

**Decision of the Chairman of the Board of Appeal of the European Chemicals Agency  
of 15 October 2009**

**regarding a request for confidential treatment of information in the course of appeal  
number A-001-2009**

**Appellant:** Specialty Chemicals Coordination Center sa/nv,  
Rue Emile Vandervelde, 131, 4431 Loncin, Belgium

represented by Field Fisher Waterhouse LLP, L’Arsenal, Boulevard Louis Schmidt 29,  
1040, Brussels, Belgium

The Chairman of the Board of Appeal gives the following

**DECISION**

**Summary of the facts**

- 1 On 16 September 2009, the applicant lodged an appeal before the Board of Appeal against a decision taken by the European Chemicals Agency (ECHA) rejecting the registration of a substance.
- 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. 8), the notice of appeal contained a request that both the identification of the appellant and the specific name of the substance concerned as well as details contained in the appeal that would tend to reveal the identification thereof be regarded as confidential.
- 3 On 23 September 2009, the Chairman of the Board of Appeal requested the appellant to provide the following additional information regarding the confidentiality request:
  - a clarification of the steps of the procedure for which confidentiality is requested and the specific reasons justifying the request,
  - a detailed indication of what information should be regarded as confidential, including the relevant words, figures and/or passages included in the notice of appeal, and
  - a more detailed justification for the request, providing in particular the reasons why and how the disclosure of specific information could undermine the commercial interests of the appellant.

- 4 On 2 October 2009, the appellant duly lodged a document containing further explanations and justifications for the request for confidential treatment of certain passages of the appeal and enclosed two different non-confidential versions of the notice of appeal. Another document was lodged on 7 October 2009, specifying additional elements to be taken into account in the non-confidential versions.
- 5 In accordance with the second subparagraph of Article 6(6) of Regulation (EC) No 771/2001 the Chairman of the Board of Appeal shall decide on the request for confidentiality made by the appellant.

### **Grounds of the request**

- 6 The appellant requests that its identity and the identification of the substance subject to the decision of ECHA be regarded as confidential. The grounds provided by the appellant to justify its requests can be summarized as follows:
- any publication or making available of that information would inevitably harm its commercial interests,
  - the disclosure will damage its reputation,
  - information that the registration dossier has been rejected by ECHA may lead its customers to decide to switch suppliers and its competitors will be able to use this information in order to attempt to take over the appellant's market share. The appellant considers that it would be difficult to recoup that market share, even if the appeal is successful.
- 7 The appellant's additional justifications relating to its request that the name of the substance be regarded as confidential can be summarized as follows:
- the arguments related to the contested decision are objective and strictly related to information submitted in the context of the registration dossier, and the presentation in the IUCLID 5 format, such information being unrelated to the identity of the substance,
  - non-disclosure of this information will have no effect on the ability of the intervening parties to assert their rights.

With regards to the request that the appellant's identity be regarded as confidential, the applicant refers to the reasoning given above and argues further that:

- according to Article 6(1)(g) of Regulation (EC) No 771/2008, there is no limitation as to the type of information that can or cannot be protected as confidential,
  - the second subparagraph of Article 6(6) of that Regulation allows the Chairman to decide to treat any information submitted in the notice of appeal as confidential, and spells out that the Chairman has the responsibility "*to ensure that any information which is regarded as confidential is not published in the announcement*".
- 8 Moreover the appellant refers to Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) which provides that the institutions shall refuse access to a document where disclosure would undermine the protection of the commercial interests of a natural or legal person, unless there is an overriding public interest in disclosure.

## Reasons

- 9 The request relates to Article 6(1)(g) and the second subparagraph of Article 6(6) of Regulation (EC) No 771/2001.
- 10 The issue to be decided by the Chairman is whether or not to regard the identity of the appellant and the identification of the substance as confidential for the different steps of the appeal proceedings as requested by the appellant. This requires an assessment of the legitimacy of private interests opposing disclosure of information weighed against the public interest at large.
- 11 As a first step in the assessment it is necessary to analyze the presence and legitimacy of the commercial interests claimed by the appellant which in this case is to maintain its clients and sales while the appeal process is pending. Secondly, it is necessary to analyze whether the disclosure of the two categories of information for which confidentiality is claimed would harm these interests.

Furthermore, it is necessary to analyze the public interest in the disclosure of the information in question and whether that public interest overrides the commercial interests of the appellant. This analysis needs to be conducted by taking into account the purpose of the REACH registration procedure and system at large as well as the underlying principles and individual provisions of the REACH Regulation (Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) - OJ L 396, 30.12.2006, p. 1, as corrected by OJ L 136, 29.5.2007, p. 3).

- 12 Providing transparency on information regarding chemical substances and their uses is one of the main objectives of the REACH Regulation. It is expressly provided in Article 1 of that Regulation that its purpose is “[...] to ensure a high level of protection of human health and the environment [...]”. Furthermore, Recital 14 of the REACH Regulation states that the Regulation “will generate information on substances and their uses. Available information should be used by the relevant actors”. Recital 19 provides further that in order to meet their obligations, as well as for transparency reasons, registration requires registrants “to submit a dossier containing all [this] information to the Agency”.

Through the REACH Regulation, the Community legislature has sought to establish not only administrative procedures for sharing information on substances but also in accordance with Article 109 a right of public access to information relating to “[...] regulatory, scientific or technical information concerning the safety of substances [...] which is not of a confidential nature”.

- 13 Article 1 of the REACH Regulation provides that its aim is not only to “ensure a high level of protection of human health and the environment” but also to enhance “[...] competitiveness and innovation”. Within this general framework, the commercial interests of the actors involved are also protected by the REACH Regulation.

- 14 More specifically, Article 118 of the REACH Regulation provides that Regulation (EC) No 1049/2001 applies to ECHA. This Regulation establishes in Article 4 the general principle of public access to documents in possession of the institutions and foresees some exceptions to this general rule. By virtue of one of the exceptions provided in Article 4(2) the institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, unless there is an overriding public interest in disclosure.
- 15 Accordingly, the REACH Regulation provides measures to prevent the undermining of commercial interests related to the disclosure of information.
- 16 Article 118(2) of the REACH Regulation provides a list of information that shall normally be deemed to undermine the protection of the commercial interests of the person concerned. That information can be summarised as follows:
- details of the full composition of a preparation,
  - the precise use, function or application of a substance,
  - the precise tonnage of the substance or preparation manufactured or placed on the market,
  - links between a manufacturer or importer and his distributors.

This Article also foresees that this information may however be disclosed if urgent action is essential to protect human health, safety or the environment, such as emergency situations (overriding public interest).

- 17 Furthermore, Article 119 of the REACH Regulation provides that certain information can be excluded from disclosure if the registrant submits an acceptable justification as to why such publication is potentially harmful for its commercial interests. Amongst various types of information, the trade name of the substance is listed as a piece of information which may be exempted from public disclosure for this reason.

In the present case it has to be taken into account that disclosing both the identity of the substance and the identity of the appellant reveals a combination of information which in certain cases might enable the public, and in particular competitors, to find out the trade name of the substance in question, and therefore could represent an implicit disclosure thereof.

- 18 Consequently, it is possible to regard the substance's identification as confidential if the disclosure could result in a potential commercial harm for the concerned person. In this particular case the appellant seeks to justify the potential harm by arguing that the immediate knowledge by its competitors of the rejection of the substance registration could be used in order to attempt to take over its market share by referring to the appellant's rejected registration in order to convince customers to buy the competitors products instead. It is argued further that this harm would be difficult to repair, even if the appeal is successful.
- 19 Having identified this potential harm to the commercial interests of the appellant as a legitimate private interest to be protected, it is necessary to test whether there is an overriding public interest in the disclosure of (a) the identity of the appellant and/or (b) the name of the substance.

- 20 Relating to the rights of potential interveners, the appellant argues that the non-disclosure of *the name of the substance* would not have any effect on the ability of the intervening parties to assert their rights and to state their case because the arguments related to the contested decision are objective and strictly related to the information in the context of the registration procedure.
- 21 As regards the possible non-disclosure of the name of the substance, it shall be taken into account that the issue under appeal is of a procedural nature since at this stage of the procedure a decision of the Agency is not based on an assessment of the quality or the adequacy of any data or justifications submitted in the registration dossier. Consequently, in this particular case it is not possible to find such a public interest in the disclosure of the name of the substance which would override the legitimate interest of the appellant.
- 22 For these reasons and having balanced all the relevant factors of the case, the request of non-disclosure of the identity of the substance is allowed.
- 23 As regards the request to also regard the appellant's identity as confidential, some guidance by analogy on the consideration of the name of the parties in the EU procedures as confidential can be found in Regulation No 17, the first Regulation implementing Articles 85 and 86 of the Treaty (OJ P 13, 21.2.1962, p. 204) in the field of competition in the common market. Article 21 of that Regulation stipulates the minimum content of the publication of the Commission decisions affected by secrecy: “[...] *the publication (of the EC decisions) shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.*”
- 24 With regards to the REACH Regulation, it is noted that the name of the registrant is not included in the list set out in Article 118(2) or in the list of possible exemptions for disclosure given in Article 119(2) (information susceptible to undermine commercial interest).
- 25 Furthermore, the first subparagraph of Article 6(6) of Regulation (EC) No 771/2008 establishing the Rules of Procedure of the Board of Appeal lists the elements that shall be contained in the announcement of the appeal and mentions expressly the names and addresses of the parties. In the opinion of the Chairman, this explicit inclusion implies a public interest in disclosure (i.e. transparency in the action of a public body) which in the present case has not been justified to the contrary.
- 26 Moreover, the announcement of the appeal must provide potential interveners with the necessary information and the information about the identity of the appellant constitutes a minimum piece of information guaranteed by the first subparagraph of Article 6(6) of Regulation (EC) No 771/2008.

This is consistent with the general principle that the right to have one's commercial interests protected should be balanced against the *rights of defence* (see e.g. Case T-30/91 *Solvay v Commission* [1995] ECR II-1775, para. 88). Consequently, it needs to be taken into account that the rights of defence also apply to potential interveners in the case.

- 27 With regards to the rights of potential interveners, the appellant argued that the non-disclosure of the identity of the appellant would not have any effect on the ability of the intervening parties to assert their rights and to state their case, particularly because “*the arguments presented in the notice of appeal leading to the rectification of annulment of the contested decision are not based on attributes related to the appellant*”. However, this argument cannot be accepted, since it cannot be excluded that the non-disclosure of the identity of the appellant would unduly restrict the legitimate interests of potential interveners. This could for instance be the case as it concerns the customers of an appellant. In this respect it can also be noted that interveners may for example be in a position to positively reinforce the case of an appellant because of their own specific interests at stake.
- 28 In addition, it can be noted that being a party to the appeal process and exercising the rights conferred by Article 20(5) of the REACH Regulation is an essential element of the legal redress system created by the REACH Regulation and as such it does not imply a negative effect per se on the reputation of a company. It is fundamentally the exercise of a legitimate right of a party with respect to a difference of opinion concerning a decision made by ECHA which holds the responsibility of managing the registration system created by the REACH Regulation.
- 29 For these reasons and having balanced all the relevant factors, the request not to disclose the identity of the appellant is not admitted.

## **Order**

For those reasons,

### **THE CHAIRMAN OF THE BOARD OF APPEAL**

hereby,

- 1. Decides to regard as confidential the information concerning the identification of the substance. This information will not be published in the announcement of the notice of appeal on the website of ECHA and can be excised in the non-confidential version of the notice of appeal to be provided by the appellant following the notification of this decision.**
- 2. Decides to reject the request for confidential treatment of the information concerning the identity of the applicant which needs to be taken into account in the non-confidential version of the notice of appeal.**

Mercedes Ortuño  
Chairman of the Board of Appeal of the European Chemicals Agency