

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

12 March 2014

Request for confidential treatment of certain information

(Confidentiality request in the notice of appeal - Chemical substance name – CAS and EC number – Commercial substance name - Substance tonnage data - Registration number – Studies relating to substance - Impurity of a substance –Information on competitors – Protection of personal data - Information required for the appeal announcement and the final decision)

Case number	A-001-2014
Language of the case	English
Appellant	Cinic Chemicals Europe Sarl France
Representative	Ms Ruxandra Cana and Ms Indiana de Seze Steptoe & Johnson LLP Avenue Louise 489 B-1050 Brussels Belgium
Contested decision	TPE-D-0000003219-74-05/F adopted by the European Chemicals Agency (hereinafter, the 'Agency') pursuant to Article 40 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') and in accordance with Articles 50 and 51 of the REACH Regulation

THE CHAIRMAN OF THE BOARD OF APPEAL

gives the following

Decision

SUMMARY OF THE FACTS

1. On 15 January 2014, 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 17 January 2014, 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 31 January 2014, the Appellant informed the Board of Appeal that it requested confidential treatment of the following information:
 - the chemical substance name, the CAS and EC number, and the substance's commercial name;
 - the Appellant's registration number;
 - the Appellant's tonnage category;
 - the name of the competitor and the registration number of the competitor's dossier for the substance;
 - the inquiry number found in Annex II to the Notice of Appeal (hereinafter, the 'inquiry number');
 - the submission report number, reference number, dossier file name, dossier Universal Unique Identifier (hereinafter, 'UUID'), name given by the dossier creator, submitting legal entity UUID, and invoice contact name;
 - the results of a study revealing certain adverse effects on human health or the environment, as specified in Page 9, paragraph 19 of the Notice of Appeal;
 - the date of the Contested Decision and the deadline by which the Appellant's dossier must be updated with the information requested in the Contested Decision;
 - the impurity of the substance;
 - the name, email and mobile number of a certain person, holding a managerial position at Cinic Chemicals Europe Sarl (hereinafter, 'the personal data of the person in question').

The Appellant also identified the location of that information in its submissions. In addition, the Appellant noted that it reserves the right to provide a further request for confidentiality and a non-confidential version of its submissions, should confidentiality be granted, in the event of third party interventions.

GROUND OF THE REQUEST

5. The grounds provided by the Appellant to justify its request for confidentiality can be summarised as follows:
 - With respect to *the chemical substance name, the CAS and EC number, and the substance's commercial name*, the Appellant states that disclosure of this

information may harm the Appellant's business by casting doubt as to the serious concerns allegedly caused by the substance, since customers may start questioning the safety of the substance and ultimately switch to competitors or competing products.

- As regards *the Appellant's registration number*, the Appellant states, firstly, that registration numbers associated to a registrant are not in the public domain. Secondly, disclosure of this information could benefit the Appellant's competitors directly, as they could fraudulently use these numbers for their own, otherwise not registered, products. According to the Appellant, such use would cause immediate financial damages to the Appellant, as well as potential damages to its reputation.
- As regards *the Appellant's tonnage category*, the Appellant claims that disclosure of this information may harm the Appellant's business and distort competition by informing competitors of its production capacity.
- With regard to *the name of the competitor and the registration number of the competitor's dossier for the substance*, the Appellant relies on the fact that this information concerns a competitor and, thus, should not be disclosed by the Appellant.
- Concerning *the inquiry number*, the Appellant relies on the arguments raised with respect to the Appellant's registration number.
- As regards *the submission report number, reference number, dossier file name, dossier UUID, name given by the dossier creator, submitting legal entity UUID, and invoice contact name*, the Appellant states that this information is not in the public domain and should remain confidential to the Appellant.
- Regarding *the results of a study revealing certain adverse effects on human health or the environment, as specified in Page 9, paragraph 19 of the Notice of Appeal*, the Appellant relies on the argument that this information discloses elements related to this study that are not in the public domain.
- With respect to *the date of the Contested Decision and the deadline by which the Appellant's dossier must be updated with the information requested in the Contested Decision*, the Appellant alleges that competitors may refer to this date, misleadingly, as a phase-out date of the Appellant's activities, and this date may become inapplicable in view of the suspensive effect of the present appeal.
- With respect to *the impurity of the substance*, the Appellant claims that disclosure of information related to impurities of the substance may indirectly disclose manufacturing processes applied by the Appellant, of which its competitors should not be made aware.
- Finally, as regards *the name, email and mobile number of the person in question*, the Appellant notes that this information is personal data.

REASONS

6. 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.
7. The issue to be decided by the Chairman in this Decision is whether or not to treat as confidential the information covered by the Appellant's confidentiality request. 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

8. The Chairman firstly wishes to clarify the scope of the issues to be decided in the present Decision.
9. 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.
10. In this respect, the Chairman's Decision is limited to whether or not to regard the information covered by the Appellant's request 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.
11. 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.

Request for confidential treatment of the chemical substance name, the CAS and EC number, the substance's commercial name, the Appellant's registration number, and the Appellant's tonnage band category

12. The chemical substance name, the CAS and the EC number, the substance's commercial name, the Appellant's registration number, and the Appellant's tonnage band category 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, this information is not specifically mentioned in Article 21(1) of the Rules of Procedure as being necessary for the final decision.
13. 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.
14. As regards the possible non-disclosure of the chemical substance name, the Appellant has explained its interest in keeping this information confidential. The Appellant claimed that disclosure of this information may harm the Appellant's business by casting doubts as to the serious concerns allegedly caused by the substance, since customers may start questioning the safety of the substance and ultimately switch to competitors or competing products.
15. In this respect, the Chairman takes notice of the Appellant's claimed private interest in not disclosing the chemical substance name.

16. However, at the same time, the Chairman recalls that, in accordance with the general framework for assessing requests for confidential treatment (see paragraph 7 to this Decision), even if an applicant has established that it has, *a priori*, a legitimate interest to be protected, that interest must be balanced against the public interest (see Case T-198/03, Bank of Austria Creditanstalt AG v. Commission, paragraph 71).
17. The public interest refers generally to the activities of the EU institutions, including the Agency and the Board of Appeal, taking place as openly as possible. Thus, on a general level, the public interest equates with the general public's right to information.
18. When analysing the public interest in the present case, it is important to consider the specific context of the REACH Regulation, and the fundamental objectives and principles that underlie it. These include the generation and dissemination of information on chemicals that permeates many of the provisions of the REACH Regulation (see, for instance, Recitals 14, 19, 25, 56 and 117 to the REACH Regulation) and the attainment of a high level of protection of human health and the environment (see, for instance, Article 1 of the REACH Regulation).
19. The Chairman observes that the Appellant's substance has been found to cause some adverse effects on human health. The Chairman also notes that the issue under appeal is not of a purely procedural nature, as the Appellant claims in essence that, despite the identified health concerns, it is not necessary to carry out the extended one-generation reproductive toxicity study in rats, oral route, requested by the Contested Decision. Due to the potential health concerns caused by the substance at issue, the general public has an interest in the substance and possibly in the present proceedings that contest the appropriateness of further testing.
20. Furthermore, in the context of appeal proceedings before the Board of Appeal, the public interest also includes the special interests of potential interveners and, more specifically, the right for third parties to participate in proceedings that may affect their legal interests. Thus, when assessing an appellant's request for confidential treatment, the Chairman must ensure that any announcement provides potential interveners with necessary information to allow them to exercise their rights (see, by analogy, Order of the President of the Seventh Chamber of the General Court of 8 September 2010 in Case T-421/08, Performing Right Society Ltd v. Commission, paragraph 18 and cases cited therein). Accordingly, in the present case the Chairman must have regard to the possible interests of potential interveners such as, for example, competitors and users down the supply chain.
21. Finally, by way of a more general remark, the Chairman notes that applicants for confidential treatment should foresee, given the adversarial and public nature of proceedings before the Board of Appeal, the possibility that some of the confidential documents and information forming part of the appeal may need to be made public (see, by analogy, Order of the President of the Fourth Chamber of the General Court of 22 February 2005 in Case T-383/03, Hynix Semiconductor Inc. v Council of the European Union, paragraph 46). At the same time, it should be noted that exercising the right to appeal against the Agency's decisions is an essential element in the system for legal redress created pursuant to the REACH Regulation. As such, being a party to proceedings before the Board of Appeal does not imply *per se* a negative effect on an appellant's reputation.
22. For the reasons explained above, and having balanced the relevant factors and interests involved, the Chairman rejects the Appellant's request for confidential treatment of the chemical substance name.
23. As regards the CAS and EC number, the substance's commercial name, the Appellant's tonnage band and the Appellant's registration number, the Chairman notes that as a result of the disclosure of the substance's chemical name in the present case, the CAS and EC number, the substance's commercial name, the Appellant's tonnage band and the Appellant's registration number can also be easily traced, as they are publicly

available on ECHA's website (and, in particular, in the 'Registered substances database' on ECHA's website). Therefore, this information is already in the public domain.

24. In accordance with settled case-law of the European Courts, a precondition for the confidential treatment of information is that it is known only to a limited number of persons (see, by analogy, Cases T-474/04, Pergan Hilfsstoffe für Industrielle Prozesse v. Commission, paragraph 65 and T-198/03, Bank Austria Creditanstalt AG v. Commission, paragraph 71). Information can lose its confidential nature when the public at large or specialist circles have access to it (see, by analogy, Order of the President of the Third Chamber of the General Court of 5 July 2010 in Case T-304/08 Smurfit Kappa Group v. Commission, paragraph 13 and the cases cited therein).
25. For these reasons, and having balanced all the relevant factors of the case, the request for non-disclosure of the CAS and EC number, the substance's commercial name, the Appellant's tonnage band and the Appellant's registration number is rejected. However, in the interest of clarity, the Chairman observes that this information will not be disclosed in the announcement by the Board of Appeal, as it is not necessary for the purposes of understanding the present case at this stage of the appeal proceedings.

Request for confidential treatment of the name of the competitor and the registration number of the competitor's dossier for the substance

26. In relation to the name of the competitor and the registration number of the competitor's dossier for the substance, the Chairman considers that this information is not necessary to allow an understanding of the present case. Furthermore, the non-disclosure of this information would not call into question the interests of 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 this information for the purposes of the present appeal proceedings.
27. Since this information 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.
28. For these reasons, the request for non-disclosure of the name of the competitor and the registration number of the competitor's dossier for the substance is accepted.

Request for confidential treatment of the Appellant's inquiry number, submission report number, reference number, dossier file name, dossier UUID, name given by the dossier creator, submitting legal entity UUID, and invoice contact name

29. In relation to the Appellant's inquiry number, submission report number, reference number, dossier file name, dossier UUID, name given by the dossier creator, submitting legal entity UUID, and invoice contact name, the Chairman considers that this information is not necessary for an understanding of the particular circumstances of the present case. Furthermore, this 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.

30. Since this information 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.
31. In view of the above considerations, the request for non-disclosure of the Appellant's inquiry number, submission report number, reference number, dossier file name, dossier UUID, name given by the dossier creator, submitting legal entity UUID, and invoice contact name is accepted.

Request for confidential treatment of the results of a study revealing certain adverse effects on human health or the environment, as specified in Page 9, paragraph 19 of the Notice of Appeal

32. As regards the justification put forward by the Appellant to substantiate the need for confidential treatment of the results of a study revealing certain adverse effects on human health and presumably the environment, as specified in Page 9, paragraph 19 of the Notice of Appeal, the Appellant claimed that it discloses elements that are not currently in the public domain. However, the Chairman notes that the above justification *per se* does not constitute a valid and sufficient reason for treating the information at issue as confidential. The Appellant failed to prove that it has a legitimate and substantiated interest in the non-disclosure of the above information, and did not provide sufficient reasons as to why and how disclosure could result in harm to that interest.
33. Moreover, the information for which confidential treatment is requested is of public interest, as it may reveal potential adverse effects to human health and/or the environment. As explained in paragraph 19 above, due to the potential health concerns caused by the substance at issue, the general public has an interest in the substance, its adverse effects and possibly in the present proceedings that contest the appropriateness of further testing. In addition, given its significance, and in accordance to Article 21 (g) of the Rules of Procedure, such information may be necessary in order to substantiate the grounds on which the final decision is based.
34. In view of the above considerations, and having balanced all the relevant factors of the case, the Appellant's request to treat this information as confidential is therefore rejected. However, in the interest of clarity, the Chairman observes that this information will not be disclosed in the announcement by the Board of Appeal, as it is not necessary for the purposes of understanding the present case at this stage of the appeal proceedings.

Request for confidential treatment of the date of the Contested Decision and the deadline by which the Appellant's dossier must be updated with the information requested in the Contested Decision

35. As regards the justification put forward by the Appellant to substantiate the need for confidential treatment of the date of the Contested Decision and the deadline by which the Appellant's dossier must be updated with the information requested in the Contested Decision, the Appellant claimed that competitors may refer to the above dates, misleadingly, as phase-out dates of the Appellant's activities, and these dates may become inapplicable in view of the suspensive effect of the present appeal.
36. The Chairman notes that this justification cannot be deemed adequate for granting the confidential treatment of the information at issue. The Chairman observes that the

harm claimed by the Appellant is not reasonably foreseeable, but merely hypothetical (see, by analogy, Case T-211/00, *Kuijer v Council of the European Union*, paragraph 56). In fact, as a result of the suspensive effect of the present appeal, competitors and consumers are in a position to know that the phase-in scheme foreseen in Article 21(1) of the REACH Regulation allows the Appellant to place the substance on the market until a final decision on the contrary.

37. For these reasons, the Chairman concludes that the private interest to keep confidential the date of the Contested Decision and the deadline by which the Appellant's dossier must be updated with the information requested in the Contested Decision has not been clearly established in the present case.
38. Moreover, and for the reasons set out in paragraphs 14 to 22 above, the Chairman has rejected the Appellant's request for confidential treatment of the substance's chemical name for the purposes of the present proceedings. As a result of the disclosure of the substance's chemical name in the present case, the date of the Contested Decision and the deadline by which the Appellant's dossier must be updated with the information requested in the Contested Decision can also be easily traced, as they are publicly available on ECHA's website (and, in particular, in the 'Registered substances database' on ECHA's website).
39. The request for confidential treatment of this information is therefore rejected.

Request for confidential treatment of the impurity of the substance

40. As regards the justification put forward by the Appellant to substantiate the need for confidential treatment of the impurity of the substance, the Appellant claimed that disclosure of information related to impurities of the substance may indirectly disclose manufacturing processes applied by the Appellant, of which its competitors should not be made aware. However, the Chairman notes that the harm claimed by the Appellant is not reasonably foreseeable, but merely hypothetical (see, by analogy, Case T-211/00, *Kuijer v Council of the European Union*, paragraph 56).
41. Moreover, the information for which confidential treatment is requested is of public interest, as the impurities can be the cause of, or can contribute to, the adverse effects of a substance to human health and/or the environment. As explained in paragraph 19 above, due to the potential health concerns caused by the substance at issue, the general public has an interest in the substance, its adverse effects and possibly in the present proceedings that contest the appropriateness of further testing. In addition, given its significance, and in accordance to Article 21 (g) of the Rules of Procedure, such information may be necessary in order to substantiate the grounds on which the final decision is based.
42. For these reasons, the Chairman concludes that the private interest to keep confidential the information on the impurity of the substance has not been clearly established in the present case. Moreover, there is a public interest in the disclosure of this information. In view of the above considerations, and having balanced all the relevant factors of the case, the Appellant's request to treat this information as confidential is therefore rejected. However, in the interest of clarity, the Chairman observes that this information will not be disclosed in the announcement by the Board of Appeal, as it is not necessary for the purposes of understanding the present case at this stage of the appeal proceedings.

Request for confidential treatment of the personal data of the person in question

43. As a preliminary remark, the Chairman notes that the Appellant's request must be assessed in light of 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 (hereinafter, the 'Regulation (EC) No 45/2001'). In accordance with Article 1 of Regulation (EC) No 45/2001, it falls on the EU institutions and bodies to protect the fundamental rights and freedoms of natural persons, in particular the right to privacy with respect to the processing of personal data. The provisions of Regulation (EC) No 45/2001 apply also to the Agency and the Board of Appeal.
44. Article 2(a) of Regulation (EC) No 45/2001 defines 'personal data' as 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 includes also surnames and forenames (see Case C-28/08 P, *Commission v The Bavarian Lager Co. Ltd*, paragraph 68).
45. In accordance with 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 constitutes '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*, paragraph 69).
46. Article 5 of Regulation (EC) No 45/2001 defines the circumstances in which personal data may be legitimately processed. It includes, pursuant to Article 5(a) of Regulation (EC) No 45/2001, circumstances where processing is necessary for the performance of a task carried out in the public interest further to the EU Treaties or other legal instruments adopted on the basis thereof, or where it is in the legitimate exercise of official authority vested in the EU institution or body or in a third party to whom the data are disclosed.
47. As regards the present case, the Chairman wishes to note that Annex XII to the Notice of Appeal allows the name, email and mobile number of the person in question to be identified. It, therefore, contains personal data for the purposes of Regulation (EC) No 45/2001.
48. As regards the processing of personal data, the Chairman clarifies that any personal data submitted to the Board of Appeal in the context of specific appeal proceedings is, by the very act of its submission, processed within the meaning of Article 2(b) of Regulation (EC) No 45/2001. However, such processing by the Board of Appeal, including its Registry, in the context of specific appeal proceedings satisfies the criteria for lawful processing, as laid down in Article 5(a) of Regulation (EC) No 45/2001.
49. It follows that the request not to disclose the personal data of the person in question to third parties must be assessed in light of Article 8 of Regulation (EC) No 45/2001, which regulates the transfer of personal data to recipients other than the EU institutions and bodies. In this respect, the Chairman observes that the requirement of necessity, as laid down in Article 8(b) of Regulation (EC) No 45/2001, is not satisfied in the present proceedings. In particular, for the purposes of the announcement and of the final decision in the present case, it is not necessary to include the personal data of the person in question.

50. For the above reasons, the Chairman accepts the Appellant's request to keep confidential in the announcement and in the final decision the personal data of the person in question.

ORDER

On those grounds,

THE CHAIRMAN OF THE BOARD OF APPEAL

hereby:

1. Decides to accept the Appellant's request for confidential treatment with respect to the following information:
 - the name of the competitor and the registration number of the competitor's dossier for the substance;
 - the Appellant's inquiry number;
 - the submission report number, reference number, dossier file name, dossier UUID, name given by the dossier creator, submitting legal entity UUID, and invoice contact name;
 - the personal data of the person in question.

This information will not be disclosed in the appeal announcement or in any final decision by the Board of Appeal in the present case.

2. Decides to reject the Appellant's request for confidential treatment with respect to the following information:
 - the chemical substance name;
 - the CAS and EC numbers, and the substance's commercial name;
 - the Appellant's tonnage category;
 - the Appellant's registration number;
 - the results of a study revealing certain adverse effects on human health or environment, as specified in Page 9, paragraph 19 of the Notice of Appeal;
 - the date of the Contested Decision and the deadline by which the Appellant's dossier must be updated with the information requested in the Contested Decision;
 - the impurity of the substance.

Information on the substance identity, as well as on the date of the Contested Decision and the deadline by which the Appellant's dossier must be updated with the information requested in the Contested Decision, is not confidential for the purposes of the present proceedings and can be made public in the appeal announcement and any final decision by the Board of Appeal.

However, information on the CAS and EC number, the substance's commercial name, the Appellant's tonnage category, and the Appellant's registration number, will not be disclosed in the announcement by the Board of Appeal, as it is not necessary for the purposes of understanding the present case at this stage of the appeal proceedings. The Board of Appeal reserves its right under Article 21 of the Rules of Procedure to disclose this information in the final decision, if necessary.

Similarly, information on the impurity of the substance, and on the results of a study revealing certain adverse effects on human health or environment, as specified in Page 9, paragraph 19 of the Notice of Appeal, will not be disclosed in the announcement by the Board of Appeal, as it is not necessary for the purposes of understanding the present case at this stage of the appeal proceedings. The Board of Appeal reserves its right under Article 21 of the Rules of Procedure to disclose this information in the final decision, if necessary.

Mercedes ORTUÑO
Chairman of the Board of Appeal