

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

4 July 2012

Request for confidential treatment of certain information

*(Confidentiality request in the notice of appeal - Chemical substance name – CAS number –
Registration number – Information required for the appeal announcement and the final
decision)*

Case number	A-003-2012
Language of the case	English
Appellant	THOR GmbH Germany
Representative	Mr Martin Ahlhaus Noerr LLP Brienner Straße 28 80333 München Germany
Contested decision	CCH-D-0000001752-76-06/F of 28 February 2012 adopted by the European Chemicals Agency (hereinafter the 'Agency') pursuant to Article 41(3) 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; hereinafter the 'REACH Regulation')

THE CHAIRMAN OF THE BOARD OF APPEAL

gives the following

Decision

SUMMARY OF THE FACTS

1. On 25 May 2012, the Appellant filed an appeal at the Registry of the Board of Appeal against the contested decision.
2. In accordance with Article 6(1)(g) 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'), the notice of appeal contained a request that certain of the Annexes to the notice of appeal should be regarded as confidential.
3. On 6 June 2012, the Appellant was asked *inter alia* to clarify which of the information contained in the notice of appeal it requested to be treated as confidential and to provide reasons for that request.
4. By letter received at the Registry of the Board of Appeal on 20 June 2012, the Appellant informed the Board of Appeal that it requested confidential treatment of the chemical substance name, the CAS number and the registration number. The Appellant also identified the location of that information in its submissions. In addition, the Appellant stated that the request relates to the announcement of the notice of appeal and the final decision. The Appellant also requested confidential treatment of that information with regards to potential interveners in the case, any hearing within the meaning of Article 13 of the Rules of Procedure, and any procedural measures within the meaning of Article 15 of the Rules of Procedure.

GROUNDINGS OF THE REQUEST

5. The grounds provided by the Appellant to justify its request that the chemical substance name, the CAS number and the registration number be regarded as confidential can be summarised as follows:
 - The appeal concerns a notified new substance, the IUCLID name of which is treated as confidential in accordance with Article 119(2)(f) of the REACH Regulation;
 - Disclosure of this information would harm the Appellant's commercial interest as it would allow its competitors to benefit from its research on new and existing applications of a 'chemical class of substances' it has developed.
6. The Appellant also claims that the Agency has accepted its registration update for the substance concerned with an alternative chemical name according to Article 24 of Regulation (EC) No 1272/2008 of the European Parliament and of the Council on the classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (OJ L 353, 31.12.2008, p. 1) and that the substance should therefore be referred to as an 'organic nitrogen-phosphorous compound' throughout the present proceedings.

REASONS

7. In accordance with the second subparagraph of Article 6(6) of the Rules of Procedure, the Chairman of the Board of Appeal shall decide on the Appellant's request for confidential treatment.

8. The issue to be decided by the Chairman in this Decision is whether or not to regard the chemical substance name, the CAS number and the registration number as confidential as requested by the Appellant. This requires inter alia an assessment of the legitimacy of the private interest opposing disclosure of information weighed against the public interest.

Scope of the confidentiality request

9. The Chairman firstly wishes to clarify the scope of the issues to be decided in the present Decision.
10. Pursuant to Article 6(6) of the Rules of Procedure, the Chairman shall decide whether information indicated by an Appellant as confidential in a notice of appeal should be regarded as such and shall ensure that confidential information is not published when an appeal is announced on the Agency's website. The same obligation to protect confidential information also applies to any final decision of the Board of Appeal. To that effect, Article 21(5) of the Rules of Procedure provides that decisions of the Board of Appeal shall be published in full, unless the Chairman decides otherwise upon a reasoned request of a party.
11. In this respect, the Chairman's Decision is limited to whether or not to regard the chemical substance name, the CAS number and the registration number as confidential in relation to the announcement of the appeal (hereinafter the 'announcement') and eventually the final decision of the Board of Appeal which are published on the website of the Agency.
12. For the sake of completeness, it should be added that should the Board of Appeal accept one or more applications to intervene in the present appeal proceedings pursuant to Article 8 of the Rules of Procedure, the Chairman shall request non-confidential versions of the parties' submissions which shall then be served on the interveners. In the event that an intervener contests the confidential treatment of the information contained in the non-confidential versions of those documents, the Chairman shall decide on the confidentiality of that information vis-à-vis the interveners.

Information required for the announcement and the final decision

13. As a second step in the examination of the request for confidentiality, the Chairman is required to establish whether the information for which confidential treatment is requested is in fact necessary for the announcement and the final decision.
14. In this respect, the chemical substance name, the CAS number and the registration number are not explicitly included amongst the information required for the announcement by the first subparagraph of Article 6(6) of the Rules of Procedure or 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. Similarly, it should be noted that this information is not specifically mentioned in Article 21(1) of the Rules of Procedure as being necessary for the final decision.
15. Nonetheless, it is the Chairman's duty to assess in each individual case what information is necessary for the announcement and the public version of the final decision having due regard inter alia to the public and private interests at stake.

16. In relation to the registration number, the Chairman considers that this information is not necessary to allow an understanding of the present case. Furthermore, the registration number is not necessary for the purposes of allowing potential interveners to exercise their rights since that information does not directly relate to the issues raised in the appeal. In that respect, there is no public interest in the disclosure of the registration number.
17. For these reasons and having balanced all the relevant factors of the case, the request for non-disclosure of the registration number is accepted.
18. As regards the possible non-disclosure of the chemical substance name and the CAS number, the Chairman notes that the issue under appeal is predominantly of a procedural nature, as the Appellant claims in essence that the contested decision is based on an out-dated version of the registration dossier, which it had updated prior to the adoption of the contested decision.
19. The Chairman considers therefore that precise references to the chemical substance name and the CAS number are not necessary for an understanding of the particular circumstances of the present case. Furthermore, that information is not necessary to permit potential interveners to exercise their rights since it does not directly relate to the issues raised in the appeal. Consequently, there is no public interest in the disclosure of that information. For the purposes of the announcement and the final decision, the Chairman considers that, in accordance with the request of the Appellant, it is sufficient to refer to the substance as an 'organic nitrogen-phosphorous compound'. The Chairman notes that this name was also used in the minutes of the 21st Meeting of the Member State Committee (MSC-21) at which the contested decision was discussed and that those minutes are available on the Agency's website.
20. Since the information for which confidential treatment is requested is not necessary for the announcement or the final decision, the Chairman is not required to examine, for the purposes of the present Decision, the existence and legitimacy of the commercial interests claimed by the Appellant or to analyse whether the disclosure of that information would harm those interests.
21. For these reasons and having balanced all the relevant factors of the case, the request for non-disclosure of the chemical substance name and the CAS number is accepted.

ORDER

On those grounds,

THE CHAIRMAN OF THE BOARD OF APPEAL

hereby:

Decides to accept the request for confidential treatment of the chemical substance name, the CAS number and the registration number. This information will not be included in the announcement of the notice of appeal or the final decision which will be published on the website of the Agency.

Mercedes ORTUÑO
Chairman of the Board of Appeal