

[REDACTED]
26 September 2022

The Claimant

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Copy to:
The Other Party

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Sent via REACH-IT

Decision number: [REDACTED]
Dispute reference number: [REDACTED]
Name of the substance (the 'Substance'): [REDACTED]
EC number of the Substance: [REDACTED]

DECISION ON A DISPUTE RELATED TO THE SHARING OF DATA

A. Decision

Based on Article 27(6) of Regulation (EC) No 1907/2006 ('REACH Regulation')¹ and Article 5 of the Commission Implementing Regulation (EU) 2016/9 on joint submission of data and data sharing in accordance with REACH ('Implementing Regulation 2016/9')²,

ECHA grants the Claimant permission to refer to information requested from the Other Party for the purpose of a registration under the REACH Regulation. However, this decision is subject to the receipt by ECHA of the proof that the Claimant has paid the Other Party a share of the costs incurred pursuant to Article 27(6) of the REACH Regulation ('proof of payment'), within two months from the notification of the present decision, i.e. by 28 November 2022.

¹ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396, 30.12.2006, p.1, as last amended.

² Commission Implementing Regulation (EU) 2016/9 of 5 January 2016 on joint submission of data and data sharing in accordance with Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), OJ L 3, 6.1.2016, p.41.

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.

(Robust) study summaries submitted at least twelve years previously are not subject to cost sharing. It is useful to note that (robust) study summaries for some of the studies listed in Annex II have been submitted to ECHA more than 12 years ago in an earlier registration dossier. Article 25(3) of the REACH Regulation allows registrants to use any (robust) study summary submitted in the framework of a registration at least twelve years previously for the purposes of registration. ECHA will provide the Claimant with these (robust) study summaries in a separate communication. These can be used for REACH registration purposes without compensation. In case the Claimant wishes to use in their registration dossier these (robust) study summaries older than 12 years, the share of the cost the Claimant will pay to the Other Party will not have to cover these (robust) study summaries.

This decision will be published in an anonymised version on ECHA's website³.

B. Observations

The present decision may not cover all the Claimant's information needs under Annexes VII and VIII 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>.

Authorised⁴ by Minna Heikkilä, Head of Legal Affairs

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

⁴ 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 27(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. 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. 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

5. This summary of facts is based on the documentary evidence submitted by the Claimant on 18 August 2022 and by the Other Party on 2 September 2022. Part of the documentary evidence submitted by the Other Party consists of records of e-mail communications taking place after the submission of the case, and it has therefore not been taken into account in the assessment.
6. On 29 March 2022, the Claimant contacted the Other Party, indicating the Claimant's intention to register the Substance and asking the Other Party to provide a '*Joint submission agreement*', information on the Substance identity profile as well as the costs of the letters of access to the data at [REDACTED] and [REDACTED] tonnage bands.⁵
7. On the same day, the Other Party reverted to the Claimant with the costs of the letters of access and the information on the Substance identity profile.⁶
8. On 31 March 2022, the Claimant declared that the costs of the letters of access were acceptable to them and reiterated their request for a '*Joint submission or SIEF agreement*'.⁷
9. In the absence of any reaction from the Other Party, the Claimant sent reminders of its request to the Other Party on three separate occasions,⁸ mentioning that the Claimant would seek access to the joint submission from ECHA if the negotiations did not progress.⁹ In two

⁵ E-mail message of the Claimant of 29 March 2022.

⁶ E-mail message of the Other Party of 29 March 2022.

⁷ E-mail message of the Claimant of 31 March 2022.

⁸ E-mail messages of the Claimant of 26 April, 23 May and 19 July 2022.

⁹ E-mail messages of the Claimant of 23 May and 19 July 2022.

instances, the Claimant asked the Other Party to react by a specific date. The Other Party failed to react to the Claimant's reminders.¹⁰

10. On 18 August 2022 at 14:59 (EET), the Claimant lodged the present dispute claim.

C. Assessment

11. 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.

12. 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.¹¹ 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.¹²

13. In the present case, although the parties agreed on the cost of sharing the data, the negotiations failed due to the lack of reaction by the Other Party to the Claimant's messages. The protracted unresponsiveness of the Other Party qualifies as a failure to make every effort in the negotiations, pursuant to Article 27(3) of the REACH Regulation.

14. For its part, the Claimant sent repeated reminders of its request to the Other Party, highlighting the possibility of informing ECHA of the failure of negotiations. The fact that the Other Party replied to the Claimant on 29 March 2022 showed that e-mails were an effective means of communications, and that there was no need for the Claimant to resort to other channels. Based on the evidence, the Claimant can be said to have made every effort that could reasonably be expected in the circumstances of the case.

15. The breach of the obligation of the Other Party to make every effort in the negotiations made it impossible for the Claimant to engage constructively in the discussion, and for both parties to achieve a data sharing agreement for the tonnage band of interest to the Claimant.

16. This case refers to information requested to the Other Party by the Claimant for a registration in the [REDACTED] tonnage band, as specified in the Claimant's dispute submission.

D. Conclusion

17. The Claimant made every effort to reach an agreement on the sharing of information, whilst the Other Party failed to do so, pursuant to Article 27(3) of the REACH Regulation.

18. 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 28 November 2022. In case it is not submitted by the indicated date, the present permission to refer will be revoked.

¹⁰ *Ibid.*.

¹¹ 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.

¹² *Ibid.*, paragraph 88.