[redacted]

12 April 2019

The Claimant

[redacted]

Represented by

[redacted]

Copy to:
The Other Party

[redacted]

Represented by its law firm

[redacted]

Sent via REACH-IT

Reference number: [redacted]

INTENTION TO ISSUE A PERMISSION TO REFER AND ASSESSMENT OF EFFORTS

The European Chemicals Agency ('ECHA') has examined the dispute claim you submitted on 21 February 2019 with reference number [redacted], regarding the failure to reach an agreement with [redacted] on sharing of data pursuant to Article 27(5) of Regulation (EC) No 1907/2006 ('REACH Regulation')[1], for the substance [redacted] (the 'Substance') with EC number [redacted].

ECHA has examined the parties' respective efforts to reach an agreement on the sharing of the data and its costs in a fair, transparent and non-discriminatory way in accordance with

[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.

[redacted]

their obligation under Article 27 of the REACH Regulation, as reinforced by Articles 2 to 4 of the Commission Implementing Regulation (EU) 2016/9 on joint submission of data and data sharing in accordance with the REACH Regulation ('Implementing Regulation 2016/9')[2]. For this purpose, it assessed whether you have made every effort to find an agreement with the previous registrant.

On the basis of the documentation supplied, and pursuant to Article 5 of the Implementing Regulation 2016/9,

ECHA intends to grant you permission to refer to the information you requested from the Other Party and access to the joint submission.

The facts and the considerations forming the basis for this assessment can be found in the attached annex. **A final decision will be issued upon receipt of the proof that you have paid the Other Party a share of the costs incurred pursuant to Article 27(6) of the REACH Regulation**.

The REACH Regulation only gives ECHA a competence to examine whether the conditions for granting permission to refer are met (*i.e.* whether the parties have made every effort to find an agreement and a proof of the payment is provided). However, the REACH Regulation does not mandate ECHA to determine the appropriateness of the share of cost, which may eventually be subject to the assessment of a competent national court.

General observations

The outcome of a dispute procedure can never satisfy a party in the way a voluntary agreement would. Therefore, ECHA strongly encourages the parties to negotiate further, taking into account the attached assessment, in order to reach an agreement that will be satisfactory for both parties.

If a voluntary agreement is reached, please inform ECHA accordingly.

Please note that the decision of ECHA on this dispute will be published in an anonymised version on ECHA's website[3].

Contact

You can contact ECHA using the email address disputes@echa.europa.eu. Please state the above-mentioned reference number in any correspondence with ECHA in relation to this communication.

Yours sincerely,

Minna Heikkilä[4]
Head of Legal Affairs

[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.

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

[redacted]

Annex: ASSESSMENT

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 and access to the joint submission, if the claimant has made every effort to find an agreement on the sharing of the data and 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 Implementing Regulation 2016/9. As per Article 2 of the Implementing Regulation 2016/9, previous registrants must provide an itemisation of costs without undue delay.

3. Making every effort means that the previous 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. Each party must also be able to explain the specific requests it makes, in particular when such request goes beyond the information usually exchanged in data sharing 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 previous 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

4. This summary of facts is based on the documentary evidence submitted by the Claimant on 21 February 2019 and by the Other Party on 15 and 19 March 2019.

5. On 12 February 2018, [redacted] (the 'Other Party's Representative') contacted the Substance Information Exchange Forum ('SIEF') members for the Substance, providing the name of the lead registrant ([redacted], the 'Other Party'). It indicated that requests for Letters of Access ('LoA') should be sent to [redacted] (the 'Other Party's Consultant') and that the LoA procedure takes a couple of weeks before the potential registrants obtain the token and can proceed with the registration.

6. On 9 March 2018, the Claimant asked the Other Party's Representative for the costs for a [redacted] dossier, as well as '*the current SIP*' (i.e. the substance identity profile). The Other Party's Consultant provided this information on 13 March 2018.

7. On 22 May 2018, the Claimant asked for a SIEF agreement, which the Other Party's Consultant sent on the following day. On 25 May 2018, the Claimant sent back the signed SIEF agreement and asked for the corresponding invoice. Following two reminders by the

[redacted]

Claimant, the Other Party's Consultant sent the invoice on 28 May 2018. On the following day, the Other Party's Consultant confirmed the receipt of the payment from the Claimant and asked the Other Party's Representative to send the token, the name of the joint submission and the signed LoA to the Claimant.

8. Between several reminders by the Claimant on 30 and 31 May 2018, the Other Party's Representative indicated that it was acting as a third party representative and that it had contacted the Other Party, who was responsible for '*the decision of token delivery*'[5]. The Claimant asked why it could not receive the token, while it had already paid the invoice. After additional email exchanges with no further progress, the Claimant indicated that it would submit a dispute to ECHA.

9. The Claimant submitted a data-sharing dispute to ECHA regarding the Substance on 31 May 2018. It was recorded as dispute [redacted].

10. Early June 2018[6], the Claimant contacted again the Other Party's Representative, indicating that it had submitted a dispute to ECHA. It wondered why the Other Party was reviewing now '*the content of the SIEF Agreement and letter of access created by himself, or by a third party contracted by him*'. The Claimant further asked whether a solution could be reached in the next few days, since it had '*to make the submission* (…) *by 8 June 2018 at the latest*'.

11. On 4 June 2018, the Other Party's Representative indicated that it would try its best to mediate with the Other Party. In reply to three reminders sent by the Claimant on 6, 7 and 8 June 2018, highlighting the urgency in view of the deadline of 8 June, the Other Party's Representative explained on 7 and 8 June that it did not manage to reach the Other Party by phone.

12. On 2 August 2018, the Claimant contacted again the Other Party's Representative and the Other Party's Consultant, asking them to let the Other Party know that the Claimant was still interested in finding an agreement. On the same day, (i) the Other Party's Representative indicated that it was '*not any more involved with the [Other Party] regarding the dispute*' and provided the contact details of the Other Party and its law firm, and (ii) the Other Party's Consultant replied that it was '*also not involved regarding dispute resolution*'.

13. On the next day, the Claimant contacted the Other Party and its law firm. On 16 and 22 August 2018, the Other Party's law firm stated that it would revert to the Claimant in the course of the following week. On 29 August 2018, the Claimant sent a reminder.

14. On 21 September 2018, the Other Party's law firm asked the Claimant four questions: i) on the Claimant's '*[m]ain activity/business*', (ii) whether the Claimant '*will subscribe for herself or a subsidiary*', (iii) whether the Claimant [redacted]*/make[s] herself the [Substance]*', and (iv) '*[i]f not, where does the [Substance] come from*'. The Other Party's law firm further stated that it was important for the Other Party to know exactly the origin and quality of the Substance[redacted]

15. On 4 October 2018, the Claimant replied that the '*REACH Regulation do[es] not set [that] both parties have to share information about their businesses*'. However, the Claimant informed that it started its activity in [redacted] and produces [redacted]. Further, the Claimant referred to Article 11 of the REACH Regulation and indicated that its Substance was '*according to the [SIP] from the [Other Party] as the Regulation*

[5] Other Party; 31 May 2018.

[6] In the evidence provided by both parties, this message of the Claimant does not contain a date. However, based on the rest of the negotiations, ECHA understands that it was sent after 31 May but not after 4 June 2018.

[redacted]

establishes'. The Claimant referred to its exchanges with the Other Party's representative and consultant and stated that it had itself fulfilled its data sharing obligations by signing the requested form and paying the invoice and asked the Other Party to fulfil its obligations too.

16. After two reminders by the Claimant[7], the Other Party's law firm asked the Claimant on 20 November 2018 (i) why it had paid '*a sum to a* [redacted] *Organism in May'*, although the Other Party had not been informed of the Claimant's request, (ii) why the Claimant had signed the draft SIEF agreement '*before someone has sent this document to [the Other Party]*', and (iii) how the sum paid was '*arrived at'*. The Other Party's law firm further stated that it did not aim at challenging the Claimant's product but '*being understood the tremendous works required to obtain the REACH authorisation, [the Claimant] may understand that [the Other Party] is afraid of seeing another [Substance] too different of its own product*'. The Other Party's law firm indicated that, in the meantime, it would have a look at the contract received on 30 May 2018.

17. On 21 November 2018, ECHA issued a decision in dispute [redacted]. Assessing the efforts made by the parties up to 31 May 2018, it considered that the Claimant had not made every effort to find an agreement and did not grant it permission to refer to the requested information.

18. On 2 January 2019, a consultant contacted the Other Party on behalf of the Claimant (the 'Claimant's Consultant'). It recalled that the Claimant had still not received the token nor its money back seven months after making the payment and asked the Other Party to also make every efforts to find an agreement. The Claimant's consultant attached a document from the Commission dated November 2015 entitled '*Competition issues in the context of REACH SIEF*' and ECHA's Guidance on Data Sharing. In addition, the Claimant's consultant asked the Other Party to clarify whether the Other Party's Consultant and Representative were legally allowed to represent its interests. On 10 January, the Claimant's Consultant forwarded the same message to the Other Party's law firm in addition.

19. On 14 January, the Other Party's law firm agreed to the reimbursement of share of cost paid by the Claimant.

20. On 15 January 2019, the Claimant's Consultant reminded the Other Party's law firm that the Claimant still needed access to the joint submission for the Substance. Highlighting the urgency for the Claimant, it requested:
    (i) a cost justification in line with the Implementing Regulation 2016/9,
    (ii) a SIP, specifying that it is the Claimant's responsibility to make sure that its composition matches the SIP and that a request for confidential information was against competition law, and
    (iii) a proposed SIEF agreement.

21. On 18 January 2019, referring to a phone discussion between the parties, the Claimant's Consultant referred to the four questions asked by the Other Party's law firm on 21 September 2018. The Claimant's Consultant indicated that it could discuss about the two first questions, but not the two last. The Claimant's Consultant copied an FAQ from the Commission, indicating that under competition law, '*[c]ommercially sensitive information that should not be exchanged [between SIEF members] would include […] details of customers and sources of supply'*. The Claimant's Consultant further referred to a document by the European Chemical Industry Council ('CEFIC') on information sharing within SIEFs. The Claimant's Consultant asked again for the cost justification, the SIP and the proposed SIEF agreement

[7] Claimant; 18 October 2018, 9 November 2018.

[redacted]

and highlighted again the urgency of its request.

22. On 20 January 2019, the Other Party's law firm stated that it disagreed with the analysis of the Claimant's Consultant of the REACH Regulation. It further stated that since the Other Party '*is a very small company in comparison of [the Claimant]* […] *it is hardly imaginable that those information may have a competition impact for [the Claimant]*'. The Other Party's law firm added that '*it is required for a small company who has worked several years and invested a lot money in obtaining the REACH agreement to primary know whether the new claimant for [the Substance] submission can respect the protected substance*'.

23. After three reminders from the Claimant's Consultant[8], the Other Party's law firm contacted the Claimant's Consultant on 14 February 2019. It indicated (i) that it was gathering the *'global amount of the costs justification*', (ii) that it was reviewing the contract sent by the Claimant in June 2018, and (iii) that the Other Party was working with its expert for several months on a new SIP. Regarding the four questions it had asked on 21 September 2018, the Other Party's law firm indicated that it did not request anymore replies to the two first questions. For the remaining, the Other Party's law firm stated that it did not ask for the tonnage nor the name of the Claimant's supplier, but it asked '*whether [the Claimant] is reseller or a pure producer*' and, if the Claimant does not make itself the Substance, where the Substance comes from. The Other Party's law firm considered that these questions do not fall under the competition law provision and that specific information may be shared between parties if necessary. The Other Party's law firm expressed again its doubts regarding an 'unfair' competition between the Other Party ('*a very small company'*) and the Claimant.

24. On 20 February 2019, the Claimant's Consultant replied that it had not received any of the documents that the Other Party had promised (i.e. the proposed SIEF agreement, SIP, and cost justification). The Claimant's Consultant stated that the Other Party *'[was] aware of a deadline proposed by ECHA*' and that it was '*forced to submit a new dispute to ECHA, which has to be lodged before the aforementioned deadline*'. However, the Claimant's Consultant asked, for '*a proper justification as to why it is necessary to share the two questions regarding the origin (source of supply) of [the Claimant's Substance]*'. The Claimant's Consultant asked for the requested information as soon as possible.

25. On the same day, the Other Party's law firm indicated that it had gathered all the information, except the contract. However, it repeated that it was waiting for replies from the Claimant.

26. On the same day, the Claimant's Consultant asked again for a justification as to the need for replies to the two questions regarding the origin of the Claimant's Substance. It further stated that if the Claimant could understand an actual necessity to share this information, the parties '*may have to consider a trustee and a confidentiality agreement*'. It pointed out again that it was under time pressure and that the Other Party was 'using' the lead registrant role to force the Claimant to reveal confidential information. The Claimant's Consultant informed that, due to the deadline, it had to submit a new dispute.

27. On 21 February 2019, the Claimant submitted a claim under Article 27 of the REACH Regulation concerning the failure to reach an agreement on the access to the joint submission and the sharing of information with the Other Party at tonnage band [redacted].

[8] Claimant; 28 January, 4 February and 12 February 2019.

[redacted]

C. Assessment

28. As explained in section A, ECHA assesses the efforts made by the parties in the negotiations[9]. This assessment covers the whole negotiations between the parties regarding the sharing of data, as described in section B[10].

1) Consistency and honouring commitments

29. According to the evidence provided by the parties, three agents represented the Other Party during the negotiations: during the first part of the negotiations (until June 2018), the Other Party's Representative and the Other Party's Consultant; during the second part of the negotiations (from August 2018), the Other Party's law firm.

30. While the Claimant had signed a SIEF agreement provided by the Other Party's Representative and paid a share of costs in May 2018 based on a cost calculation and an invoice provided to it by the Other Party's Consultant, the Other Party did not recognise this agreement in the second part of the negotiations[11]. The Claimant had to request the Other Party to either fulfil its part of the agreement (i.e. providing a permission to refer) or to reimburse the share of costs paid in May 2018 several times[12]. The Other Party finally recognised that its Representative had received a payment in the first at of the negotiations, when it indicated that it would reimburse the sum paid[13]. However, it indicated that it would prepare new itemisation, SIP and data sharing agreement instead of relying on those provided earlier.

31. Making every effort means that parties need to behave in a consistent and predictable manner as reliable negotiators. Actions taken by agents of a party are valid for and against the party. Thus, the Other Party did not make every effort, when it did not recognise its commitments and instead announced that it would prepare new documents to replace the data sharing agreement, cost itemisation and SIP that had been sent earlier. In this respect, it does not matter whether the lack of consistency is attributable to a lack of organisation, coordination, or communication between the Other Party and its three agents. The lack of consistency delayed the negotiations and constitutes a lack of effort. By contrast, the Claimant entered in contact with the three agents, explaining its situation and highlighting its urgency[14]. By doing so, the Claimant showed efforts to make the negotiations progress.

[9] For the sake of clarity, when referring to the 'Claimant' in this section, ECHA considers both the Claimant and its Consultant.

[10] As per ECHA's Board of Appeal decision in case A-007-2016, *Sharda Europe B.V.B.A.* (in particular, paragraph 59).

[11] Ibid.

[12] In particular, Claimant; 30 and 31 Mai 2018, 4 October and 9 November 2018, 2 January 2019.

[13] Other Party; 14 January 2019 and Claimant; 15 January 2018.

[14] In particular, Claimant; 28-31 May and 6 June 2018; 10, 15 and 18 January and 4, 12 and 20 February 2019.

[redacted]

2) On the lack of provision of the basic information requested by the Claimant for data sharing

32. As mentioned above, the Other Party[15] did not consider the SIP, cost itemisation and data sharing agreement provided in the first part of the negotiations applicable.

33. The Other Party indicated on 20 February 2019 that the SIEF agreement was still not ready. Regarding the SIP and the cost justification, the Other Party stated that it would provide the documents only after having received replies from the Claimant on some specific questions asked by the Other Party on 21 September 2018. These questions related to (i) the Claimant's '*[m]ain activity/business'*, (ii) whether the Claimant '*will subscribe for [it]self or a subsidiary*', (iii) whether the Claimant '[redacted]*/make[s] [it]self the [Substance]*', and (iv) '*[i]f not, where does the [Substance] come from*'[16].

34. To support this demand to know the origin of the Claimant's substance[17], the Other Party i) referred to the risk of seeing a product too different from its own[18] and the need to '*respect'* the Substance[19] ii) stated that [redacted][20] and iii) referred to the amount of work needed to register[21]. It did not explain how these considerations could justify a demand to be informed of the source of supply of the Claimant.

35. The Claimant replied that the Other Party was not [redacted]. It explained that it is in breach of competition law to share information on suppliers and referred to documents from the European Commission and CEFIC on the matter[22]. The Other Party pointed to the difference in size between the parties[23], but did not explain why the difference in size would justify the disclosure of confidential information. It did not explain why it would be necessary to share information that competitors normally must not share, nor why there would not be any competition between the parties. Hence, the Other Party did not counter the Claimant's argument.

36. The Claimant also asked the Other Party to justify its demand for information on the source of the Claimant's substance[24]. However, the Other Party did not reply nor explain how its questions on the source of the Claimant's substance could be relevant in data-sharing negotiations.

37. In sum, the Other Party made the provision of the documents conditional on the Claimant disclosing the source of its supply. When the Claimant pointed to confidentiality and competition concerns, the Other Party could not show how the disclosure of the Claimant's source of supply would be relevant. The Other Party also could not respond to the Claimant's

[15] References to the 'Other Party' in this section cover the Other Party, the Other Party's Consultant, the Other Party's Representative and the Other Party's law firm.

[16] Other Party; 21 September 2018. The Other Party repeated those questions on 20 January and 14 February 2019.

[17] Other Party; 21 September 2018.

[18] Other Party; 20 November 2018.

[19] Other Party; 20 January 2019.

[20] Other Party; 21 September 2018.

[21] Other Party; 20 November 2018 and 20 January 2019.

[22] Claimant; 2 and 18 January 2019.

[23] Other Party; 20 January and 14 February 2019.

[24] Claimant; 20 February 2019.

[redacted]

concerns with sharing information on its supply chain under competition law.[25]

38. An itemisation of the costs, an explanation of the general identity of the substance that is covered in a registration and a SIEF agreement with an explanation of the terms of the agreement and the cost sharing mechanism are essential for any data sharing negotiations. Without knowing what studies nor what agreement it is negotiating, and how the share of the costs has been calculated, a potential registrant is on bare ground and can hardly contribute to finding an agreement. Therefore, the Implementing Regulation 2016/9 has introduced a requirement for existing registrants to provide such fundamental information without undue delay. Given that the Other Party and its agents had not provided a cost itemisation, a SIP document or a draft SIEF agreement, which they considered valid after 11 months of negotiation, they had not made the minimum effort required by the Implementing Regulation 2016/9, and the Claimant did not even have the information necessary to start negotiating.

39. Therefore, on the one hand, the Claimant tried to make the negotiations progress by clearly requesting information based on the Implementing Regulation 2016/9, highlighting the urgency and explaining its concerns in reply to the Other Party's questions with documents published by the Commission and CEFIC. On the other hand, by insisting on receiving information that is in principle confidential without justifying the request based on the REACH Regulation or other regulatory texts, the Other Party effectively blocked the negotiations. Further, by not providing a cost justification and SIEF agreement within a reasonable timeline, the Other Party acted in breach of Article 2 of the Implementing Regulation 2016/9.

D. Conclusion

40. In light of the above, the Claimant made every effort by contacting the three agents involved on the side of the Other Party, clearly requesting the information it needed, explaining its concern regarding the sharing of information on the origin of its substance and highlighting the urgency of its situation. By contrast, the Other Party showed inconsistency during the negotiations, never provided a cost justification, an updated SIP and a reviewed SIEF agreement, did not justify its request for the origin of the Claimant's substance and did not take into account the urgency faced by the Claimant.

41. Therefore, the Claimant made every effort to reach an agreement on the sharing of information, while the Other Party did not make every effort.

[25] Indeed, also Article 118(2)(d) of the REACH Regulation refers to information on a company's supply chain as confidential business information.