



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 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 30 May and 9 June 2023, and by the Other Party on 27 June 2023.
5. At the end of January 2023, the Claimant wrote to the Other Party expressing their intention to register the Substance in the [REDACTED] tonnage band, providing company details for the Other Party to grant access to the relevant data<sup>5</sup> and asking the total cost to be paid in that respect.<sup>6</sup>
6. On 1 March 2023, in the absence of any reaction, the Claimant reiterated their request for the data costs, mentioning that, in case of no answer by 8 March 2023, they would raise the matter with ECHA.<sup>7</sup> On the same day, the Other Party provided the requested cost to the Claimant.<sup>8</sup>
7. On 3 March 2023, the Claimant confirmed their intention to proceed with the registration and invited the Other Party to further process the data sharing request.<sup>9</sup>

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<sup>5</sup> E-mail message of the Claimant of 26 January 2023.

<sup>6</sup> E-mail message of the Claimant of 27 January 2023.

<sup>7</sup> E-mail message of the Claimant of 1 March 2023, 14:28.

<sup>8</sup> E-mail message of the Other Party of 1 March 2023, 15:51.

<sup>9</sup> E-mail message of the Claimant of 3 March 2023.

8. Between 7 March and 24 May 2023, the Claimant sent multiple reminders to the Other Party.<sup>10</sup> In that context, the Claimant repeatedly called upon the Other Party to indicate a timeline for the request to be processed,<sup>11</sup> emphasised the urgency of the request,<sup>12</sup> lamented the delays caused by the Other Party,<sup>13</sup> and mentioned the intention to submit a dispute claim in case of failure of the negotiations.<sup>14</sup> In reaction, the Other Party offered various timelines by which they would provide a draft data sharing agreement<sup>15</sup> or update the Claimant on the status of their request,<sup>16</sup> and explained that the delays were due to an ongoing corporate reorganisation of the Other Party<sup>17</sup> and the pending transfer of their registrations to another legal entity.<sup>18</sup>
9. On 30 May 2023, the Claimant informed the Other Party that they were lodging a data sharing dispute claim with ECHA, due the lack of progress with the data sharing agreement. Despite the dispute, the Claimant offered to continue the negotiations with a view to an amicable solution.<sup>19</sup>
10. On 30 May 2023, 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.<sup>20</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>21</sup>
13. In the present case, there was no disagreement between the Claimant and the Other Party with regard to the cost of sharing the data. However, the Other Party failed to provide the Claimant with a draft data sharing agreement, despite repeatedly vowing to do so.
14. For their part, the Claimant sent multiple reminders to the Other Party over the course of four months, demanding a timeline for the fulfilment of the request, stressing the importance of the negotiations and highlighting the intention to inform ECHA in case the negotiations failed. The Other Party limited themselves to arguing that the delays were due to an internal corporate reorganisation and that more time was needed.

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<sup>10</sup> E-mail messages of the Claimant of 7 March, 20 March, 23 March, 29 March, 5 April, 25 April, 10 May, 15 May and 24 May 2023.

<sup>11</sup> E-mail messages of the Claimant of 7 March, 15 May and 24 May 2023.

<sup>12</sup> E-mail messages of the Claimant of 20 March and 25 April 2023.

<sup>13</sup> E-mail message of the Claimant of 24 May 2023.

<sup>14</sup> E-mail message of the Claimant of 15 May 2023.

<sup>15</sup> E-mail message of the Other Party of 8 March 2023.

<sup>16</sup> E-mail message of the Other Party of 10 May 2023.

<sup>17</sup> E-mail message of the Other Party of 5 April 2023, 12:07.

<sup>18</sup> E-mail message of the Other Party of 23 May 2023.

<sup>19</sup> E-mail message of the Claimant of 30 May 2023, 17:32.

<sup>20</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>21</sup> *Ibid.*, paragraph 88.

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 of the Other Party demonstrate a failure to make every effort in the negotiations.
16. The breach of the obligation of the Other Party to make every effort in the negotiations made it impossible 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(2) and (3) of the REACH Regulation.
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 18 September 2023. In case it is not submitted by the indicated date, the present permission to refer will be revoked.