

[REDACTED]  
1 July 2020

*The Claimant*

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

Copy to:  
*The Other Party*

[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')<sup>1</sup> 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')<sup>2</sup>,

**ECHA grants the Claimant permission to refer to information requested from the Other Party for the purpose of a registration under the REACH Regulation.**

The reasons for this decision are set out in Annex I. The list of studies that ECHA grants permission to refer to, along with copies of the (robust) study summaries, can be found in Annexes II and III, respectively.

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<sup>1</sup> 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.

<sup>2</sup> 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.

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 Annexes VII-X 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 parties.

According to Article 27(6) of the REACH Regulation, the Other Party shall have a claim on the Claimant for an equal share of the cost, which shall be enforceable in the national courts, provided that the Other Party makes the full study report or reports available to the Claimant.

Instructions to the Claimant on how to submit the 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

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<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 the 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) ('proof of payment').
2. The obligation to make every effort to find an agreement that is fair, transparent 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.
4. In particular, every effort means being consistent and replying to the other party's questions; it means addressing the issues raised in a constructive and reasoned way so that the negotiations can move forward, and the parties can eventually come to an agreement.

### **B. Summary of facts**

5. This summary of facts is based on the documentary evidence submitted by the Claimant on 19 November 2019. The Other Party did not provide any evidence to ECHA despite having been asked to do so on 25 November 2019 and 5 December 2019.
6. On 20 June 2018, the Claimant reached out to the Other Party via email asking whether the latter was the lead registrant responsible for the registration of the Substance or, alternatively, whether it could provide contact details for the person responsible. The Claimant further queried about the price for a Letter of Access ('LoA') for the a tonnage band of [REDACTED] tonnes per year.<sup>5</sup>
7. On 21 June 2018, the Other Party confirmed it was the lead registrant for the Substance but informed the Claimant that the registration process was handled by its consultants, referring to one by name and providing an email contact, respectively. This specific consultant ('the Consultant') was put in copy of the email, and the Other Party promised that the Consultant

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<sup>5</sup> Claimant; 20/06/2018.

would reach out to the Claimant in respect of its query on the LoA price.<sup>6</sup>

8. The Consultant did not come back to the Claimant. On 21 September 2018, the Claimant sent a reminder to both the Consultant and the Other Party, asking, in addition, for a copy of the substance identity profile ('SIP').<sup>7</sup>
9. Following the reminder, the Claimant asked the Other Party for a phone number for the Consultant, in addition to the provided email contact.<sup>8</sup> In reply, the Other Party stated that it had forwarded the Claimant's query regarding a phone number to the Consultant. It further informed the Claimant that *'works are in progress'*, but that only its consultants could send the requested information. The Other Party assured the Claimant that it had asked its consultants to reply to the Claimant's request *'in the shortest time'*.<sup>9</sup>
10. Neither the Other Party nor any of its consultants contacted the Claimant during the following weeks. The Claimant reached out to the Other Party two more times, asking again for a phone number to reach the Consultant, as well as an explanation regarding the delay to provide the requested LoA costs.<sup>10</sup> It further warned that, should it not receive a response from the Other Party's consultants anytime soon, it *'will need to approach ECHA'*.<sup>11</sup> In response, the Other Party repeated that *'the delay in providing the LoA price and SIP does not depend'* on it, since it does not *'have the possibility to send this information/documents'* to the Claimant. The Other Party added that it was again submitting its request to the Consultant, *'asking for a reply in the shortest time'*.<sup>12</sup>
11. The Claimant continued making attempts to receive information from the Other Party regarding the LoA costs, asking it to explain the reasons for the delay and to provide an estimate for when the costs would be available.<sup>13</sup> It also sent an e-mail directly to the Consultant with the request for the LoA price, in which it also noted that *'[l]ooking at the ECHA website, the lead dossier was submitted in 2013 with a co-registrant dossier submitted in 2018'*, and that it therefore did *'not understand why the LoA fees are not available'*.<sup>14</sup>
12. In the meantime, the Claimant reached out to a contact of its own group in the same country where the Other Party is based, asking it to try to contact the Consultant in its own language in order to obtain the LoA costs.<sup>15</sup> As a result, it eventually received an e-mail with the information on the LoA costs.<sup>16</sup>
13. On 15 August 2019, the Claimant replied to the Consultant's e-mail directly, informing that it had *'now submitted an inquiry for this substance and would like to proceed with purchasing a LoA in the [REDACTED] tpa'*.<sup>17</sup> On 9 September 2019, the Claimant sent a reminder,<sup>18</sup> and on 18 October 2019, it reached out to both the Other Party and the Consultant, requesting a

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<sup>6</sup> Other Party; 21/06/2018.

<sup>7</sup> Claimant; 21/09/2018.

<sup>8</sup> Claimant; 03/10/2018.

<sup>9</sup> Other Party; 09/10/2018.

<sup>10</sup> Claimant; 19/10/2018 and 09/11/2018.

<sup>11</sup> Claimant; 19/10/2018.

<sup>12</sup> Other Party; 09/11/2018.

<sup>13</sup> Claimant; 24/01/2019 and 05/02/2019. The Consultant was copied in on the e-mail of 24/01/2019.

<sup>14</sup> Claimant; 06/02/2019.

<sup>15</sup> ECHA can only assess the efforts made in the negotiations between the Claimant and the Other Party. As such, any email exchanges between one of the parties and a third party cannot be considered in the assessment.

<sup>16</sup> Consultant; 19/04/2019.

<sup>17</sup> Claimant; 15/08/2019.

<sup>18</sup> Claimant; 09/09/2019

confirmation of the LoA costs for the indicated tonnage band and *'the SIEF agreement'* so that it could *'proceed to join the joint submission'*.<sup>19</sup> The Claimant added that the Other Party had *'obligations under Art. 30 of REACH'* and warned that it *'would prefer not to launch a data-sharing dispute but will have no choice should [it] not receive a response (...) within the next 5 working days'*.<sup>20</sup>

14. On 19 November 2019, the Claimant submitted a claim under Article 27 of the REACH Regulation concerning the failure to reach an agreement on the sharing of information with the Other Party.
15. On 20 December 2019, ECHA informed both parties of its assessment of their efforts. The Claimant did not inform ECHA of any agreement voluntarily reached by the parties. The Claimant provided a proof of payment of a share of the costs to ECHA on 19 June 2020 in the form of a banker's draft.

### **C. Assessment**

16. As explained in Section A, ECHA assesses the efforts made by the parties in the negotiations that were outlined in Section B.
17. On 20 June 2018, the Claimant submitted a clear request to the Other Party regarding the LoA costs for a specified tonnage band in order to join an existing submission for which the Other Party acted as the lead registrant.<sup>21</sup> Despite the fact that the Other Party replied almost without delay to the Claimant's emails, the information sought was only received almost one year later, on 19 April 2019.
18. More specifically, in response to the Claimant's request, the Other Party only repeated that it could not provide the sought information itself and that its consultants were responsible for it and would revert to the Claimant as soon as possible.<sup>22</sup> The Other Party did not provide the Claimant with alternative contact details for the Consultant, nor did it make any effort in exploring alternative routes for the Claimant to obtain the LoA costs after several months. It furthermore did not give any explanation with regard to the delays. Thus, it cannot be said that the Other Party made sure that the negotiations moved forward in a timely and constructive manner regarding the Claimant's request to provide an LoA cost offer.
19. In contrast, the Claimant reached out to the Other Party and the Consultant in a continuous and timely manner, repeating its request for the LoA costs and indicating its objective to join the existing submission several times.<sup>23</sup> In face of the long delays, the Claimant pursued an alternative route to obtain the sought information.<sup>24</sup> This eventually proved to be successful since the Claimant obtained the LoA costs. However, when the Claimant sought subsequent confirmation of the LoA costs and reiterated its intention of proceeding with the joint submission, as well as referred to the data sharing obligations under the REACH Regulation,<sup>25</sup> the Other Party remained silent, thus preventing the negotiations from progressing. The Claimant hence submitted the dispute to ECHA as a last resort measure.

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<sup>19</sup> Claimant; 18/10/2019.

<sup>20</sup> Claimant; 18/10/2019. The Claimant received delivery receipts for both Consultant and Other Party; it further received a read receipt from the Other Party on 21/10/2019.

<sup>21</sup> Claimant; 20/06/2018.

<sup>22</sup> Other Party; 09/10/2018, 09/11/2018 and 05/02/2019.

<sup>23</sup> Claimant; 20/06/2018, 21/09/2018, 03/10/2018, 19/10/2018, 09/11/2018, 24/01/2019, 05/02/2019, 06/02/2019.

<sup>24</sup> See paragraph 12, above.

<sup>25</sup> Claimant; 15/08/2019, 09/09/2019, 18/10/2019.

20. In the light of the above, it can be concluded that the Claimant made every effort to find an agreement on the sharing of data with the Other Party, whereas the Other Party failed to do so.

#### **D. Conclusion**

21. The Claimant made every effort to reach an agreement on the sharing of information and paid a share of the costs.

22. Therefore, ECHA grants the Claimant permission to refer to the studies specified in the Annex II.