ATC/ATIEL Position Paper

Use of an Alternative Chemical Name in the supply chain

A manufacturer, importer or downstream user whose mixture contains hazardous ingredients above specified thresholds is obliged to disclose their chemical identity on the label and safety data sheet (SDS) as prescribed by the CLP regulation (EC 1272/2008) and the REACH regulation (EC 1907/2006) Annex II (and amendments thereto) respectively. However, the precise chemical identity of certain novel and unique chemistries may be considered confidential business information, the disclosure of which may put their business and intellectual property rights at risk.

This is particularly applicable to the lubricant industry where the technical cost of development is extremely high and the lifecycle of the product often limited to the duration of the engine or driveline equipment for which it has been approved.

Under Article 24 of the CLP Regulation - and Article 15 of the earlier Dangerous Preparations Directive 1999/45/EC (DPD) - the legislation allows for a manufacturer, importer or downstream user of certain low hazard substances in a mixture to request an alternative name in order to protect the precise identity of such substances. Where permission is granted, the company may use an alternative generic name on their label and SDS to conceal the true identity of the substance.

Examining the text of CLP Article 24, it clearly states that "where he *(i.e. the manufacturer, importer or downstream user)* can demonstrate that disclosure on the label or in the safety data sheet of the chemical identity of that substance puts the confidential nature of his business, in particular his intellectual property rights, at risk" then, assuming other conditions are met, the application for alternative name can proceed. This suggests that only the first formulator in the supply-chain to claim confidentiality can be subject to this application procedure. It would be impossible for any further downstream formulator who may need to show the chemical identity on his label or in his SDS to comply with the requirement to demonstrate that his intellectual property rights are at risk when he will not know the precise identity of the chemical(s) already claimed confidential by an actor up the supply chain. The logical conclusion is therefore that downstream users of chemicals already claimed as confidential cannot be subject to the application procedure of Article 24. A similar conclusion is reached by analysing the text from the earlier DPD Article 15.

A further consequence of any interpretation that downstream formulators also need to apply for such substances in their mixtures could be to place at a commercial disadvantage those formulators who protect their proprietary chemicals in their mixtures, compared with those who do not need to do so. Faced with a situation of equivalent performance products from either supplier A, where no hazardous ingredients have their identity protected, or supplier B, where one or more ingredients are protected from full disclosure, a downstream formulator may well choose the product from company A to avoid the administrative burden and costs required to apply subsequently for alternative name in their downstream mixtures. This could actually be to the detriment of the use of more recent and safer chemicals that formulator B has spent years developing. It is assumed that such a distortion of the market or product deselection cannot be an intentional consequence of the legislation where the legitimate right of a formulator to protect certain intellectual property is recognised.

Ideally, having gained permission from ECHA to use an alternative generic name, the applicant company uses this name on their SDS and labels as appropriate and any downstream users in that supply-chain use the same identifier without any further need for the formal application process.

It is therefore the position of ATC and ATIEL that:

- The legislation clearly sets out to allow companies to protect their Intellectual property in prescribed situations
- As the legislation is written, it makes sense that only the first actor in the supply chain to claim confidentiality can do so and meet all the requirements of CLP Article 24 or DPD Article 15. No

further downstream users can possibly comply in relation to that particular substance in their own product as the precise identity will not be their intellectual property

- It is not the intention of such legislation to introduce any market disadvantage or unnecessary technical barriers to trade for those companies wishing to avail themselves of such rights to apply for confidentiality
- Downstream users in the same supply chain are allowed to use an alternative name for a particular substance, provided this alternative name has been successfully granted to an actor up the same supply chain and all actors in the supply chain can provide evidence of this permission.

And therefore, the following system will be adopted.

1. Where an additive formulator has successfully applied for permission to use an alternative name for a substance, he will provide evidence (reference number where available) to the lubricant companies that he is supplying provided the recipient confirms that disclosure is still a requirement for their lubricant SDS and/or label. The lubricant companies can then present such evidence to any MS competent authority inspectors who may require it.
2. Where an additive formulator receives a component from a third party additive supplier that contains an ingredient protected under confidentiality, the additive formulator shall seek similar evidence of successful alternate name application from his upstream supplier. The additive formulator will confirm possession of such confirmation to any lubricant customer who further requires this information for their SDS and/or labels.
3. Where an application for permission to use an alternative chemical name is in preparation or progress, the additive company shall provide a statement to this effect.

Member companies of ATC and ATIEL strongly believe an application process for alternative names for downstream users of the same chemicals already claimed as confidential higher up the supply-chain according to the above-mentioned CLP regulation is inconsistent with the intent to afford protection to company trade secrets. Such an application process would lead to a situation where either the lubricant company is in the position where they are unable to comply with the requirements for their label or SDS because they cannot demonstrate that their intellectual property is at risk or the additive formulator is in the position where their successful application for confidentiality is nullified because the downstream user requires the precise identity to complete their application. Both situations seem to contradict the intention of the legislation.