

8 October 2021

The Claimant

[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

ECHA does not grant a permission to refer to the information requested from the Other Party.

This decision is adopted under 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.

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

This decision will be published in an anonymised version on ECHA's website³.

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.

³ Available at <https://echa.europa.eu/regulations/reach/registration/data-sharing/data-sharing-disputes/echa-decisions-on-data-sharing-disputes-under-reach>.

a. Recommendation

Under Article 27 of the REACH Regulation and Implementing Regulation 2016/9, the parties must still make every effort to reach an agreement on the sharing of the information. Therefore, the parties should continue to negotiate in order to reach an agreement that will be satisfactory for both parties. If the future negotiations fail, the Claimant is free to submit another claim covering the efforts that occurred after the submission date of the dispute claim that led to the present decision (i.e. 24 August 2021).

Advice and further observations are provided in Annex II.

b. 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. If an appeal is submitted, this decision will be suspended. 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

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 procedure pursuant to Article 27(5) of the REACH Regulation, ECHA performs an assessment to determine whether the parties made every effort to reach an agreement on the sharing of information and associated costs for the purposes of registration. In doing so, ECHA checks whether the parties' obligations related to the sharing of data and data costs have been complied with, including whether the parties complied with the requirements of fairness, transparency and non-discrimination (Article 5 of Implementing Regulation 2016/9). 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. Specifically, Article 27(3) of the REACH Regulation and Article 2 of Implementing Regulation 2016/9 provide for the requirement for data and cost sharing to be transparent. Article 2(1)(a) and (2) of Implementing Regulation 2016/9 requires a previous registrant to provide to a potential registrant, upon request, with an *'itemisation of data to be shared, including the cost of each data item, a description indicating the information requirements in the REACH Regulation to which each cost corresponds and a justification of how the data to be shared satisfies the information requirement'*⁵. Under the last subparagraph of Article 2(2) of Implementing Regulation 2016/9, the previous registrant is expected to provide this information to the potential registrant *'without undue delay'*.
4. Under Article 5 of Implementing Regulation 2016/9, *"when settling a data-sharing dispute [...], the Agency shall take account of the parties' compliance with the obligations set out in Articles 2, 3 and 4 of this Regulation"*.
5. The parties 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. In doing so, each party must clearly state his or her requests of information and ensure that the other party has had enough time to provide an answer before concluding that the negotiations have failed.

B. Summary of facts

6. This summary of facts is based on the documentary evidence submitted by the Claimant on 24 August 2021 and by the Other Party on 13 September 2021. Part of the documentary evidence submitted by the Other Party consists of records of e-mail communications taking place after the submission of the case, and it has therefore not been taken into account in the assessment.
7. During the negotiations e-mail messages were exchanged both directly between the Claimant and the Other Party, and between their respective consultants. For the sake of simplicity, however, no distinction is made below between each party and its respective representative, and only the Claimant and the Other Party are referred to as taking part in the exchange.

⁵ Article 2(1)(a) of Implementing Regulation 2016/9.

8. On 1 February 2021, the Claimant first contacted the Other Party expressing its interest in purchasing a Letter of Access ('LoA') to the data for the registration of the Substance for two different tonnage bands ([REDACTED]). Along with the cost of such LoA, the Claimant also asked the Substance Identity Profile ('SIP').⁶
9. In reply, the Claimant received a seemingly automated message explaining the Other Party's approach to joint submission requests. This message explained that data sharing requests were dealt with by the Other Party in batches every two months, on pre-defined deadlines along the year. All requests received before each deadline would be processed simultaneously once the upcoming deadline would expire. The message also indicated that an accelerated processing was possible upon request (so-called 'fast track'), subject to additional administrative costs for the Claimant. The amount of those additional costs was not specified.⁷
10. On 3 February 2021, the Other Party provided the SIP.⁸
11. From 23 February to 17 March 2021, the Claimant and the Other Party discussed the scope of the SIP and the possible adaptations the SIP would require in order to enable the Claimant to join the submission. In its last message on the topic, on 17 March 2021, the Claimant indicated its intention to file a registration inquiry where it would be specified that the parties were working on adaptations to the SIP.⁹
12. As for the costs of the LoA, on 2 February 2021 the Other Party explained that the estimates were not readily available and more time was necessary for their determination.¹⁰ On three occasions, the Claimant requested the Other Party to specify an indicative timeline for the determination of the costs.¹¹ On 10 February 2021, the Other Party provided a tentative timeline of three weeks.¹² Such a timeline was then extended twice by the Other Party.¹³ On 24 March 2021, the Other Party provided the LoA cost estimates and invited the Claimant to react further if interested in the purchase.¹⁴
13. On 13 August 2021, the Claimant confirmed its intention to share the data and join the submission for the Substance at the tonnage band of [REDACTED]. According to the Other Party's batched approach, the next processing deadline would have been 1 October 2021. However, the Claimant also asked in its message that its request were processed in an accelerated manner, i.e. before 1 October 2021. Finally, the Claimant required in its message a template of the joint submission agreement or SIEF agreement.¹⁵
14. On 17 August 2021, the Other Party confirmed the possibility to follow an accelerated procedure and specified the additional administrative costs in EUR [REDACTED] for this accelerated processing. The representative of the Other Party further specified that it had to be authorised by the Other Party itself in order to share the agreement template.¹⁶

⁶ E-mail message of the Claimant of 1 February 2021.

⁷ E-mail message of the Other Party of 1 February 2021, 10:22.

⁸ E-mail message of the Other Party of 3 February 2021.

⁹ E-mail message of the Claimant of 17 March 2021.

¹⁰ E-mail message of the Other Party of 2 February 2021.

¹¹ E-mail messages of the Claimant of 3 February 2021 and 9 February 2021, 14:27 and 14:30.

¹² E-mail message of the Other Party of 10 February 2021.

¹³ E-mail messages of the Other Party of 4 and 15 March 2021.

¹⁴ E-mail messages of the Other Party of 24 March 2021, 9:44, 10:28 and 14:34.

¹⁵ E-mail message of the Claimant of 13 August 2021.

¹⁶ E-mail message of the Other Party of 17 August 2021.

15. On 18 August 2021, the Claimant asked for a breakdown of the additional administrative costs, explaining that the Claimant was *'struggling to understand what [those costs were] for'*¹⁷. It further pointed out that *'[t]he ECHA guidance on data sharing is clear that any fees should solely be for the purpose of preparing and maintaining registration dossiers'*¹⁸ and that *'[f]ees and revenues originating from data-sharing activities should follow the 'not for profit' principle and solely serve to cover budget needs for preparing and maintaining registration dossiers'*¹⁹. Finally, the Claimant reiterated the urgency of the request and argued that the Other Party's approach to process requests in batches *'could be seen as keeping [the Claimant] out of the joint submission'*²⁰.
16. On 24 August 2021, the Claimant lodged the present dispute claim.

C. Assessment

17. 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.
18. 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.²¹ 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 filing of the case.²²
19. In the present case, while the parties agreed on the cost of sharing the data, at the time of the submission of the case to ECHA, they did not reach an agreement on the administrative costs for the accelerated processing of the data sharing request. The submission of the case followed the request from the Claimant to the Other Party to provide an itemisation of the costs of the accelerated processing.
20. In relation to this issue, the Agency conducted its assessment in light of the first criterion laid down in Article 2(2) of Implementing Regulation 2016/9, namely whether the agreement was negotiated in accordance with the transparency requirement.²³
21. This provision requires the previous registrant to provide an itemisation of the cost only when requested by a potential registrant. However, when requested, the previous registrant is required to provide this itemisation *'without undue delay'*.
22. At the beginning of the negotiations, the Other Party informed the Claimant of the possibility to rely on an accelerated processing of the data sharing request ('fast track'). The Other Party also informed the Claimant of the conditions for this accelerated processing, including the payment of an additional fee for the service. Although being made aware of that fee, the Claimant did not request further information at that time. On 13 August 2021, the Claimant asked to benefit from the accelerated processing. On 17 August 2021, the Other Party

¹⁷ E-mail message of the Claimant of 18 August 2021.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*, paragraph 87.

²² *Ibid.*, paragraph 88.

²³ See, to this effect, Case A-010-2017, *REACH & Colours and REACH & Colours Italia*, Decision of the Board of Appeal of 15 April 2019, paragraph 85.

indicated the cost of this accelerated processing. On 18 August 2021, the Claimant asked the Other Party to provide an itemisation of this cost.

23. Under Article 2(2) of Implementing Regulation 2016/9, the Other Party had to reply to this request for itemisation '*without undue delay*'.
24. However, the Claimant submitted the case to ECHA on 24 August, i.e. four working days after the Claimant's itemisation request. This interval appears extremely short, particularly during a period which is traditionally of holiday in most EU Member States. The Claimant did not leave sufficient time to the Other Party to provide the requested information '*without undue delay*' in accordance with Article 2(2) of Implementing Regulation 2016/9.
25. As a result, the decision by the Claimant to file a case under Article 27(5) was premature as it did not allow the Other Party reasonable time to fulfil the information request as expected. Consequently, both parties were not in a position to reach a data sharing agreement for the tonnage band of interest to the Claimant.

D. Conclusion

26. The Claimant did not provide an opportunity to the Other Party to comply with its obligation to provide without undue delay information on the itemisation of the costs of the accelerated processing. Therefore, the Other Party did not fail to comply with its obligation under Article 2(2) of Implementing Regulation 2016/9.
27. Article 5(1) of Implementing Regulation 2016/9 requires the Agency to take account of the parties' compliance with the obligations set out in Implementing Regulation 2016/9, including Article 2(2). Therefore, ECHA does not grant the Claimant permission to refer to the requested studies.