

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

5 September 2011

Request for confidential treatment of certain information

*(Information in documents communicated to a third party – Circumstances enabling the
Chairman not to examine a confidentiality request)*

Case number	A-001-2010
Language of the case	English
Appellant	N.V. Elektriciteits – Produktiemaatschappij Zuid-Nederland EPZ Borssele The Netherlands
Representative	C.H.M. Verwijs – van Fraassen N.V. Elektriciteits – Produktiemaatschappij Zuid-Nederland EPZ Zeedijk 32 4454 PM Borssele The Netherlands
Contested decision	SUB-D-2114130952-53-01/F of 24 September 2010 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) (hereinafter the 'REACH Regulation')

THE CHAIRMAN OF THE BOARD OF APPEAL

gives the following

Decision

SUMMARY OF THE FACTS

1. On 21 December 2010, the appellant filed an appeal at the Registry of the Board of Appeal against the contested decision, which rejects the registration because of the late payment of the fee for registration and states that the received registration fee will not be reimbursed.
2. On 22 July 2011, the Agency applied for confidential treatment of certain information contained in Annexes Q 1 a) and b) to the Agency's observations submitted to the Board of Appeal on the same date. The information for which confidential treatment has been requested consists of the name and contact details of the company and the submission number. The information was contained in a Technical Completeness Check (TCC) letter and related invoice (hereinafter the 'documents') that the Agency communicated to a registrant unrelated to this appeal.
3. On 23 August 2011, following the Registry's request to clarify the scope of its confidentiality request, the Agency submitted its clarification. The Agency specified that the information was requested not to be disclosed to the appellant or third parties to the proceedings.

GROUND OF THE REQUEST

4. The Agency bases its confidentiality request on the REACH Regulation, in particular Article 119(1) and (2) thereof.
5. The Agency argues that divulging the information which it requests to be kept confidential, and that is not yet available on the Agency's website, would potentially harm the commercial interests of the company referred to in the documents by making third parties aware of its submission to the Agency. The Agency argues further that since the parts of the evidence for which confidentiality is requested are not directly related to the subject matter of the dispute between the main parties, the Board of Appeal does not need to rely on this information. Moreover, the Agency argues that the information relates to a registrant who is neither party to, nor in any other way concerned by, the subject of the present appeal proceedings.
6. Alternatively, if its confidentiality request is not accepted, the Agency requests the Board of Appeal to replace the previously submitted Annexes Q 1 a) and b) with Annexes P 1 a) and b) which were submitted with the Agency's submission of 23 August 2011. The Agency pointed out that it removed some text from Annexes P 1 a) and b), namely information related to the name and contact details of the company, the submission and communication number, the name of the substance and the customer ID number, as the documents serve the sole purpose of giving examples as evidence that the Agency's practise was to give registrants 30 days as a second extended due date even before July 2010.

REASONS

7. Article 7(2)(d) 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 (hereinafter 'the Rules of Procedure') (OJ L 206, 2.8.2008, p. 5) provides

that the Agency may request that information contained in the defence be treated as confidential.

8. By way of a preliminary remark, it should be noted that since the Rules of Procedure are silent on who should decide on a confidentiality request when it is submitted by the Agency, the present confidentiality request should be decided by analogy with the second subparagraph of Article 6(6) of the Rules of Procedure which provides that the Chairman of the Board of Appeal shall decide on whether information indicated by an appellant in its notice of appeal is to be regarded as confidential.
9. The issue to be decided by the Chairman in this Decision is whether or not the information covered by the confidentiality request related to the name and contact details of the company, the submission and communication number, the name of the substance and the customer ID number contained in Annex Q 1 a) and blanked out in Annex Q 1 b) that were attached to the Agency's submission of 22 July 2011, should be regarded as confidential vis-à-vis third parties as well as the appellant.
10. It should be noted that point 41 of the Practice Directions to parties to appeal proceedings before the Board of Appeal of the European Chemicals Agency (hereinafter 'the Practice Directions') provides that confidential treatment cannot be accorded to an appellant vis-à-vis ECHA or vice versa, since the Board of Appeal cannot rely on any matters which have not been the subject of disclosure between the principal parties to the proceedings.
11. As a result, the Board of Appeal cannot base its decisions on facts and documents of which one of the parties or the parties have not been able to take cognisance and, in relation to which they have not been able to set out their views. If that would be the case, such actions would amount to a violation of a party's right to be heard which is a fundamental principle of European Union law which must be guaranteed even in the absence of any rules governing the proceedings in question (Case C-32/95 P *Commission v Lisrestal and Others* [1996] ECR I-5373, paragraph 21). A party cannot therefore in principle insist that evidence should be withheld from another party on grounds of confidentiality.
12. Without prejudice to the above, the Chairman may nevertheless allow parts of a document or other evidence to remain undisclosed in order to preserve confidentiality, as long as those parts do not relate to evidence which is material to the issue of fact in question, unless they would tend to deprive the rest of the document or evidence of its probative value (see to that effect, Case 2/54 *Italy v High Authority* [1954 to 1956] ECR 37, page 42).
13. The Chairman is however of the opinion that, considering the Agency's request to replace the previously submitted documents enclosed in Annexes Q 1 a) and b) with documents enclosed in Annexes P 1 a) and b), it is not necessary in the present case to examine the Agency's request for confidential treatment of certain information.
14. Considering the Agency's abovementioned request, the Chairman compared the documents submitted by the Agency as Annexes Q 1 a) and b) with those submitted as Annexes P 1 a) and b), in order to verify whether they can be, for the purposes of this case, considered as identical. The examination of the documents showed that the documents in Annexes P 1 a) and b) were the same documents as previously submitted as Annex Q 1 a) except that in the TCC letter the information regarding the name and address of the company submitting the registration dossier, the submission number, the communication number and the

name of the substance were left out. Similarly with regard to the invoice the information regarding the name and address of the company to which the services were provided, the customer ID number and the submission number were omitted.

15. The information removed from the documents produced by the Agency as Annexes P 1 a) and b) is thus irrelevant as regards the purpose of the submitted evidence, which is to show the Agency's practise relating to the communication of a second extended due date to the registrants. Omission of that information does not therefore interfere with the proper examination of the present case or with the appellant's right to be heard. Consequently, as also requested by the Agency in its application, the Chairman instructs the Registrar to place Annexes P 1 a) and b) in the case file and notify them to the appellant alongside the Agency's submission of 22 July 2011 without Annexes Q 1 a) and b). Annexes Q 1 a) and b) shall be removed from the case file and returned to the Agency.
16. In these circumstances, there is no need to examine the Agency's confidentiality request.

ORDER

On those grounds,

THE CHAIRMAN OF THE BOARD OF APPEAL

hereby:

1. Decides that, in the circumstances of the present case, it is not necessary to examine the Agency's application of 22 July 2011 for confidential treatment of certain information contained in Annex Q 1 a) and Annex Q 1 b).
2. Instructs the Registrar to place Annex P 1 a) and Annex P 1 b) in the case file and to notify them to the appellant together with the submission of the Agency of 22 July 2011.
3. Instructs the Registrar to remove Annex Q 1 a) and Annex Q 1 b) from the case file and to return them to the Agency.

Mercedes ORTUÑO
Chairman of the Board of Appeal