

**DECISION OF THE CHAIRMAN OF THE BOARD OF APPEAL
OF THE EUROPEAN CHEMICALS AGENCY**

5 February 2014

Request for confidential treatment of certain information

(Confidentiality request in the notice of appeal – Information required for the appeal announcement and the final decision – Name of the Appellant – Name of the substance)

Case number Joined cases A-011-2013 to A-015-2013

Appellant [CONFIDENTIAL]

Representative HÜLSEN MICHAEL HAUSCHKE SEEWALD Rechtsanwälte
Berlin
Germany

Contested Decisions [CONFIDENTIAL]

all Contested Decisions were adopted by the European Chemicals Agency (hereinafter the 'Agency') pursuant to Article 20(2) of Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (OJ L 396, 30.12.2006, p. 1; corrected by OJ L 136, 29.5.2007, p. 3) and Article 3(6) of the Commission Regulation (EC) No 340/2008 on the fees and charges payable to the European Chemicals Agency (OJ L 107, 17.4.2008, p. 6)

THE CHAIRMAN OF THE BOARD OF APPEAL

gives the following

Decision

SUMMARY OF THE RELEVANT FACTS

1. On 9 September 2013, in cases A-011-2013, A-012-2013, A-013-2013, A-014-2013 and A-015-2013, the Appellant filed five appeals at the Registry of the Board of Appeal, contesting the respective Contested Decisions. On 10 October 2013, the Board of Appeal decided to join the cases.

2. The notices of appeal contained a request for confidential treatment of certain information contained in the appeals. The Appellant requested that the name, address and further details of the Appellant's company (the 'identity of the Appellant'), and the names of the substances affected by the Contested Decisions be treated as confidential information.
3. The Appellant justified its confidentiality request by arguing, first, that the publication of the information for which it requested confidential treatment may have serious adverse repercussions on its business should its business' partners find out about the Contested Decisions; second, that its request should be granted as special consideration should be observed vis-à-vis small and medium sized enterprises (SMEs) as underlined in the REACH Regulation; third, that the gravity of the violation, i.e. insufficient payment of the registration fee, does not justify the publication of Appellant's data; fourth, that an addressee of a decision pursuant to Article 20(2) of the REACH Regulation is in need of special protection, as recognised by the Board of Appeal in its decision in appeal case A-001-2010. Finally, the Appellant argues that confidential treatment for the requested information would not affect the purpose of publishing lodged appeals, that is transparency of the decision-making of the Board of Appeal as the description of the facts and arguments in the case remain comprehensible even without that information.
4. On 29 October 2013, the Agency lodged a request for stay of proceedings pursuant to the first paragraph of Article 25 of Commission Regulation (EC) No 771/2001 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency (OJ L 206, 2.8.2008, p. 5; hereinafter the 'Rules of Procedure'). In its request the Agency stated that it had opened discussions with the Appellant with a view to the possible settlement of the joined cases and that it anticipates that the settlement discussions should be completed by the end of 2013.
5. In view of the above, and in particular as both Parties support the stay of proceedings, the Board of Appeal decided to stay the proceedings until 31 January 2014. On 31 January 2014 the Agency requested a prolongation of the stay of proceedings.
6. In the request for an extension of the stay of proceedings the Agency stated that 'ECHA and the Appellant have in principle agreed on the terms of the settlement'. The Agency also indicates that as a consequence of the settlement agreement the Appellant commits to withdraw the appeal.

REASONS

7. By its confidentiality request, the Appellant in principle seeks to ensure that, its name and names of the registered substances affected by the Contested Decisions are regarded as confidential vis-à-vis third parties.
8. Before analysing the substance of the Appellant's confidentiality request and by way of a preliminary remark, the Chairman observes that Article 6(6) of the Rules of Procedure creates the obligation to publish on the Agency's website an announcement concerning every appeal brought before the Board of Appeal. Similarly, Article 21(5) of the Rules of Procedure requires the Board of Appeal to publish all final decisions.
9. As a reflection of these two provisions, requests for confidential treatment before the Board of Appeal are raised in connection with public proceedings that serve, in addition

to an appellant's private interest, also a wider public interest. Accordingly, the Chairman, when called upon to decide on a request for confidential treatment, must have regard not only to the appellant's private interest in protecting confidential information but also to the general public interest in transparency, the public's right to know about proceedings that take place before the Board of Appeal, as well as the specific public interests guaranteed by the REACH Regulation, in particular the protection of human health and the environment. This assessment should be performed on a case by case basis taking into consideration the specific circumstances of the case.

10. In addition, it should be remembered that, pursuant to Article 8(2) of the Rules of Procedure, applications to intervene must be submitted within two weeks of publication of the announcement. The publication of an announcement is therefore essential and allows potential applicants to intervene to exercise their rights.
11. Considering the circumstances of this confidentiality request, regard should be had that the Agency has informed the Board of Appeal that the Appellant is an SME and has apparently found it difficult to follow up on communications addressed to it on regulatory matters. Considering these circumstances and in particular the SME status of the Appellant which makes it more economically vulnerable, the Chairman considers that the Appellant's concerns over adverse repercussions on its business of the release of the information requested to be treated as confidential should be taken into account when deciding on the confidentiality claim.
12. It is in light of the above considerations that the Appellant's confidentiality request will be examined with a view to determining whether information covered by the Appellant's request is to be kept confidential in the announcement and in the final decision to be taken by the Board of Appeal in the present case.

Assessment of the Appellant's confidentiality request

13. The issue to be decided by the Chairman is whether or not to regard the identity of the Appellant and the names of the registered substances affected by the Contested Decisions as confidential for the different steps of the appeal proceedings as requested by the Appellant.
14. In relation to the Appellant's request to regard its identity as confidential, the Chairman observes that, the information required for the announcement is set out in Article 6(6) of the Rules of Procedure and the Decision of the Board of Appeal of 30 September 2009 on implementing the rules on publication of an announcement of the notice of appeal on the website of the Agency. The provisions provide that the announcement shall include the name and address of the appellant, the subject matter of the proceedings, the remedy sought by the appellant, and a summary of the pleas in law and the main supporting arguments.
15. Moreover, as regards the possibility to intervene in a case before the Board of Appeal as provided in Article 8 of the Rules of Procedure an appeal announcement should provide potential applicants to intervene with the necessary information on the appeal to establish whether they have an interest in the result of the case. Considering that, the legitimate interests of potential interveners might be adversely affected if it is decided that the identity of the appellant should not be disclosed. This could for instance be the case as regards the customers of an appellant. In this respect it should also be noted that interveners may also be in a position to support the appellant because of their own specific interests.
16. However the Chairman considers that in the circumstances of this particular case, namely that before announcing the appeal the Appellant and the Agency have agreed in principle on the terms of the settlement and subsequently the Appellant will withdraw

the appeal, there will be no possibility for potential intervenor to participate in this case. Therefore, the Chairman is of the opinion that in the present case, no legitimate interests of interveners would be affected by accepting the Appellant's confidentiality request.

17. As regards the public interest to give transparent information on the Board of Appeal work, the Chairman considers that this public interest is accordingly taken into account in the circumstances of this particular case, where a settlement has been agreed in principle and the appeal will be subsequently withdrawn, by giving enough information on the description of the facts and arguments in a way that the case remains comprehensible even without the information on the Appellants' identity and names of the substances concerned in the appeals.
18. Moreover, the subject-matter of the present case relates, in principle to an administrative issue within the registration process under the REACH Regulation and will not negatively impact the main objectives of the REACH Regulation, namely to ensure a high level of protection of human health and the environment. Furthermore, treating the identity of the Appellant and the names of the substances concerned as confidential in this particular case may support another of the objectives of the REACH Regulation, namely enhancing competitiveness. The Chairman also notes that 'special account should be taken of the potential impact of this Regulation on small- and medium-sized enterprises (SMEs) and the need to avoid any discrimination against them'.
19. For the above reasons, the request not to disclose the identity of the Appellant is accepted.
20. In relation to the Appellant's request to regard the names of the registered substances affected by the Contested Decisions as confidential, the Chairman observes that, the name of the substance affected by a contested decision is not specifically required by Article 6(6) or Article 21(1) of the Rules of Procedure for the announcement or the final decision. The Chairman also considers that, in the present appeal proceedings the names of the substances affected by the Contested Decisions are not necessary to allow an understanding of the present case or for the purpose of allowing potential interveners to exercise their rights. In that respect, there is no public interest in the disclosure of the names of the substances affected by the Contested Decisions as part of the present proceedings.
21. As a result, in the present case, it is not necessary for the Chairman to analyze whether the public interest in the disclosure of the information related to the names of the substances affected by the Contested Decisions overrides the commercial interests of the Appellant as articulated in its confidentiality request.
22. For these reasons, the names of the substances affected by the Contested Decisions shall not be included in the announcement of the notice of appeal or the final decision to be published on the Agency's website.

ORDER

On those grounds,

THE CHAIRMAN OF THE BOARD OF APPEAL

hereby:

Decides the Appellant's identity shall not be disclosed in the appeal announcement or in the published version of the Chairman's confidentiality decision or in the published version of the Board of Appeal's final decision.

Decides that the names of the substances affected by the Contested Decisions shall not be disclosed in the appeal announcement or in the published version of the Board of Appeal's final decision.

Mercedes ORTUÑO
Chairman of the Board of Appeal