



**REACH Regulation ('proof of payment'), within two months from the notification of the present decision, i.e. by 25 October 2023.**

The reasons for this decision are set out in Annex I.

The list of studies covered by the present decision, along with copies of the (robust) study summaries, can be found in Annexes II and III, respectively. However, **the Claimant cannot make use of this permission to refer** to submit a registration dossier for the Substance **before submitting to ECHA a proof of payment and before receiving from ECHA an acknowledgment of receipt.**

Provided that the Other Party makes the full study report available to the Claimant, the Other Party shall have a claim on the Claimant for an equal share of the cost it has incurred, which shall be enforceable in the national courts.

**If the Claimant does not provide ECHA with a proof of payment within two months from the notification of the present decision**, ECHA will issue a decision revoking the present decision. In such case, the Claimant may continue negotiating to reach an agreement with the Other Party. Should these subsequent negotiations fail, the Claimant can submit a new dispute to ECHA.

This decision will be published in an anonymised version on ECHA's website<sup>3</sup>.

## **B. Observations**

The present decision may not cover all the Claimant's information needs under [REDACTED] of the REACH Regulation.

Despite the present decision, both parties are still free to reach a voluntary agreement. ECHA strongly encourages the parties to negotiate further in order to reach an agreement that will be satisfactory for both of them.

Instructions to the Claimant on how to submit a registration dossier making use of the permission to refer are provided in Annex IV.

## **C. Appeal**

Either party may appeal this decision to the Board of Appeal of ECHA within three months of its notification. The appeal must set out the grounds for appeal. Further details, including the appeal fee, are set out at <http://echa.europa.eu/web/guest/regulations/appeals>.

Authorised<sup>4</sup> by Minna Heikkilä, Head of Legal Affairs

<sup>3</sup> Available at <https://echa.europa.eu/regulations/reach/registration/data-sharing/data-sharing-disputes/echa-decisions-on-data-sharing-disputes-under-reach>.

<sup>4</sup> As this is an electronic document, it is not physically signed. This communication has been approved according to ECHA's internal decision-approval process.

## **Annex I: REASONS FOR THE DECISION**

### **A. Applicable law**

1. In a dispute pursuant to Article 27(5) of the REACH Regulation, ECHA performs an assessment of the efforts of the parties to reach an agreement (Article 5 of Implementing Regulation 2016/9). According to Article 27(6) of the REACH Regulation and Article 3(2) of Implementing Regulation 2016/9, ECHA may grant permission to refer to the requested studies, if the claimant has made every effort to find an agreement on the sharing of the data and the other party has failed to do so. The permission to refer is subject to the proof that the potential registrant has paid a share of the costs incurred by the previous registrant(s).
2. The obligation to make every effort to find an agreement that is transparent, fair and non-discriminatory is laid down in Articles 27(2) and (3) of the REACH Regulation. It is further defined in Articles 2 and 4 of Implementing Regulation 2016/9.
3. Making every effort means that the registrants must negotiate as constructively as possible and in good faith. They must make sure that the negotiations move forward in a timely manner, express their arguments and concerns, ask questions and reply to each other's arguments, concerns and questions. They must try to understand the other party's position and consider it in the negotiations. Making every effort also means that the parties need to be consistent in their negotiating strategy. They should raise their concerns in a timely manner and behave in a consistent and predictable manner as reliable negotiators. When they face dissent on an aspect, the parties have to explore alternative routes and make suitable attempts to unblock the negotiations. As the potential and existing registrants themselves bear the obligation to make every effort to find an agreement, they need to exhaust all possible efforts before submitting a dispute to ECHA with the claim that negotiations have failed.

### **B. Summary of facts**

4. This summary of facts is based on the documentary evidence submitted by the Claimant on 24 July 2023 and by the Other Party on 1 August 2023.
5. During the negotiations relating to the present dispute, e-mail messages were exchanged between [REDACTED], acting on behalf of the Claimant, on one side, and the Other Party, on the other side. For the sake of simplicity, no distinction is made below between the Claimant and the Claimant's representative and only the Claimant and the Other Party are referred to as taking part in the exchange.
6. On 3 April 2023, the Claimant approached the Other Party by e-mail, identifying them as the lead registrant for the Substance and requesting a letter of access to data for registration purposes. On that occasion, the Claimant provided, as a possible model, contractual documents relating to a previous data sharing transaction between the Other Party and a third entity and invited the Other Party to replace the details of the third entity with those of the Claimant.<sup>5</sup>
7. On 27 April 2023 and then again on 16 May 2023, the Claimant reminded the Other Party of the request of access to data on the Substance<sup>6</sup> and asked for a timeline for the provision of

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<sup>5</sup> E-mail messages of the Claimant of 3 April 2023, 11:10 and 14:35.

<sup>6</sup> E-mail message of the Claimant of 27 April 2023 and 16 May 2023, 16:26 and 17:33.

a draft data sharing contract<sup>7</sup>. On the same day, the Other Party informed that the Claimant's request had been forwarded to a different contact person within the Other Party.<sup>8</sup>

8. On 2 June 2023, the Claimant, writing to the newly designated contact person, highlighted the time passed so far and asked again for a timeline for the provision of the documents.<sup>9</sup> On the same day, the Other Party provided a document with an overview of the data sharing terms and conditions, including the cost for the sharing of data at different tonnage bands,<sup>10</sup> and invited the Claimant to write to another contact person to proceed further.<sup>11</sup>
9. On 7 June 2023, the Claimant indicated their interest in a registration for the [REDACTED] tonnage band and reiterated the request for the draft contract.<sup>12</sup>
10. On 12 July 2023, the Claimant turned again to the Other Party to complain about their failure to comply with Article 27(3) of the REACH Regulation and informed they would notify a data sharing dispute to ECHA if no contract were provided by the end of the day.<sup>13</sup>
11. On 14 July 2023, in the absence of reaction from the Other Party, the Claimant lodged the present dispute claim.

### C. Assessment

12. As explained in section A, ECHA is called upon to determine whether the parties complied with their obligations related to the sharing of data and data costs in the negotiations outlined in section B.
13. In addition, when carrying out its assessment, the Agency must pay due regard to all individual actions and communications of the parties as well as the development of the negotiations over time.<sup>14</sup> Finally, the Agency's assessment centres upon those elements on which the parties could not agree during their negotiations, and which therefore led to the submission of the dispute claim.<sup>15</sup>
14. In the present case, there was no disagreement between the Claimant and the Other Party with regard to the identification of the data to be shared, its cost or any other related condition. However, the parties never came to a point of exchanging a data sharing agreement on the Substance.
15. At the outset of the negotiations, the Claimant provided a draft data sharing agreement based on documents provided by the Other Party in the past as a possible negotiating basis. The Claimant sent multiple reminders on the need to provide a draft contract. The Claimant followed the Other Party's instructions about the contact persons to be approached for the processing of the data sharing request, invited the Other Party to provide a timeline for the provision of the draft agreement, gave a time frame of their own in the absence of any

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<sup>7</sup> E-mail messages of the Claimant of 16 May 2023, 16:26.

<sup>8</sup> E-mail message of the Other Party of 16 May 2023.

<sup>9</sup> E-mail messages of the Claimant of 2 June 2023.

<sup>10</sup> [REDACTED], 'Terms and conditions for Letters of Access'.

<sup>11</sup> E-mail message of the Other Party of 2 June 2023.

<sup>12</sup> E-mail message of the Claimant of 7 June 2023.

<sup>13</sup> E-mail message of the Claimant of 12 July 2023.

<sup>14</sup> See, to this effect, Decision of the Board of Appeal of 15 April 2019, Case A-010-2017, *REACH & Colours and REACH & Colours Italia*, paragraph 87.

<sup>15</sup> *Ibid*, paragraph 88.

indication from the Other Party, and mentioned the possibility of a dispute claim with ECHA in case of failure of the negotiations.

16. For their part, the Other Party never validated the draft agreement provided by the Claimant, nor provided reasons for it. They neither provided an alternative over the three months of exchanges.
17. Based on the available evidence, the Claimant made every effort that could reasonably be expected in the circumstances of the case. On the other hand, the lack of co-operation of the Other Party made it impossible to achieve a data sharing agreement for the tonnage band of interest to the Claimant.

#### **D. Conclusion**

18. The Claimant made every effort to reach an agreement on the sharing of information, pursuant to Article 27(2) and (3) of the REACH Regulation, whilst the Other Party failed to do so.
19. Therefore, ECHA grants the Claimant permission to refer to the studies specified in Annex II, subject to the receipt by ECHA of the proof that the Claimant has paid the Other Party a share of the costs incurred. This proof of payment must be submitted to ECHA by 25 October 2023. In case it is not submitted by that date, this permission to refer will be revoked.