

**DECISION OF THE CHAIRMAN OF THE BOARD OF APPEAL
OF THE EUROPEAN CHEMICALS AGENCY**

10 February 2015

Request for confidential treatment of certain information

(Confidentiality request in the notice of appeal – Information required for the appeal announcement and the final decision – Name of the Appellant – Protection of personal data)

Case number A-018-2014

Appellant BASF Grenzach GmbH
Germany

Contested Decision SEV-D-2114285478-33-01/F of 19 September 2014 adopted by the European Chemicals Agency pursuant to Article 46(1), and in accordance with the procedure laid down in Articles 50 and 52, of Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (OJ L 396, 30.12.2006, p. 1; corrected by OJ L 136, 29.5.2007, p. 3; hereinafter the 'REACH Regulation')

THE CHAIRMAN OF THE BOARD OF APPEAL

gives the following

Decision

SUMMARY OF THE RELEVANT FACTS

1. On 17 December 2014, the Appellant filed an appeal at the Registry of the Board of Appeal against the Contested Decision on substance evaluation for triclosan (hereinafter the 'Substance').
2. The Notice of Appeal contained a request for confidential treatment of certain information related to the appeal vis-à-vis third parties.
3. The Appellant's confidentiality request covers three sets of information. The first confidentiality request relates to the identity of the Appellant and extends to the name of the original registration holder for the Substance that has been acquired by the Appellant. The Appellant claims that disclosure of this information could undermine the protection of its commercial interests, especially considering the political nature of the discussions during the substance evaluation procedure and also having regard to Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council

regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43; hereinafter 'Regulation 1049/2001'). The Appellant adds that the European Chemicals Agency (hereinafter the 'Agency') also considered the information related to the identity of the Appellant as confidential when preparing the public version of the Contested Decision. The Appellant also submits that rejecting its confidentiality request would be inconsistent with the Agency's past practice in this regard.

4. The second and third confidentiality requests concern respectively the identity of the Appellant's representatives and that of the independent expert and the research institute to which that expert is affiliated. The Appellant argues that those requests relate to the privacy and integrity of the individuals concerned. The Appellant further justifies its claims by referring to Article 4(1)(b) of Regulation 1049/2001 and to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1; hereinafter 'Regulation 45/2001'). The Appellant adds that disclosure of the expert's identity could also undermine the protection of that expert's commercial interests that are protected by Article 4(2) of Regulation 1049/2001.

REASONS

5. Before examining the Appellant's confidentiality request and by way of a preliminary remark, the Chairman of the Board of Appeal (hereinafter 'the Chairman') observes that Article 6(6) of Commission Regulation (EC) No 771/2001 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency (OJ L 206, 2.8.2008, p. 5; hereinafter the 'Rules of Procedure') creates the obligation to publish on the Agency's website an announcement concerning every appeal brought before the Board of Appeal. Similarly, Article 21(5) of the Rules of Procedure requires the Board of Appeal to publish all final decisions.
6. Furthermore, and in relation to the two provisions of the Rules of Procedure mentioned in the previous paragraph, requests for confidential treatment before the Board of Appeal are raised in connection with public proceedings that serve, in addition to an appellant's private interest, also a wider public interest. Accordingly, the Chairman, when called upon to decide on a request for confidentiality, must have regard not only to the appellant's private interest in protecting confidential information but also to the general public interest in transparency, the public's right to know about proceedings that take place before the Board of Appeal, as well as the specific public interests guaranteed by the REACH Regulation, in particular the protection of human health and the environment. This assessment should be performed on a case-by-case basis taking into consideration the specific circumstances of each case before the Board of Appeal.
7. In addition, it should be remembered that, pursuant to Article 8(2) of the Rules of Procedure, applications to intervene must be submitted within two weeks of publication of the announcement of the appeal (hereinafter the 'announcement'). The announcement is therefore essential and allows potential applicants to intervene to exercise their rights.
8. Finally, considering that the confidentiality request in this instance has been submitted in relation to an appeal lodged against a decision adopted by the Agency under the substance evaluation procedure, when deciding on the confidentiality claim, regard should be had to the characteristics of the substance evaluation process, in particular that this process is triggered as a result of concerns that the evaluated substance poses a risk for human health or the environment.
9. It is in light of the above considerations that the Appellant's confidentiality request will be examined with a view to determining whether the information covered by the

Appellant's request is to be kept confidential in the announcement and in the final decision to be taken by the Board of Appeal in the present case.

Assessment of the Appellant's confidentiality requests

10. In relation to the Appellant's request to regard its identity as confidential, the Chairman observes that, the information required for the announcement is set out in Article 6(6) of the Rules of Procedure and the Decision of the Board of Appeal of 30 September 2009 on implementing the rules on publication of an announcement of the notice of appeal on the website of the Agency. Those provisions provide that the announcement shall include the name and address of the appellant, the subject matter of the proceedings, the remedy sought by the appellant, and a summary of the pleas in law and the main supporting arguments.
11. Moreover, as regards the possibility to intervene in a case before the Board of Appeal provided for in Article 8 of the Rules of Procedure, an appeal announcement should provide potential applicants to intervene with the necessary information on the appeal enabling them to establish whether they have an interest in the result of the case. In this respect, it cannot be excluded that the non-disclosure of the identity of the appellant would unduly restrict and therefore adversely affect the legitimate interests of potential interveners. This could for instance be the case as regards the customers of an appellant or the co-registrants of a certain substance. In this respect it should also be noted that interveners may also be in a position to support the appellant because of their own specific interests.
12. In addition, it should be noted that as a party to appeal proceedings, exercising the right to appeal against an Agency's decision is an essential element of the legal redress system created by the REACH Regulation and as such it does not imply a negative effect per se on the reputation of an appellant. It is fundamentally the exercise of a legitimate right of a party with respect to a difference of opinion concerning a decision adopted by the Agency within the framework of its competences created by the REACH Regulation.
13. As regards the Appellant's argument that pursuant to Article 4(2) of Regulation 1049/2001 the disclosure of its identity could undermine the protection of the Appellant's commercial interests the Chairman notes firstly that the Appellant does not develop its argument further. It should be noted however, for the sake of clarity, that the Chairman's decisions taken pursuant to Article 6(6) and 21(5) of the Rules of Procedure are distinct from the general right to access document pursuant to Regulation 1049/2001. As a result, the interests to be considered, including the manner in which they are balanced, may be different from any assessment made pursuant to Regulation 1049/2001. The Chairman therefore considers that, regardless of whether the disclosure of the Appellant's identity may be identified as a legitimate private interest to be protected, the overriding public interest in its disclosure, as described in previous paragraphs, exists that justifies the disclosure of the Appellant's identity.
14. As regards the Appellant's submission that rejecting its confidentiality request would be inconsistent with the Agency's past practice in this regard, the Chairman observes that the present decision on confidentiality regarding the appellant's identity is consistent with the previous decisions adopted by the Chairman with regard to such requests in previous appeal cases. It should be reiterated that confidentiality related to the identity of an appellant will only be granted exceptionally and in certain specific circumstances where the legitimate interests of interveners would not be affected by accepting the appellant's confidentiality request. This would be for example the case where the parties to the appeal proceedings agree following settlement discussions that the appellant will withdraw its appeal before its announcement is published. In such a case potential interveners would not be disadvantaged as the appeal case will be closed following the withdrawal of the appeal by the appellant. These circumstances are however not present in the case at hand.

15. Moreover, the Chairman notes that the decision contested in the present appeal proceedings is a decision adopted in the process of substance evaluation that contributes considerably towards achieving one of the main objectives of the REACH Regulation, namely to ensure a high level of protection of human health and the environment.
16. Finally, in relation to the Appellant's argument that the Agency also considered the information related to the identity of the Appellant as confidential when preparing public version of the Contested Decision, that argument should be dismissed as, by publishing on the Agency's website the decisions on substance evaluation, different objectives are being pursued than when announcing an appeal.
17. In view of the above considerations, having considered all the relevant circumstances, the request to keep the identity of the Appellant confidential is not granted.
18. As regards the Appellant's request to regard the registration number of the Substance confidential, together with any other information contained in the documents in the case file of the present appeal that would allow the identification of the registration number, the Chairman observes that the registration number is not specifically required by the legislation or needed for the understanding of the case or for the purpose of allowing potential interveners to exercise their rights. In that respect, there is no public interest in the disclosure of the registration number of the Substance.
19. For those reasons, the registration number of the Substance shall not be included in the announcement of the Notice of Appeal or the final decision to be published on the Agency's website.
20. The Chairman will next examine the Appellant's requests for confidential treatment of the identity of respectively the Appellant's representatives and that of the expert that prepared the opinion submitted with the appeal.
21. As stated in previous decisions on confidentiality (see, for example, decision of 27 October 2011 in case A-005-2011), the Chairman considers that these Appellant's requests must be assessed in light of Regulation 45/2001.
22. After examining the requests in accordance with relevant provisions of Regulation 45/2001 and the requirements for announcement of an appeal contained in Article 6(6) of the Rules of Procedure and the Decision on the publication of the announcement, the Chairman concludes that the identities of persons that represent the Appellant in the appeal proceedings as well as the identity of the person that prepared the expert opinion on which the Appellant relies in support of its appeal are not required for the announcement of the appeal. Moreover, revealing their identity in the announcement of the appeal is not relevant to the understanding of the case. Such information may therefore be omitted from the announcement.
23. The conclusion applies mutatis mutandis to any final decision by the Board of Appeal in the present appeal case, published in accordance with Article 21(5) of the Rules of Procedure.
24. Finally, with regard to the Appellant's request that the name of the research institute to which the expert that prepared the opinion presented in the appeal is affiliated, the Chairman observes that the name of that research institution falls outside the scope of application of Regulation 45/2001. Consequently, if the request relating to confidentiality of the name of that research institution would be examined, the Chairman would analyse it in accordance with the general framework for assessing requests for confidential treatment (see paragraphs 5 to 7 to this Decision).
25. The Chairman considers however that revealing the identity of the research institute in the announcement of the appeal is not relevant for the understanding of the case. Consequently, this information is not required to be published in the announcement pursuant to Article 6(6) of the Rules of Procedure. Such information may therefore be omitted from the announcement.

26. The Chairman adds that regardless of whether the name of the research institute to which the expert that prepared the opinion presented in the appeal is affiliated, constitutes or not confidential information for the purposes of the present proceedings, this information will also not be included in the published version of in the final decision by the Board of Appeal, as such publication may allow the expert's identity whose confidentiality has been granted to be deduced.

ORDER

On those grounds,

THE CHAIRMAN OF THE BOARD OF APPEAL

hereby:

Decides to accept the Appellant's request for confidential treatment with respect to the following information:

- **the identity of the Appellant's representatives;**
- **the identity of the expert that prepared the opinion that the Appellant submitted in its notice of appeal;**
- **the identity of the research institute to which the expert that prepared the opinion is affiliated; and**
- **the registration number of the Substance.**

This information shall not be disclosed in the appeal announcement or in the published version of any final decision of the Board of Appeal in the present case.

Decides to reject the Appellant's request for confidential treatment with respect to the identity of the Appellant.

Mercedes ORTUÑO
Chairman of the Board of Appeal