

[REDACTED]
Helsinki, 5 August 2019

The Claimant

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

Represented by

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

Copy to:
The Other Party

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

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

ECHA does not grant you permission to refer to the information you requested from the Existing Registrant of the Substance.

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.

¹ Regulation (EC) N° 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

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

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

B. Recommendation

Under Article 27 of the REACH Regulation and the Implementing Regulation 2016/9, the parties must still make every effort to reach an agreement on the sharing of the information and costs related to the access to the joint submission. 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, also covering the efforts that occurred after the submission date of the dispute claim that led to the present decision (i.e. 26 June 2019).

Advice and further observations are provided in Annex II.

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. 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>.

Yours sincerely,

William Broere⁴

Acting Head of Legal Affairs

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>.

⁴ As this is an electronic document, it is not physically signed. This decision has been approved according to the ECHA's internal decision-approval process.

Annex I: Reasons for the decision

A. Applicable law

1. When a dispute is submitted to ECHA pursuant to Article 27(5) of the REACH Regulation, ECHA performs an assessment of the parties' efforts to reach an agreement (Article 5 of the 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).
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 the Implementing Regulation 2016/9.
3. Making every effort means that the existing and potential registrants must negotiate as constructively as possible. They should make sure that the negotiations move forward in a timely manner. They must express their arguments and concerns and give their negotiating partner sufficient time to address those. They must try to understand each other's position, ask questions, reply to each other's arguments, concerns and questions and consider those in the negotiations.
4. Making every effort also means that the parties need to 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

5. This summary of facts is based on the documentary evidence submitted by the Claimant on 26 June 2019 and by the Other Party on 11 July 2019.
6. On 27 March 2019, the Claimant contacted the Other Party, stating that it wished to register the Substance and asking for the Letter of Access ('LoA') costs for [REDACTED]. On 2 April 2019, the Claimant sent a reminder, asking for the LoA cost, the SIEF Agreement and the Substance identity profile ('SIP').
7. After a few email exchanges regarding the treatment of the Claimant's request⁵, the Other Party apologised for the delayed reply on 19 April 2019. It communicated the LoA cost to the Claimant and asked for some information to prepare the SIEF Agreement. After sending the required information⁶, the Claimant expressed its will to buy the LoA and reminded of its request to receive the SIEF Agreement and the SIP⁷. On 16 May 2019, the Other Party

⁵ Emails from the Other Party; 2 April 2019 and 11 April 2019. Emails from the Claimant; 11 April 2019 and 17 April 2019.

⁶ Email from the Claimant; 23 April 2019.

⁷ Email from the Claimant; 6 May 2019.

apologised for the delay and sent the SIEF Agreement.

8. On 20 May 2019, the Claimant sent back the SIEF Agreement signed and asked the Other Party for invoicing details⁸. On the following day, the Claimant came back to the Other Party to ask for further information regarding the data it would receive based on the SIEF Agreement. After further email exchanges⁹, the Other Party's reply was considered as satisfactory by the Claimant¹⁰. On 28 May 2019, the Other Party also provided the requested SIP. The Claimant reiterated its request for the invoicing details¹¹ and later sent another reminder regarding this¹².
9. On 11 June 2019, the Other Party raised a new element in the negotiations with regard to the protection of intellectual property. It explained that to its understanding, the Claimant is a distributor and not a manufacturer, and consequently asked which company is the manufacturer for the Substance. It referred to a Court decision in China for infringement of technical and commercial secrets that prohibited some Chinese companies to produce some substances, including the Substance. In this regard, the Other Party noted that the Claimant used to act as a distributor for one of these Chinese companies in the past. The Other Party expressed his concerns that *'if [the Claimant] is on behalf of these Chinese companies to register [the Substance] in Europe and [the Other Party] provides [the Claimant] with data in accordance with ECHA regulations, it is tantamount to contributing to the continued infringement'*. The Other Party underlined that it *'think[s] that intellectual property protection is global'*¹³.
10. On 17 June 2019, the Other Party sent a reminder to the Claimant. On the same day, the Claimant replied stating that *'[its] client doesn't want to disclose the name of their collaborators due to confidentiality reasons, which is legal according to REACH'*. Lastly, the Claimant set a deadline of 25 June 2019 for the Other Party to provide it *'with everything [...] in order to process the co-registration.'*
11. On 26 June 2019, the Claimant submitted a claim under Article 27 of the REACH Regulation concerning the failure to reach an agreement on the sharing of data with the Other Party.

C. Assessment

12. As explained in section A., ECHA assesses the efforts made by the parties in the negotiations that were outlined in section B.
13. The negotiations between the parties can be divided in two parts.
14. During the first part of the negotiations¹⁴, both parties made efforts to find an agreement on the conditions for the sharing of data and to clarify the content of the agreement. They generally replied to each other's questions promptly and managed to agree on the LoA cost and the SIEF Agreement within two months after the beginning of the negotiations¹⁵.

⁸ Email from the Claimant; 20 May 2019.

⁹ Emails from the Other Party; 21, 28 and 29 May 2019. Emails from the Claimant; 21 and 28 May 2019.

¹⁰ Email from the Claimant; 29 May 2019.

¹¹ Ibid.

¹² Email from the Claimant; 4 June 2019.

¹³ Email from the Other Party; 11 June 2019.

¹⁴ Emails from both parties; 27 March 2019 to 4 June 2019.

¹⁵ Email from the Other Party; 19 April 2019.

15. However, after reminders from the Claimant asking for the Other Party's invoicing details, the second part of the negotiations¹⁶ started when the Other Party raised a new element in the negotiations in relation to the protection of intellectual property¹⁷. The Other Party referred to a Chinese court decision in which two Chinese companies were prohibited to produce the Substance, on the ground of infringing intellectual property rights. The Other Party consequently asked the Claimant to disclose the name of its non-EU supplier, in order to confirm that the Claimant was not linked to these Chinese companies. The Claimant did not reply on that point, referring to confidentiality reasons, and indicated that it would submit a dispute if the Other Party would not provide the necessary elements for the Claimant's registration by 25 June 2019¹⁸.
16. Making every effort to find an agreement means that the negotiating parties must justify their position and reply to the concerns raised by their negotiating partners. Finding a common understanding on each party's position regarding the sharing of data is a prerequisite for entering into successful data-sharing negotiations. When an existing registrant has concerns about the compliance of a potential registrant and explains its own liability risk, this existing registrant must explain its position and open a discussion on that point with the potential registrant. In return, a potential registrant needs to try to reply to the questions raised by the existing registrant in this regard, in order to give to the existing registrant the opportunity to adequately assess the situation and adapt its stand if relevant.
17. In this regard, ECHA notes that the Other Party raised its question regarding intellectual property rights at a late stage in the negotiations¹⁹, after having sent the SIEF Agreement²⁰, which the Claimant signed²¹. In addition, the Other Party did not further explain how the new issue raised would have an impact on the sharing of data with the Claimant. In addition, ECHA notes that, despite the Claimant's warning that it would submit a dispute if the Other Party would not provide it '*with everything [...] in order to process the co-registration*' by 25 June 2019²², the Other Party did not reply to the Claimant until the submission of the dispute claim to ECHA. Therefore, ECHA considers that the Other Party could have made more efforts to explain its concern and take actions during the week before the submission of the dispute.
18. On the other hand, ECHA notes that the Claimant replied six days after the Other Party raised its concern regarding intellectual property rights, after a reminder by the Other Party. In its reply, the Claimant did not respond on whether it was linked with the Chinese companies in question, or on the alleged breach of protection of intellectual property. The Claimant only indicated that it did not want to disclose the name for confidentiality reasons. The Claimant did not try to understand the Other Party's concern or explain why this concern was not relevant to the data sharing negotiations. Further, the Claimant submitted the data sharing dispute to ECHA nine days after sending the above-mentioned reply, which did not address the Other Party's concern. ECHA notes that the concern raised by the Other Party could potentially be of a complex nature and involve different legislations of different States. By submitting a dispute only nine days after providing a reply that did not address the concern raised by the Other Party, the Claimant did not make every effort to understand and address the Other Party's concern and did not give sufficient time for the issue to be solved between the parties.

¹⁶ Emails from both parties; 11 June 2019 to 17 June 2019.

¹⁷ Email from the Other Party; 11 June 2019.

¹⁸ Email from the Claimant, 17 June 2019.

¹⁹ Email from the Other Party; 11 June 2019.

²⁰ Email from the Other Party; 16 May 2019.

²¹ Email from the Claimant; 20 May 2019.

²² Ibid.

19. In view of the above, ECHA notes that, while the Other Party could have made more efforts to explain its concern, the Claimant failed to exhaust every effort before submitting its dispute claim to ECHA by not replying to the concern raised, trying to understand it or giving sufficient time for a discussion between the parties to happen on this concern.
20. Therefore, and without prejudice to whether the Other Party has itself made every effort in the negotiations, ECHA considers that the Claimant did not make every effort to find an agreement with the Other Party.

D. Conclusion

21. The Claimant did not make every effort to reach an agreement on access to the joint submission and the sharing of information.
22. Therefore, ECHA does not grant the Claimant permission to refer to the studies it negotiated.

Annex II: ADVICE AND FURTHER OBSERVATIONS²³

The parties should continue the negotiations aiming to reach an agreement on the access to the joint submission and on the sharing of information.

Based on ECHA's understanding of the negotiations, ECHA recommends the parties to consider the elements set out below.

- The Other Party may consider clarifying how an alleged breach of intellectual property could have an impact on the obligation to share data. If there is no justification under the REACH Regulation to refuse sharing data, ECHA recommends the Other Party to provide the invoicing details to allow the negotiations to be successful. ECHA also recommends the Other Party to reply within a reasonable time limit.
- ECHA advises the Claimant to consider clarifying:
 - Whether the information about its potential links to the Chinese companies in question is confidential. Regarding the disclosure of its non-EU suppliers, the Claimant could explain to the Other Party how disclosing this specific information could undermine the protection of its commercial interest²⁴.
 - Why the information on its non-EU suppliers may be considered irrelevant in the framework of data sharing negotiations. In particular, it can be noted that importers may import from different non-EU sources and are not representatives of one non-EU company.

In case the future negotiations fail and the Claimant considers that it has exhausted every effort, the Claimant is free to submit another claim, also covering the efforts that occurred after the submission date of the dispute claim leading to the present decision (i.e. 26 June 2019).

²³ Please note that this section does not contain elements that ECHA took into consideration in its assessment of the parties' efforts in their negotiations. ECHA's assessment of the dispute is set out only in the section 'C. Assessment' of Annex I. The Annex II 'Advice and Further Observations' aims only at providing further advice and information that can be helpful for the parties in the future of their discussions on data sharing and joint submission obligations.

²⁴ Article 118(2) of the REACH Regulation.

"ECHA reminds you that following Article 16 of Regulation (EC) No 1049/2001, the documents attached are subject to copyright protection."