

[REDACTED]
5 January 2024

The Claimant

[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 5 March 2024.

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

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 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 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 16 November 2023. The Other Party did not submit any evidence by the set deadline, 8 December 2023. Therefore, the assessment has been conducted solely on the basis of the information provided by the Claimant.
5. In February 2023, as part of an ongoing conversation between the Claimant and the Other Party, the Other Party informed the Claimant of the cost of a Letter of Access ('LoA') to the data required for the registration of the Substance for a tonnage up to [REDACTED].⁵
6. On 4 August 2023, the Claimant informed the Other Party that they wished to proceed with the purchase of the LoA, asked whether there had been any price variation since the previous communication and offered to provide additional information upon request.⁶
7. Between 14 August 2023 and 22 September 2023, the Claimant sent reminders of the pending data sharing request to the Other Party on five instances.⁷ In particular, on 5 September 2023, the Claimant made reference to a recent phone call where the Other Party had promised to provide a '*SIEF agreement*' and to indicate '*a procedure for the purchase of the LoA*', and noted that those promises were still to be fulfilled.⁸

⁵ E-mail message of the Other Party of 22/02/2023.

⁶ E-mail message of the Claimant of 04/08/2023.

⁷ E-mail messages of the Claimant of 14/08/2023, 24/08/2023, 05/09/2023, 12/09/2023 and 22/09/2023.

⁸ E-mail message of the Claimant of 05/09/2023.

8. On 25 September 2023, the Other Party confirmed the intention to provide the Claimant with a draft contract for the sharing of data and an invoice for the purchase of the LoA.⁹
9. Between 27 September and 9 October 2023, the Claimant sent four more reminders to the Other Party,¹⁰ stressing twice that it may submit a data sharing dispute to ECHA if the Other Party failed to send a draft agreement.¹¹ The Claimant also made reference to the Other Party's obligation to make every effort so that *'the cost of sharing information is determined in a fair, transparent and non-discriminatory way'*¹² and underlined that the delay of the Other Party in reacting to the data sharing request was preventing the Claimant from submitting a registration.¹³ Finally, in the absence of further replies, the Claimant asked for the draft agreement to be provided by a set deadline of 23 October 2023.¹⁴
10. On 16 November 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.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
13. 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.
14. The Other Party first assured to the Claimant that they would provide them with a draft data sharing agreement, but then never followed through on that step.
15. For their part, the Claimant sent a total of nine e-mail reminders to the Other Party over a time span of two months, summarised the agreed way forward after one of their phone calls and drew the Other Party's attention to their obligation to make every effort to come to an agreement. In addition to that, the Claimant stressed that the delay was effectively preventing their registration of the substance, pointed out at the possibility to submit a data sharing dispute to ECHA and, in this context, gave a final timeline for the Other Party to provide a draft agreement.
16. 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

⁹ E-mail message of the Other Party of 25/09/2023.

¹⁰ E-mail messages of the Claimant of 27/09/2023, 03/10/2023, 06/10/2023 and 09/10/2023.

¹¹ E-mail messages of the Claimant of 27/09/2023 and 09/10/2023.

¹² E-mail message of the Claimant of 09/10/2023.

¹³ *Ibid.*

¹⁴ *Ibid.*

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.

Other Party made it impossible 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, pursuant to Article 27(2) and (3) of the REACH Regulation, whilst the Other Party failed to do so.
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 5 March 2024. In case it is not submitted by the indicated date, the present permission to refer will be revoked.