

18 August 2021

The Claimant

[REDACTED]

Represented by

[REDACTED]

*Copy to:
The Other Party*

[REDACTED]

Sent via REACH-IT

Decision number:
Dispute reference number:
Name of the substance (the 'Substance'):

[REDACTED]

EC number of the Substance:

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

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.

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 18 October 2021.

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 website³.

B. Observations

The present decision may not cover all the Claimant's information needs under Annex VII 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.

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. 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

5. This summary of facts is based on the documentary evidence submitted by the Claimant's representative (the 'Representative') on behalf of the Claimant⁵ on 29 June 2021. Documentation was submitted on behalf of the Other Party on 23 July 2021, consisting of an e-mail message sent to the Claimant on that same day. Given that such message post-dates the submission of the present dispute, it cannot be considered as part of the negotiations between the parties and cannot be taken into account in the assessment thereof.
6. On 21 May 2021, the Claimant submitted an inquiry for the Substance pursuant to Article 26 of the REACH Regulation.
7. On 24 May 2021, the Other Party, in its capacity as lead registrant for the Substance, was contacted by the Representative, and was asked to provide information on the cost of a letter of access and the procedure for the Claimant to join the existing submission for the Substance for the tonnage bands [REDACTED] and [REDACTED]. Additional information was also sought on the Substance identification and related analytical methods.⁶
8. On 28 May 2021, the Other Party confirmed its capacity as lead registrant and provided an estimated cost for the [REDACTED] tonnage band, as well as information on analytical methods. Citing existing restrictions on the Substance, the Other Party proposed to the Claimant to purchase it from the Other Party, instead of pursuing its own registration.⁷
9. On the same day, the Representative confirmed the Claimant's interest in obtaining access to the joint submission and asked the Other Party to provide the 'SIEF Agreement' and the costs

⁵ The present dispute claim was lodged by the Representative on behalf of the Claimant. This circumstance was clarified by the Representative himself and further confirmed directly by the Claimant upon ECHA's request (see e-mail message of the Claimant's representative of 5 July 2021 and e-mail message of the Claimant of 6 July 2021).

⁶ E-mail message of the Claimant's representative of 24 May 2021.

⁷ E-mail message of the Other Party of 28 May 2021.

of a letter of access relating to the [REDACTED] tonnage band.⁸ The Claimant did not request an itemisation of the data to be shared, including the cost of each data item.

10. In the absence of any reaction from the Other Party, the Representative sent three separate reminders to the Other Party, respectively on 7, 9 and 10 June 2021, reiterating the information request and confirming the Claimant's intention to submit a registration for the [REDACTED] tonnage band.⁹
11. On 23 June 2021, the Representative noted the Other Party's unresponsiveness and announced his intention to file a dispute.¹⁰
12. On 29 June 2021, the present dispute was initiated.

C. Assessment

13. Making every effort to agree on the sharing of data requested by a potential registrant means in the first place to facilitate an exchange of information, in order to come to an agreement in a fair, transparent and non-discriminatory manner, as well as to constructively engage in the conversation with the other negotiating party so that a positive outcome can be achieved.
14. By its initial message of 24 May 2021, the Claimant, through his Representative, requested information on the cost and practicalities to join the registration for the Substance. This request was only partially addressed by the Other Party on 28 May 2021, in what was effectively the only reaction from that side before the dispute was lodged. By contrast with the Other Party's unresponsiveness after 28 May, subsequent attempts by the Claimant to obtain the missing information, and more broadly to engage with the Other Party, are an indicator of the Claimant's willingness to continue the negotiations and to pursue a data sharing agreement.
15. As to the timeline of the exchange, the Representative confirmed the Claimant's intention to purchase the right to use the data on 28 May 2021. In the absence of any reaction from the Other Party, the Representative sent a first reminder seven working days later and then two more messages shortly thereafter, before finally notifying the Other Party of the Claimant's intention to file a dispute with ECHA on 23 June 2021. The time interval between the confirmation by the Representative and the reminders, up to the filing of the dispute (a time period of approximately 4 weeks), should have been sufficient to allow the Other Party to react to the pending request of information, particularly in light of the fact that the Other Party responded within four days to the initial request. By neither providing the requested information nor explaining why this would not be possible, the Other Party made it impossible to constructively engage in the discussion and left the Claimant in the unknown about the costs of the data sharing for the tonnage band of interest to him.
16. It follows that the Other Party failed to comply with the obligation to make every effort to achieve an agreement on the sharing of the information requested by the Claimant in his capacity as potential registrant.
17. The dispute claim has been lodged after more than one month from the submission of the inquiry by the Claimant made pursuant to Article 26 of the REACH Regulation.¹¹ The requirement provided for by Article 27(5) of the REACH Regulation is therefore fulfilled.

⁸ E-mail message of the Claimant's representative of 28 May 2021.

⁹ E-mail messages of the Claimant's representative of 7 June 2021, 9 June 2021 and 10 June 2021.

¹⁰ E-mail message of the Claimant's representative of 23 June 2021.

¹¹ As indicated in the dispute claim submission, and as per ECHA's inquiry records.

18. This dispute refers to information requested to the Other Party by the Claimant for a registration in the [REDACTED] tonnage band.¹²

D. Conclusion

19. Having regard of the above, ECHA considers that the Claimant made every effort to reach an agreement on the sharing of information, whereas the Other Party did not.

20. Therefore, ECHA grants the Claimant permission to refer to the studies specified in 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 October 2021. In case it is not submitted by the indicated date, the present permission to refer will be revoked.

¹² E-mail messages of the Claimant's representative of 24 May 2021, 28 May 2021, 7 June 2021 and 10 June 2021.