

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

11 April 2011

Request for confidential treatment of certain information

*(Data Sharing Agreements between appellant and data owners – confidential
business information contained in a research and development project of appellant –
Protection of personal data – Regulation (EC) No 45/2001)*

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| Case number | A-003-2011 |
| Language of the case | English |
| Appellant | BASF SE D 100 – ZRR Carl-Bosch-Strasse 38 D-67056 LUDWIGSHAFEN |
| Representative | Dr. Anja von Hahn BASF SE D 100 – ZRR Carl-Bosch-Strasse 38 D-67056 LUDWIGSHAFEN |
| Contested decision | DSH-30-3-D-0005-2010 of 19 November 2010 adopted by the European Chemicals Agency (hereinafter the 'Agency') pursuant to Article 30(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 21 February 2011, the appellant filed an appeal with the Registry of the Board of Appeal against the contested decision, which grants to another SIEF participant permission to refer to certain data previously submitted by the appellant.
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, hereinafter the 'Rules of Procedure'), the notice of appeal contained a request for confidential treatment of certain attachments, all information on a substance not subject to the underlying data sharing dispute, as well as particulars (names and addresses) of all natural persons in the notice of appeal and its attachments.
3. In its request for confidential treatment, the appellant asks the Board of Appeal to keep confidential attachments 2 and 3 to the notice of appeal containing data sharing agreements with certain data owners. Moreover, confidential treatment of all information with respect to a research and development project relating to a substance not subject to the contested decision (hereinafter the 'R&D substance'), has also been requested. Finally, all names and addresses of natural persons that appear in the notice of appeal and its attachments should not be further disclosed. The appellant further specified that the information was requested to be kept confidential with regard to third parties not including the Agency.

GROUNDS OF THE REQUEST

4. The grounds provided by the appellant to justify its request can be summarised as follows:
5. With respect to the two individual data sharing agreements the appellant claims that the content of one of these is to be regarded as 'business secrets' whereas the other one is subject to a non-disclosure agreement that obliges parties not to disclose the existence nor the contents of the data sharing agreement.
6. Moreover, the appellant claims that any information on the R&D substance, which is not subject to the contested decision, relates to a research and development project, the disclosure of which could harm the appellant as it reflects business secrets and potential future business plans.
7. As far as the non-disclosure of all names and addresses of natural persons in the notice of appeal and its attachments is concerned, the appellant bases its confidentiality request on the applicable data protection legislation as referred to in Article 4(b) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission document (OJ L 145, 31.5.2001, p. 43, hereinafter the 'Regulation 1049/2001'). For proceedings before the Board of Appeal, the applicable piece of legislation with respect to data protection is Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on

the free movement of such data (OJ L 8, 12.1.2001, p.1, hereinafter 'Regulation (EC) No 45/2001').

REASONS

8. 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 request for confidentiality made by the appellant.
9. The issue to be decided by the Chairman is whether or not to regard the information concerned as confidential following the appellant's request. This requires an assessment of the legitimacy of the private interest opposing disclosure of information and weighing this against the public interest in activities of the Community institutions taking place as openly as possible (see Cases T-198/03 *Bank Austria Creditanstalt AG v. Commission*, [2006] ECR II-1429, paragraph 71 and T-30/91 *Solvay SA v. Commission*, [1995] ECR II-1775, paragraph 88). Moreover, given the procedure applicable to dealing with appeals, there is also the special interest of any potential intervener to be taken into account which amounts to a general right to participate in proceedings that affect the intervener's legal interests. Hence, the principle of protection of a personal interest through non-disclosure must be observed in such a way as to reconcile it with the requirement to allow for an effective participation of interveners in the appeal proceeding, which is to be regarded as part of the public interest.
10. The analysis of the public interest needs to be conducted by taking into account the purpose of the REACH registration procedure and system as well as the underlying principles and individual provisions of the REACH Regulation. 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*".
11. Within this general framework, the commercial interests of the actors involved are also protected by the REACH Regulation.
12. More specifically, Article 118(1) 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 the possession of the institutions and foresees some exceptions to this general rule. By virtue of one of the exceptions provided in Article 4(2) of Regulation (EC) No 1049/2001 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. Furthermore, Article 119(2) 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.

Request for confidential treatment of the attached data sharing agreements

13. As a first step in the assessment it is necessary to analyze the presence and legitimacy of the commercial interests claimed by the appellant in the first part of the confidentiality request, which relates to alleged 'business secrets' contained in the data sharing agreements concerned. It should be noted that

the requirement of legitimacy is satisfied where the existence of a commercial interest would be undermined as a result of disclosure (See Case T-380/04 *Ioannia Terezakis v. Commission*, [2008] ECR II-11 (summ. pub), at paragraph 81). Secondly, it must be assessed whether the disclosure of the two agreements for which confidentiality is claimed would harm these interests. In this respect the risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Finally, a concrete and individual assessment (as opposed to an abstract and general examination) with respect to each document for which confidentiality has been requested must be undertaken.

14. Moreover, in cases in which reference is made to confidential business information 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. More specifically, for the purpose of determining the conditions under which confidential treatment may be given during appeal procedures it is necessary, in respect of each document on the file or passage in a procedural document for which confidential treatment is sought, to balance the legitimate concerns of both the appellant and the intervener. While it is in the appellant's interest to prevent substantial damage to its business interests through disclosure, the intervener needs to have the necessary information for the purposes of being fully in a position to assert their rights and participate in the case within the boundaries of Article 8(3) of the Rules of Procedure.
15. None of the data sharing agreements concerned are publicly available and are only known to a limited number of persons, which makes them confidential. Moreover, they contain information of commercial interest, i.e. [CONFIDENTIAL INFORMATION]. With respect to attachment 3 of the Notice of Appeal, the appellant claims that the entire agreement, including the parties' names, is to be considered confidential due to an underlying non-disclosure agreement. While it should be noted that such a non-disclosure agreement cannot bind any third party not subject to the agreement, including the Agency, it demonstrates that the other party to the data sharing agreement could have a justified right to remain anonymous due to its marketing plans and/or sales strategy. Therefore, commercial interests worthy of protection in relation to both agreements exist. Due to the nature of the commercial interests concerned, the parties to the data sharing agreements will also be directly harmed if these interests were disclosed because competitors will obtain knowledge of confidential business information and may use it to harm the interests of the parties.
16. When reviewing the entire contents of both data sharing agreements, however, the Chairman notes that these do not exclusively pertain to confidential business information. Instead, there are clauses containing general and standard terms which do not manifestly touch on the parties' commercial interest and can, therefore, not benefit from protection against disclosure (See Case T-380/04 *Ioannis Terezakis v. Commission*, [2008] ECR II-11 (summ. pub.), at paragraph 98).
17. Moreover, it needs to be assessed whether there is an overriding public interest in the disclosure of the data sharing agreements concerned. In the current appeal the appellant argues that, among other points, [CONFIDENTIAL INFORMATION]. In support of this claim the appellant refers to the data sharing agreements covered by its confidentiality request, which

[CONFIDENTIAL INFORMATION]. It seems conceivable that any potential intervener, which can establish an interest to intervene, may wish to comment on the allegation made by the appellant that the Agency [CONFIDENTIAL INFORMATION]. In order to properly do so, however, it is necessary that the intervener should at least have access to those passages of the data sharing agreements that deal with [CONFIDENTIAL INFORMATION]. As the applicable provisions in the data sharing agreements contain general terms, none of which bear any commercial interest, it must be concluded that the request for confidentiality of the data sharing agreements must be rejected with respect to those passages that deal with with respect to those passages that deal with the ownership of the studies subject to data sharing under the agreements.

18. For those reasons and having balanced all the relevant factors, the request for confidential treatment of the data sharing agreements contained in attachments 2 and 3 of the notice of appeal can only be accepted to the extent that [CONFIDENTIAL INFORMATION].

Request for confidential treatment of the [CONFIDENTIAL INFORMATION] substance

19. According to Article 119(1) of the REACH Regulation, the name of a substance shall be made publicly available and cannot, hence, be claimed confidential. The Chairman acknowledges, however, that in this case the substance for which confidentiality is requested, i.e. [CONFIDENTIAL INFORMATION], is not subject to the contested decision adopted by the Agency. It only occurs as part of the Agency's proof of an alleged unilateral approach of the appellant in the latter's role as lead registrant of the substance concerned by the contested decision, which is in fact different from the [CONFIDENTIAL INFORMATION]. Therefore, Article 119(1) of the REACH Regulation does not apply to the [CONFIDENTIAL INFORMATION] because it has not been registered by the appellant.
20. Instead, the request for confidential treatment must be assessed within the general framework as explained in paragraphs 9 to 12 of this decision.
21. Given the framework of a research and development project within which the [CONFIDENTIAL INFORMATION] has been dealt with, all information pertaining to it must be regarded as confidential business information. The request for a confidential treatment of the [CONFIDENTIAL INFORMATION] is also legitimate as its disclosure could directly harm the appellant's research strategies and future business plans, which in turn would amount to a devaluation of the research undertaken to date.
22. Moreover, there is no overriding public interest in the disclosure of the [CONFIDENTIAL INFORMATION] substance. As explained, the substance concerned by the contested decision is a different one and none of the information pertaining to the [CONFIDENTIAL INFORMATION] substance is necessary to be able to fully participate in the appeal procedure.
23. For these reasons and having balanced all the relevant factors of the case, the request for non-disclosure of all information on the [CONFIDENTIAL INFORMATION] is accepted.

Request for confidential treatment of names and addresses of natural persons that appear in the notice of appeal and its attachments

24. The appellant contends that the request for confidential treatment of particulars of natural persons should be accepted on the basis of data protection rules. It is therefore necessary first to examine whether Regulation (EC) No 45/2001 is applicable in the present case; that is whether the information for which the appellant requested confidential treatment falls within the scope of Regulation (EC) No 45/2001.
25. Pursuant to Article 2(a) of Regulation (EC) No 45/2001, 'personal data' means any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. Personal data would therefore also include surnames and forenames (see Case C-28/08 P, *Commission v The Bavarian Lager Co. Ltd*, [2010] ECR I-0000, paragraph 68).
26. In addition, under Article 2(b) of Regulation (EC) No 45/2001, 'processing of personal data' means any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction. Therefore, the communication of surnames and forenames falls within the definition of 'processing', for the purposes of Regulation (EC) No 45/2001 (see to that effect, Case C-28/08 P, *Commission v The Bavarian Lager Co. Ltd*, [2010] ECR I-0000, paragraph 69).
27. In this case, the request for confidential treatment concerns various pieces of communication exchanged between the appellant and addressee of the contested decision as well as written records of meetings between them held in the context of negotiations on the preparation of a REACH registration. While each communication contains at least an addressee and a sender, and some of them even further references to other natural persons that participated in the negotiation process, the records mention [CONFIDENTIAL INFORMATION], identified by their respective forenames and surnames.
28. The pieces of communication and written records in question thus contain personal data for the purposes of Article 2(a) of Regulation (EC) No 45/2001 since the persons who communicated or participated in [CONFIDENTIAL INFORMATION].
29. Consequently, the Chairman is of the opinion that the disclosure of the particulars of natural persons contained in the notice of appeal and its attachments could undermine the protection of their privacy and the integrity of the individual. Therefore, there are compelling legitimate grounds according to Article 18(a) of Regulation (EC) No 45/2001 which relate to these natural persons and give them the right to object to such a disclosure.
30. The Chairman further acknowledges that the appellant did not intend to present the names of those individuals contained in communications and [CONFIDENTIAL INFORMATION] as part of the evidence as they do not appear to be relevant for the appeal. Therefore, there is also no necessity for any potential intervener to comment on these individuals.

31. It must be noted, however, that confidentiality in relation to potential interveners cannot be accepted for those individuals who have been nominated by the appellant as witnesses in footnotes 8-11, 13 and 15, of the notice of appeal. Their right to object to the processing of data in the sense of disclosure of their names to potential interveners needs to be reconciled with an intervener's right to comment effectively on the evidence brought forward. Although under Article 16(3) 2nd subparagraph of the Rules of Procedure, interveners do not have the same rights as parties to an appeal proceeding when it comes to the objection of witnesses, they may still wish to submit their comments on a witness's competence in relation to the appeal. Therefore, interveners are in a special situation which distinguishes them from the general public and which entails the necessity for the interveners of having the data concerned transferred to them in the sense of Article 8(b) of Regulation (EC) No 45/2001.
32. For those reasons and having balanced all the relevant factors, the request not to disclose names and addresses of natural persons that appear in the notice of appeal and its attachments is accepted with the exception of the nomination of witnesses in footnotes 8-11, 13 and 15 of the notice of appeal.

ORDER

On those grounds,

THE CHAIRMAN OF THE BOARD OF APPEAL

hereby:

Decides to accept the appellant's request for confidential treatment with regard to

- all information contained in the notice of appeal and its attachment 7 with regard to the [CONFIDENTIAL INFORMATION] substance; and
- names and addresses of natural persons that appear in the notice of appeal and its attachments except for the nomination of witnesses in footnotes 8-11, 13 and 15 of the notice of appeal; and
- the data sharing agreements [CONFIDENTIAL INFORMATION] except for those passages of these agreements which regulate the ownership of studies subject to data sharing.

This information can be excised in the non-confidential version of the notice of appeal and its attachments to be provided by the appellant following the notification of this decision.

Mercedes ORTUÑO
Chairman of the Board of Appeal