

[REDACTED]
14 July 2023

The Claimant

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

Copy to:

The Other Party

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

Sent via REACH-IT

Decision number:

Dispute reference number:

Name of the substance (the 'Substance'):

EC number of the Substance:

[REDACTED]
[REDACTED]
[REDACTED]
[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 14 September 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

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.

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 website³.

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>.

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. 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 5 June 2023. The Other Party did not submit any evidence by the set deadline, 27 June 2023.
5. In December 2022, the Claimant contacted the Other Party, asking them to provide a Letter of Access ('LoA') for the registration of the Substance in the [REDACTED] tonnage band.⁵ The Other Party noted they were '*in contact with the L[ead] R[egistrant] to collect the LoA cost*'.⁶
6. After reminders and repeated requests for the LoA,⁷ the Other Party reverted to the Claimant stating they had '*contacted the Lead Registrant. They [Lead Registrant] are finalizing the cost*'.⁸
7. On 31 January 2023, the Claimant was contacted by [REDACTED] ('the Non-EU Company'). They indicated that they had '*performed EU-REACH registration as representative of 3 [non-EU] manufacturers [of the Substance], and have been supplying the goods to EU for the past two decades*', and that they had been informed by the Other Party of the Claimant's intention to register the Substance. The Non-EU Company noted that the necessary documents were under preparation, but that it '*will require some time*'.⁹

⁵ E-mail from the Claimant, 02/12/2022.

⁶ E-mail from the Other Party, 01/12/2022.

⁷ E-mails from the Claimant, 05/12/2022, 20/01/2023.

⁸ E-mail from the Other Party, 20/01/2023.

⁹ E-mail from the Non-EU Company, 31/01/2023.

8. On 1 February 2023, the Claimant reiterated their wish to *'start manufacturing [the Substance] as soon as possible'* and requested the LoA for the indicated tonnage band.¹⁰ On the next day, the Non-EU Company replied they were preparing *'the necessary documents and data'*, which would then be sent to the Claimant through the Other Party.¹¹
9. Between March and May 2023, the Claimant sent further reminders to the Other Party, warning it would *'be forced to contact ECHA'* in case of no reply.¹²
10. In May 2023, the Claimant contacted the Non-EU Company with the Other Party in carbon copy. They expressed disappointment at not having received a reply and reiterated the request for the LoA.¹³ The Non-EU Company explained that the LoA was under preparation with the Other Party and that it would *'be done in a couple of weeks'*.¹⁴
11. On 5 June 2023, 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.¹⁵ 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.¹⁶
14. In the present case, the Claimant requested the LoA from the Other Party in December 2022. Although the Other Party informed that the LoA was under preparation, and despite the multiple requests and reminders sent by the Claimant over a span of four months, the Other Party failed to indicate the cost of the LoA to the Claimant.
15. Based on the available evidence, the Claimant made every effort that could reasonably be expected in the circumstances of the case, while the delays and unresponsiveness of the Other Party demonstrate a failure to make every effort in the negotiations, pursuant to Article 27(3) of the REACH Regulation.
16. The breach of the obligation of the Other Party to make every effort in the negotiations made it impossible for the Claimant to obtain the requested information and for both parties to achieve a data sharing agreement for the tonnage band of interest to the Claimant.

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.

¹⁰ E-mail from the Claimant, 01/02/2023.

¹¹ E-mail from the Non-EU Company, 02/02/2023.

¹² E-mails from the Claimant, 15/03/2023, 04/04/2023, 10/05/2023, particularly.

¹³ E-mail from the Claimant, 30/05/2023.

¹⁴ E-mail from the Non-EU Company, 31/05/2023.

¹⁵ 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.

¹⁶ *Ibid.*, paragraph 88.

18. Therefore, ECHA grants the Claimant permission to refer to the studies specified in the 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 14 September 2023. In case it is not submitted by the indicated date, the present permission to refer will be revoked.