delay in the event of an ECHA check, as the ECHA generally sets very tight deadlines for submission of documents.

This is also often problematic in practice as the ECHA does not provide tailored information on which specific documents are considered sufficient for verification of the SME status with regard to the circumstances and legal situation in the individual Member States.

This Quick Guide is intended to make self-classification easier for the enterprises concerned by compiling the fundamental legal texts and guidelines¹ and thereby prevent incorrect classification. It also contains information on how to provide evidence of an enterprise's SME status to the ECHA. Naturally, this document can merely offer an overview of the checks and verification of SME status and cannot cover all possible individual cases.

¹ The new SME definition – User guide and model declaration, 2006:
http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf

2. Determining the SME status

For the aforementioned reasons it is advisable for an enterprise to check its status before registering a substance as a single substance or in a mixture, and in some circumstances also before undertaking any other activity that is subject to charge and where reductions are granted to SMEs.

Enterprises are defined as SMEs in accordance with the "*Commission Recommendation concerning the definition of micro, small and medium-sized enterprises*" 2003/361/EC (Commission Recommendation).²

Article 2 of the Annex to the Commission Recommendation defines the parameters for determining SME status.

- A **medium-sized enterprise** is defined as an enterprise, that employs fewer than 250 persons and has an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.
- A **small enterprise** is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.
- A **microenterprise** is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

The information needed to prove the status is therefore always the same. This is:

1. the staff headcount

and

2. the annual turnover / annual balance sheet total

It is important that both conditions are met. The SME status is to be determined in each case on the basis of *the last two financial years* before submission of registration and/or before performance of the activity that is subject to charge.

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0036:EN:PDF>

2.1 Staff headcount

The first decisive factor for enterprise classification is the staff headcount. If the particular specified threshold is exceeded, an enterprise cannot be classed as an SME, even if the annual turnover or annual balance sheet total is below the specified ceiling.

In accordance with Article 5 of the Annex to the Commission Recommendation, the headcount corresponds to the number of annual work units (AWU), i.e. the number of persons who worked full-time within the enterprise in question or on its behalf during the entire reference year under consideration. The work of persons who have not worked the full year, the work of those who have worked part-time, regardless of duration, and the work of seasonal workers are counted as fractions of AWU.

The staff consists of:

- employees;
- persons working for the enterprise being subordinated to it and deemed to be employees under national law;
- owner-managers;
- partners engaging in a regular activity in the enterprise and benefiting from financial advantages from the enterprise.

Apprentices or students engaged in vocational training with an apprenticeship or vocational training contract are not included as staff. The duration of maternity or parental leaves is not counted.

2.2 Annual turnover and annual balance sheet total

If the staff headcount is below one of the defined thresholds, it should be checked whether the enterprise also fulfils the second requirement for the relevant SME status, or if it must be classified in a higher category due to the annual turnover or annual balance sheet total. The corresponding values are to be produced according to the applicable criteria under commercial law in the relevant Member State.

2.3 Linked and partner enterprises

In determining the SME status, Article 3 of the Annex to the Commission Recommendation is to be observed with regard both to the staff headcount and to the financial ceilings. This Article specifies that linked and partner enterprises must be taken into account when determining the SME status. An enterprise may only be considered in isolation if it is an autonomous enterprise within the meaning of Article 3 Paragraph 1 of the Annex to the Commission Recommendation. The key here is that it is irrelevant for classification as a linked or partner enterprise whether or not the enterprise in question is based in the European Union. In the case of multinational concerns, for example, subsidiaries in third countries outside the EU must therefore also be taken into account.

a) Autonomous enterprises

In accordance with Article 3 Paragraph 1 of the Annex to the Commission Recommendation, an enterprise is autonomous if it

- is fully independent

or

- holds less than 25% of the capital or voting rights (with consideration for whichever is greater in each case) in one or more other enterprises, and/or outside investors hold less than 25% of the capital or voting rights (with consideration for whichever is greater in each case) in the enterprise.

An enterprise may also be autonomous in the case of multiple investors owning less than 25% each, provided that those investors are not linked enterprises within the meaning of Article 3 Paragraph 2 or 3 of the Annex to the Commission Recommendation (see below).

By way of exception, an enterprise counts as an autonomous enterprise despite an investment of over 25% but less than 50%, provided the investors are:

- public investment corporations, venture capital companies and "business angels";
- universities or non-profit research centres;
- institutional investors, including regional development funds, or;

- autonomous local authorities with an annual budget of less than EUR 10 million and fewer than 5,000 inhabitants.

b) Linked enterprises

In accordance with Article 3 Paragraph 3 of the Annex to the Commission Recommendation, "linked enterprises" are enterprises which have any of the following relationships with each other:

- an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;
- an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;
- enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;
- an enterprise, which is a shareholder in or member of another enterprise, has sole control of a majority of shareholders' or members' voting rights in that enterprise, pursuant to an agreement with other shareholders in or members of that enterprise.

(cf. Figure 1 – Linked enterprises I, page 8)

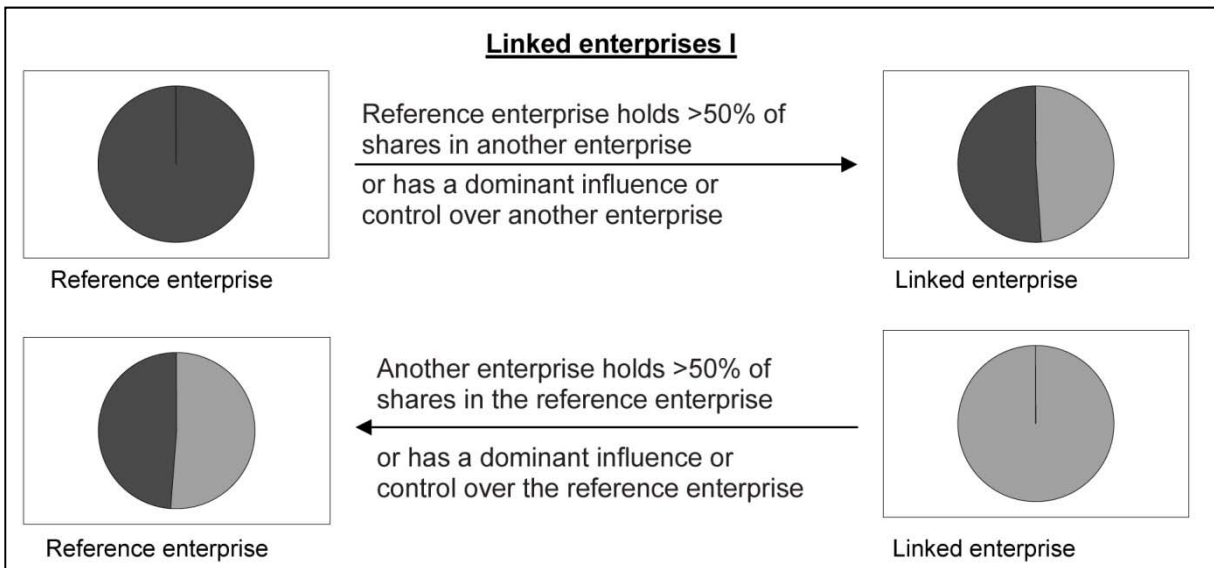


Figure 1 – Linked enterprises I

In addition, enterprises that have one of the relationships referred to with one or more other enterprises or investors are also deemed to be linked (*cf. Figure 2 – Linked enterprises II*).

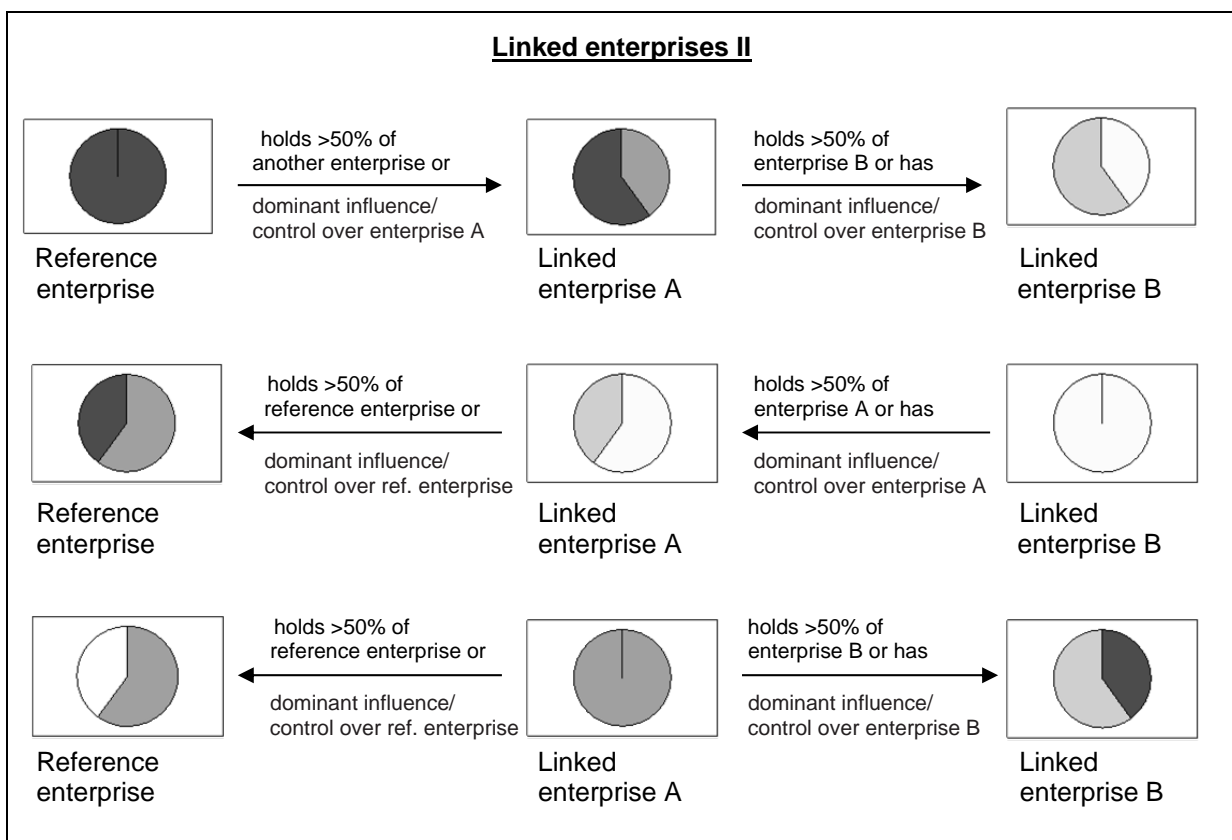


Figure 2 – Linked enterprises II

Enterprises which have one or another of the above relationships through a **natural person** or **group of natural persons acting jointly** are also considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets. An "adjacent market" is considered to be the market for a product or service situated directly upstream or down

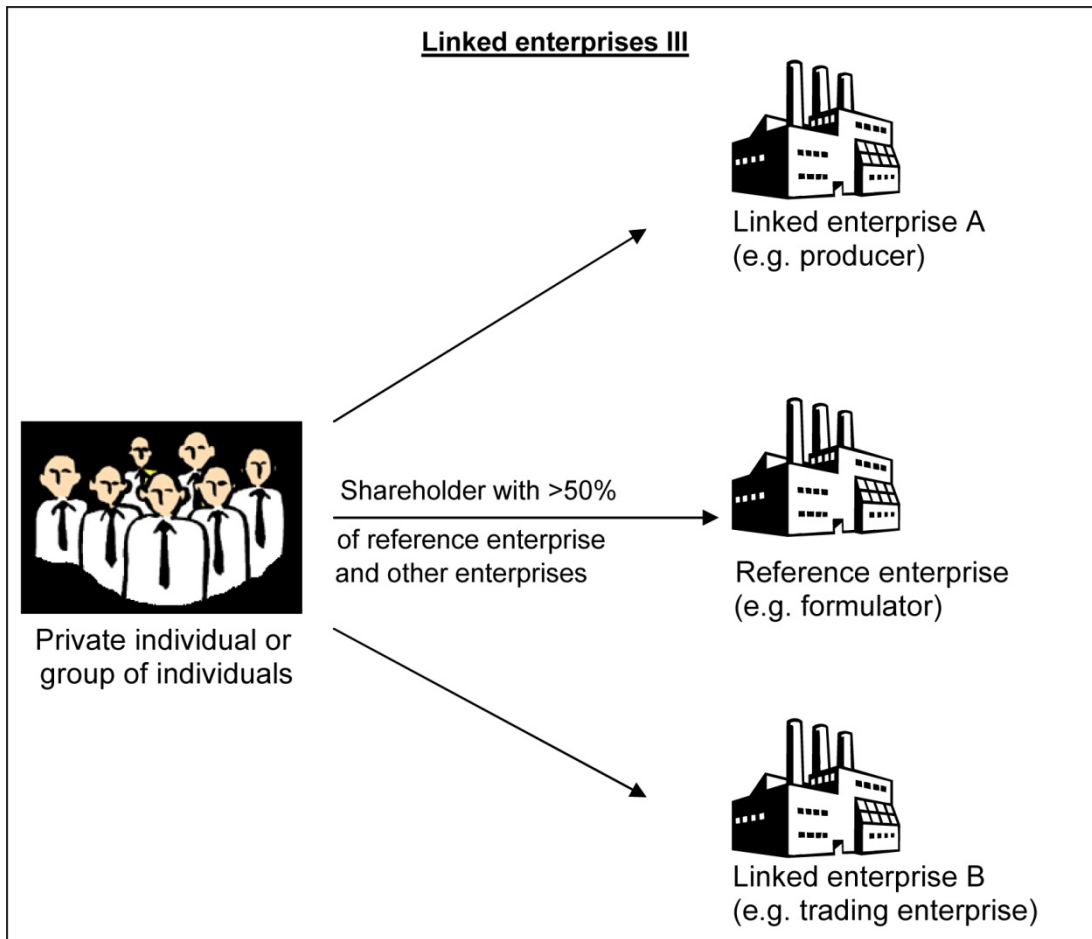


Figure 3 – Linked enterprises III

c) Partner enterprises

In accordance with Article 3 Paragraph 2 of the Annex to the Commission Recommendation, enterprises are considered partner enterprises if:

- the reference enterprise holds at least 25% of the capital or voting rights in another enterprise or another enterprise holds 25% of the capital or voting rights in the reference enterprise

and

- the enterprises are not classified as linked enterprises within the meaning of Article 3 Paragraph 3 of the Annex to the Commission Recommendation (see above).
(cf. Figure 4 – Partner enterprises)

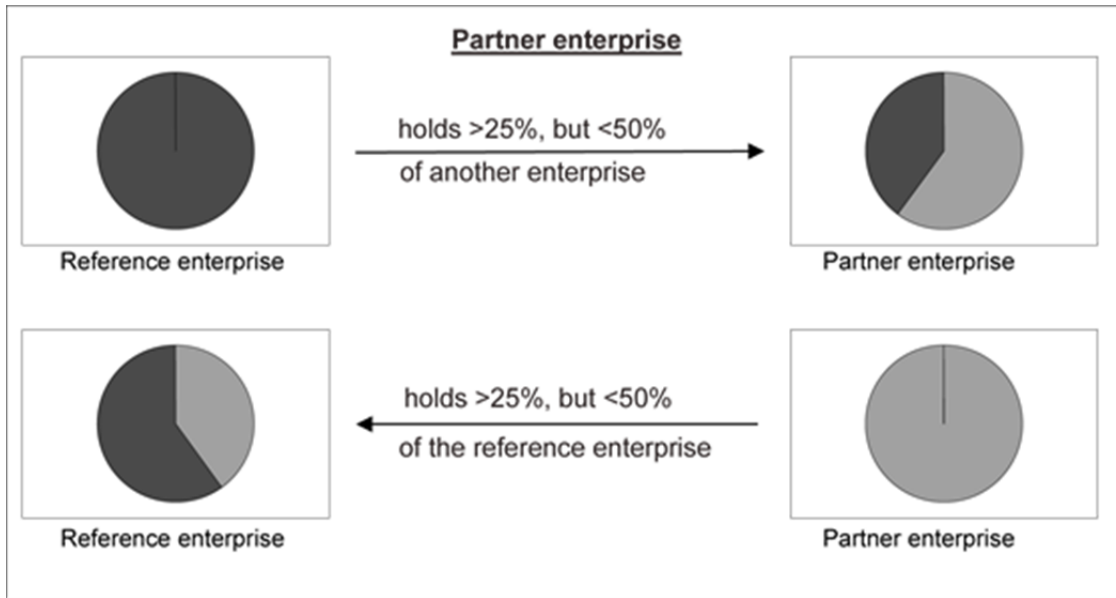


Figure 4 – Partner enterprises

For partner enterprises it should be noted that the staff numbers and capital are considered in proportion to the percentage interest in the capital or voting rights (whichever is greater).

2.4 SME status for only representatives

In accordance with Article 12 of the Commission Regulation (EC) No. 340/2008 on fees and charges, in the case of an only representative referred to in Article 8 of the REACH Reg., the assessment of whether the reduction for SMEs applies shall be determined by reference to the headcount, turnover and balance sheet information of the represented non-Community enterprise, including relevant information on linked and partner enterprises of the represented enterprise. The information in Section 2.3 should be observed in particular with regard to this.

3. Verification of SME status

For verification of SME status, the ECHA requests documentary evidence regarding this from the enterprises as part of random checks on existing registrations.

The establishment of an enterprise's data is regulated in Article 6 of the Annex to the Commission Recommendation (2003/361/EC):

- In accordance with Paragraph 1, in the case of an autonomous enterprise, the data, including the number of staff, are determined exclusively on the basis of the accounts of that enterprise.

- In accordance with Article 6 Paragraph 2 of the Annex to the Commission Recommendation (2003/361/EC), the data, including the headcount, of an enterprise having partner enterprises or linked enterprises are determined on the basis of the accounts and other data of the enterprise or, where they exist, the consolidated accounts of the enterprise, or the consolidated accounts in which the enterprise is included through consolidation.

3.1 Verification of the annual turnover and annual balance sheet total

As evidence of the annual turnover or annual balance sheet total of the two years prior to registration, the ECHA generally requires copies of the officially audited annual balance sheets along with explanatory documents and copies of annual reports for the two official accounting periods prior to registration. The same documents are also required for linked or partner enterprises.

This often leads to problems as the ECHA generally does not take into account the national differences between EU Member States in its requirements.

In Germany for example, officially approved versions of the annual balance sheets or accounts are not generally produced. It is therefore not always clear which documents are sufficient as evidence of SME status.

In this regard, the past decisions of the ECHA can be used as a guide.

The ECHA has previously accepted the following as confirmation of the annual balance sheets/annual turnover:

- Tax returns
- Audit reports for external audits
- Balance sheets issued by tax consultants

The key is that the documents are complete and comprehensible for the ECHA.

The ECHA has previously not accepted evidence such as accounts as published in the Bundesanzeiger (Federal Gazette) of corporate enterprises in accordance with Article 325 of the German Commercial Code (Handelsgesetzbuch – HGB).

If the enterprise has been in existence for less than two years, any existing balance sheets are to be submitted. In addition, documents relating to the expected key data should also be submitted with an explanatory letter and, if necessary, supplementary documents.

3.2 Verification of the enterprise size

As evidence of an enterprise's staff headcount, the ECHA requires (according to its website) submission of official documents issued by an agency or a public institution that prove the number of annual work units for the two years prior to registration, within the meaning of Article 5 of the Annex to the Commission Recommendation. Such documents do not need to be submitted, however, if this information is provided in the submitted financial documents.

In Germany there are no agencies or official bodies that are prepared or able to officially confirm the staff headcount of an enterprise.

Furthermore, the ECHA has in the past rejected corresponding documents from the Chambers of Commerce and Industry (Industrie- und Handelskammer – IHK) as insufficient.

It is therefore advisable for enterprises to submit financial documents that provide this information, with at least the salaries of the staff. Supplementary information or documents should also be submitted if the financial documents do not provide sufficient information.

4. Final remarks

In June 2013, the ECHA announced that following the second REACH registration deadline (as upon expiry of the first REACH registration deadline in December 2010) it would check **all** dossiers in which enterprises had declared themselves as SMEs. Enterprises should therefore check their status carefully in **all cases** where charges may be reduced due to SME status and keep the relevant documents available for presentation to the ECHA on request. If enterprises conclude that they have declared the wrong status, they should update this with the ECHA **immediately**. Payment of an additional administrative charge can only be avoided if this is done in advance of an ECHA request for evidence of the status.

Further information on SME status in relation to REACH and the verification process can be found at: <http://echa.europa.eu/support/small-and-medium-sized-enterprises-smes>

If you have any questions concerning REACH, CLP or Biocides, do not hesitate to contact us by phone from Monday through Thursday between 8 a.m. and 4.30 p.m (Englisch 1.00 p.m.), on Friday between 8 a.m. and 1.00 p.m.

phone 0231 9071-2971

fax 0231 9071-2679

mailto reach-clp-biozid@bua.bund.de

Internet www.reach-clp-biozid-helpdesk.de