[redacted]

Helsinki, 10 June 2019

The Claimant

[redacted]

Copy to:
The Other Party

[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].

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

[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 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.

[redacted]

This decision will be published in an anonymised version on ECHA's website[3].

b. Recommendation

Under Article 27 of the REACH Regulation and the Commission Implementing Regulation, 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 lead to the present decision.

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,

Minna Heikkilä[4]

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 decision has been approved according to the ECHA's internal decision-approval process.

[redacted]

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 access to the joint submission 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 Commission Implementing Regulation. Under Article 11 of the REACH Regulation and Article 3 of the Commission Implementing Regulation, all registrants of the same substance must be part of the same registration ('joint submission obligation') and share the costs related to the joint submission.

3. Making every effort means that the existing and potential 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 each other's position and consider it in the negotiations.

4. 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.

5. ECHA notes that the Claimant has filed the present dispute under Article 30(3) of the REACH Regulation. However, this provision concerns the sharing of data for phase-in substances in the context of Substance Information Exchanges Forums, which have ceased to exist with the last registration deadline, 31 May 2018 according to Article 29(3) of the REACH Regulation.

6. The dispute at issue should have thus been submitted rather under Article 27(5) of the REACH Regulation, which concerns the procedure for data-sharing disputes on registered substances. ECHA has thus decided to process the dispute under the latter provision, which has added procedural guarantees for the parties.

7. It should however be noted that an assessment of the present dispute under Article 30(3) of the REACH Regulation would have resulted in the same conclusion, as transpires from the every effort analysis conducted below.

[redacted]

B. Summary of facts

8. This summary of facts is based on the documentary evidence submitted by the Claimant on 17 April 2019 and by the Other Party on 13 May 2019.

9. On 14 March 2018, the Claimant contacted the Other Party, identifying itself as 'importer and user' of the Substance, and asking for further information, namely whether the Substance was registered and what the registration cost would be for importing it into the EU.[5] The Other Party replied that it represents one manufacturer who has registered the Substance, and asked the Claimant for its permission to forward the contact details to their client. In addition, the Other Party provided the Letter of Access costs to the Claimant for [redacted] per year (tpa).[6]

10. The Claimant replied on the same day, asking for clarifications: what was included in the presented costs , what exactly is the Letter of Access, what are the quantities allowed and whether there are any weight limitations, whether there is 'an expiry date on the registration', how long it takes to register the company, and whether the Other Party could take over the registration procedure on its behalf.[7] The Other Party informed the Claimant that the Letter of Access costs included the costs of the study data for the substance in [redacted], adding that imports below 1 tpa do not need a registration and that there was no expiry date for the registration, but that the deadline to register was 31 May 2018. It thus suggested quick action from the Claimant's part. It moreover addressed all the questions posed by the Claimant, adding links to ECHA's support pages.[8]

11. The Claimant got back to the Other Party with further clarification requests, asking for a confirmation of the total costs and stating that its company could probably be categorised as a micro-sized enterprise for the purpose of the registration fee.[9]

12. The Other Party provided a link for the Claimant to confirm its size category. Furthermore, it informed the Claimant that, by buying the Letter of Access, it would become a co-registrant of the substance. This, the Other Party explained, 'means [the co-registrants] will pay for the letter of access to this study data, in order to take equal parts in cost sharing for these activities'. It replied to the other questions posed by the Claimant, explaining that after the Letter of Access costs are paid and the inquiry to ECHA successful, the Claimant will receive a token to join the joint submission. The Other Party also informed the Claimant that products imported before the registration deadline could no longer be placed on the market thereafter in volumes over 1 tpa; it sent the Claimant a link with information on the exceptions to this.[10]

13. The Claimant got back to the Other Party, recapping the costs presented and asking for a fee reduction, affirming that its company is a microenterprise and that this should be reflected in all fees, including the Other Party's so-called 'REACH consultation fees' and the Letter of Access.[11] On 28 March 2018, the Other Party replied that the costs were indeed accurate and that no reduction based on company size was applicable. It however told the Claimant that the Letter of Access costs could eventually be subject to reimbursement if more registrants

[5] The Claimant; 14 March 2018.
[6] The Other Party; 16 March 2018.
[7] The Claimant; 16 March 2018.
[8] The Other Party; 20 March 2018.
[9] The Claimant; 21 March 2018.
[10] The Other Party; 23 March 2018.
[11] The Claimant; 27 March 2018.

[redacted]

decided to join the joint submission. It asked the Claimant to indicate their interest by indicating the required tonnage band.[12]

14. The Claimant did not react to this e-mail, but came back to the Other Party on 5 June 2018, asking whether there had been any changes on the Letter of Access costs, since the registration deadline had passed.[13]

15. The Other Party replied that the cost calculation remained accurate, since the number of registrants was the same as previously discussed.[14] The Claimant retorted asking for detailed and transparent Letter of Access costs. It added that the company size criteria must also apply to such costs, thus asking for their recalculation based on its classification as a micro-sized enterprise.[15]

16. The Other Party sent the cost calculation details for [redacted]. It further explained that the cost reductions for small and medium sized enterprises (SMEs) apply to registration fees before ECHA but not to the Letter of Access costs, since these 'should be shared equally by all registrants'. The Other Party sent a link to a "Directors Contact Group" recommendation published by ECHA in this respect.[16]

17. On 12 September 2018, the Claimant wrote to the Other Party, asking, 'as anticipated by phone', for its 'authorization to import [redacted] of the substance using the Other Party's registration number. The Claimant asked for agreement and costs associated.[17] The Other Party replied on 14 September 2018 that it had registered the substance on behalf of its client and could not thus give the Claimant any authorization without its client's consent. The Other Party suggested forwarding the request to its client, so the matter could be further discussed. It asked the Claimant's agreement to do so.[18] The Claimant did not react to this e-mail.

18. On 17 April 2019, the Claimant informed the Other Party that it was going to introduce a dispute claim with ECHA. On the same day, the Claimant submitted a claim concerning the failure to reach an agreement on the sharing of information with the Other Party

C. Assessment

19. As explained in section A., ECHA assesses the efforts made by the parties in the negotiations that were outlined in section B.

20. The Other Party always replied promptly to the Claimant's messages, assisting the Claimant with point-by-point clarifications and sending links to support pages where more information could be found. It moreover provided, upon request, the detailed cost calculations for the letter of access for [redacted] of potential interest for the Claimant.

21. However, it induced the Claimant an error by stating that quantities imported before the registration deadline could no longer be placed on the market thereafter in volumes above 1 tpa. Moreover, it cannot require the Claimant to pay a 'REACH Consultation fee' by default

[12] The Other Party; 28 March 2018.
[13] The Claimant; 5 June 2018.
[14] The Other Party; 8 June 2018.
[15] The Claimant; 26 June 2018.
[16] The Other Party; 28 June 2018.
[17] The Claimant; 12 September 2018.
[18] The Other Party; 14 September 2018.

[redacted]

against the will of the Claimant. These points cannot be considered an effort to progress in data sharing negotiations.

22. The Claimant, on the other side, did not make any effort to react to the itemisation of costs proposed by the Other Party. If the Claimant considered the costs to be excessive, it should have addressed the breakdown presented by the Other Party, and which explained the Other Party's cost calculation. For example, it could have questioned the method used for the cost calculations, such as the fact that the general costs as a whole were to be borne by each individual registrant instead of split by all of them.

23. Instead, the Claimant let several months pass before sending another e-mail. This time, it indicated it would like to have the Lead Registrant's 'authorization' to import the substance. This message however was not directed at sharing data in order for the Claimant to submit its own registration. Then, another seven months passed, before the Claimant informed the Other Party that it was introducing a dispute.

24. The Claimant's attempt to negotiate a reduction of the share of costs to be paid on the basis that it is an SME is not as such an effort to find an agreement. An existing registrant need not offer a reduced share of costs to another company because it is an SME.

25. Making every effort would require the Claimant to continue the negotiations, communicate the concerns and questions clearly to the Other Party on the basis of the explanations given by the Other Party, and clarifying the scope of the request made.

26. It is hence clear that the Claimant did not do every effort to reach an agreement on the sharing of data.

D. Conclusion

27. The Claimant did not make every effort to reach an agreement on the sharing of information.

28. Therefore, ECHA does not grant the Claimant permission to refer to the studies.

[redacted]

Annex II: ADVICE AND FURTHER OBSERVATIONS[19]

- The Parties should continue the negotiations aiming to reach an agreement on the sharing of information.

- In particular, the parties could clarify the Claimant's data requirements and focus on discussing the itemised cost breakdown sent by the Other Party to the Claimant in June 2018. The administrative costs presented by the Other Party are introduced as overall costs to be borne by each registrant. The Claimant could challenge whether some of these costs, corresponding to one-time actions, could not also be divided by the total number of registrants. This would ease the financial burden of the registrants.

- The Other Party could also, in light of the "Recommendation to help small volume and SME registrants in registering", consider some possibilities to help facilitating the registration by the Claimant (file:///C:/Users/u18245/AppData/Local/Temp/171219_dcg_recommendation_low_volume_sme_en.pdf).

- While it is not an obligation, registrants are encouraged to ease the registration obligations for SMEs. One possibility is, for example, facilitating the payment of the data sharing costs by allowing them to pay in instalments.

[19] 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.