

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

**25 September 2013**

*(Evaluation – Compliance check of a registration dossier – Request to submit further information – Rectification of Contested Decision – Good administration)*

<b>Case number</b>	A-007-2012
<b>Language of the case</b>	English
<b>Appellant</b>	Italcementi Fabbriche Riunite Cemento S.p.A. Bergamo Italy
<b>Representative</b>	Ursula Schliessner and Nicolas Croquet McKenna Long & Aldridge LLP Brussels Belgium
<b>Contested decision</b>	CCH-D-0000002626-72-02/F of 31 July 2012 adopted by the European Chemicals Agency (hereinafter the 'Agency') pursuant to Article 41 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'); partially rectified pursuant to Article 93(1) of the REACH Regulation by Decision CCH-D-0000002626-72-03/F/RECT of 29 October 2012

**THE BOARD OF APPEAL**

composed of Mercedes ORTUÑO (Chairman), Mia PAKARINEN (Legally Qualified Member and Rapporteur) and Andrew FASEY (Technically Qualified Member)

Registrar: Sari HAUKKA

gives the following

## Decision

### RELEVANT LEGISLATION

1. Article 1(1) of the REACH Regulation provides:

*'The purpose of this Regulation is to ensure a high level of protection of human health and the environment, including the promotion of alternative methods for assessment of hazards of substances, as well as the free circulation of substances on the internal market while enhancing competitiveness and innovation.'*

2. Article 10(a)(ii) of the REACH Regulation provides:

*'A registration required by Article 6 or by Article 7(1) or (5) shall include all the following information:*

*(a) a technical dossier including:*

*[...]*

*(ii) the identity of the substance as specified in section 2 of Annex VI; [...]*

3. Article 41(1)(a) and (3) of the REACH Regulation provides:

*'1. The Agency may examine any registration in order to verify any of the following:*

*(a) that the information in the technical dossier(s) submitted pursuant to Article 10 complies with the requirements of Articles 10, 12 and 13 and with Annexes III and VI to X;*

*[...]*

*3. On the basis of an examination made pursuant to paragraph 1, the Agency may, within 12 months of the start of the compliance check, prepare a draft decision requiring the registrant(s) to submit any information needed to bring the registration(s) into compliance with the relevant information requirements and specifying adequate time limits for the submission of further information. Such a decision shall be taken in accordance with the procedure laid down in Articles 50 and 51.'*

4. Article 51(1) to (7) of the REACH Regulation provides:

*'1. The Agency shall notify its draft decision in accordance with Articles 40 or 41, together with the comments of the registrant, to the competent authorities of the Member States.*

*2. Within 30 days of circulation, the Member States may propose amendments to the draft decision to the Agency.*

*3. If the Agency does not receive any proposals, it shall take the decision in the version notified under paragraph 1.*

*4. If the Agency receives a proposal for amendment, it may modify the draft decision. The Agency shall refer a draft decision, together with any amendments proposed, to the Member State Committee within 15 days of the end of the 30-day period referred to in paragraph 2.*

5. *The Agency shall forthwith communicate any proposal for amendment to any registrants or downstream users concerned and allow them to comment within 30 days. The Member State Committee shall take any comments received into account.*

6. *If, within 60 days of the referral, the Member State Committee reaches a unanimous agreement on the draft decision, the Agency shall take the decision accordingly.*

7. *If the Member State Committee fails to reach unanimous agreement, the Commission shall prepare a draft decision to be taken in accordance with the procedure referred to in Article 133(3).'*

5. Article 93(1) of the REACH Regulation provides:

*'If, after consultation with the Chairman of the Board of Appeal, the Executive Director considers the appeal to be admissible and well founded he may rectify the decision within 30 days of the appeal being filed in accordance with Article 92(2).'*

6. Section 2 of Annex VI to the REACH Regulation provides:

*'For each substance, the information given in this section shall be sufficient to enable each substance to be identified. If it is not technically possible or if it does not appear scientifically necessary to give information on one or more of the items below, the reasons shall be clearly stated.*

2.1. *Name or other identifier of each substance*

2.1.1. *Name(s) in the IUPAC nomenclature or other international chemical name(s)*

2.1.2. *Other names (usual name, trade name, abbreviation)*

2.1.3. *EINECS or ELINCS number (if available and appropriate)*

2.1.4. *CAS name and CAS number (if available)*

2.1.5. *Other identity code (if available)*

2.2. *Information related to molecular and structural formula of each substance*

2.2.1. *Molecular and structural formula (including SMILES notation, if available)*

2.2.2. *Information on optical activity and typical ratio of (stereo) isomers (if applicable and appropriate)*

2.2.3. *Molecular weight or molecular weight range*

2.3. *Composition of each substance*

2.3.1. *Degree of purity ( %)*

2.3.2. *Nature of impurities, including isomers and by-products*

2.3.3. *Percentage of (significant) main impurities*

2.3.4. *Nature and order of magnitude (... ppm, ... %) of any additives (e.g. stabilising agents or inhibitors)*

2.3.5. *Spectral data (ultra-violet, infra-red, nuclear magnetic resonance or mass spectrum)*

2.3.6. *High-pressure liquid chromatogram, gas chromatogram*

*2.3.7. Description of the analytical methods or the appropriate bibliographical references for the identification of the substance and, where appropriate, for the identification of impurities and additives. This information shall be sufficient to allow the methods to be reproduced.'*

## **SUMMARY OF THE FACTS**

7. The Appellant submitted a registration for the substance flue dust, Portland cement (hereinafter 'the Substance') at the tonnage level of 1 000 tonnes or more per year.
8. On 23 March 2012, the Agency initiated a dossier compliance check of the Appellant's registration dossier for the Substance targeted at the information on the identity of the Substance. Further to this, the Agency prepared a draft decision pursuant to Article 41(3) of the REACH Regulation. The Agency notified to the Appellant the draft decision and invited it, pursuant to Article 50(1) of the REACH Regulation, to submit comments by 4 May 2012.
9. On 19 April 2012, the Agency and the Appellant held a teleconference to discuss the content of the draft decision.
10. On 4 May 2012, the Appellant submitted comments on the draft decision and subsequently on 31 May 2012, submitted an updated registration dossier to the Agency. The updated registration dossier explains that the Substance is a by-product in the production of Portland cement clinker and describes the Substance as of unknown or variable composition, complex reaction products or biological materials (hereinafter 'UVCB').
11. After the update of the registration dossier the Agency amended the draft decision. On 14 June 2012, the Agency notified, pursuant to Article 51(1) of the REACH Regulation, the draft decision to the Member States Competent Authorities (hereinafter the 'MSCAs') and invited them to propose amendments. The MSCAs did not submit any proposals for amendment to the draft decision.
12. On 31 July 2012, the Agency adopted the Contested Decision and notified it to the Appellant. In the Contested Decision the Agency concluded that the registration did not comply with the requirements of Article 10 as well as Annex VI of the REACH Regulation and requests the Appellant to update its registration dossier with the required information by 1 October 2012. The Agency requested the Appellant to submit the information first as regards name or other identifier of the Substance (Section 2.1 of Annex VI), including information which is suitable and necessary to allow the Agency to establish and verify the name and identity of the Substance and, second, the composition of the Substance (Section 2.3 of Annex VI), including information which is suitable and necessary to allow the Agency to establish and verify the composition and the name of the Substance.
13. The Agency's reasoning for its decision as regards the name or other identifier of the Substance can be summarised as follows. The Agency stated that the naming of UVCB substances shall consist of two parts, the chemical name and a detailed description of the manufacturing process. Since the composition of the Substance varied considerably with a high variation in the concentration of three constituents in particular, the Agency concluded that, based on the information provided in the Appellant's comments and in the updated registration dossier, significant changes in the manufacturing process of flue dust from Portland cement are likely to lead to different substances being produced. The Agency stated that insufficient information

on extraction/collection steps and manufacturing processes were provided. The Agency also stated that the Appellant has not demonstrated how the compositions of the flue dust fractions extracted at different collection points may vary. The Agency concluded that the flue dust fractions collected at significantly different extraction points and temperatures are likely to be regarded as different substances under the REACH Regulation and therefore require separate registrations.

14. The Agency's reasoning for its decision as regards the composition of the Substance can be summarised as follows. According to the Agency, the registration dossier does not contain sufficient information to establish the composition of the Substance and therefore its identity. The Appellant has provided information on the composition(s) of the Substance and on the variation in the concentrations of the main constituents. For some compositions exceptionally wide concentration ranges of the individual constituents have been provided. The Agency stated that while inherent variations due to the composition of the raw materials are perfectly acceptable, compositions referring to different fractions of the flue dust shall potentially be regarded as different substances. Furthermore, for some constituents the minimum concentration values were not provided. The Agency concluded that the reported composition covers fractions/grades which differ significantly in their composition and are thus potentially not manufactured under the same process conditions. As a result, the Appellant was requested to provide compositional information which refers solely to each fraction or grade of flue dust that is a single substance requiring registration.

#### **PROCEDURE BEFORE THE BOARD OF APPEAL**

15. On 28 September 2012, the Appellant lodged a Notice of Appeal at the Registry of the Board of Appeal challenging the Contested Decision. The Appellant requested the Board of Appeal to annul the Contested Decision and to order the reimbursement of the appeal fees and costs arising from the appeal proceedings. In the event that the Board of Appeal does not annul the Contested Decision, the Appellant requested its partial annulment and its replacement by a new decision extending the time limit for submission of the information to a date that is six months after the decision of the Board of Appeal.
16. The Notice of Appeal was notified to the Agency on 1 October 2012. On 29 October 2012, pursuant to Article 93(1) of the REACH Regulation, the Executive Director decided to rectify parts of the Contested Decision by replacing it with Decision number CCH-D-0000002626-72-03/F/RECT (hereinafter the 'Contested Decision as rectified').
17. In the Contested Decision as rectified, the time for the Appellant to submit the information required to bring the registration into compliance was extended from two to three months. The Appellant therefore had until 2 November 2012 to submit the requested information. The Agency also made some editorial changes to the statement of reasons. In the Contested Decision the Agency had stated that significant changes in the manufacturing process of the flue dusts from Portland cement production lead to different substances under REACH. The Contested Decision as rectified however states that significant changes in the manufacturing process of the flue dusts from Portland cement production are likely to lead to different substances. In addition, the Contested Decision as rectified states that dust fractions collected at significantly different extraction points and/or temperature are likely to be regarded as different substances and therefore require separate registration whilst before its rectification,

the Contested Decision had stated that such dust fractions shall be regarded as different substances and registered separately.

18. On 7 November 2012, the Appellant informed the Registry of the Board of Appeal that it intended to continue with the appeal proceedings despite the partial rectification of the Contested Decision.
19. On 17 December 2012, the Agency submitted the Defence.
20. On 21 February 2013, the Appellant lodged observations on the Defence.
21. On 19 March 2013, the Parties were notified of the Board of Appeal's decision to close the written procedure.
22. On 28 March 2013, the Appellant requested a hearing to be held.
23. On 2 April 2013, the Agency requested the Board of Appeal to re-open the written procedure and grant it an opportunity to reply to the Appellant's submissions lodged on 21 February 2013. In the alternative, the Agency requested a hearing to be held.
24. In accordance with Article 13 of Commission Regulation (EC) No 771/2008 of 1 August 2008 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'), following the Parties' requests for a hearing to be held, the Parties were summoned to a hearing which was held on 4 June 2013. Oral presentations were made by the Parties. The members of the Board of Appeal also posed questions to the Parties.

## **ARGUMENTS OF THE PARTIES**

### **Appellant's arguments**

25. In the Notice of Appeal the Appellant challenged the Contested Decision's requirements to submit information related to the name or other identifier and composition of the Substance.
26. The Appellant supported this claim with the following pleas of law and fact:
  - (i) The Contested Decision infringes the principle of legitimate expectations insofar as the Agency's request for further information has no basis either in the REACH Regulation or the Guidance for identification and naming of substances under REACH and CLP (hereinafter the 'Guidance'). In addition, the Agency's approach is not reflected in the actual manufacturing process of flue dust. More specifically, according to the Appellant, the Guidance confirms that UVCB substances are not identified at every step in the manufacturing process but at the end of the manufacturing process. As there is only one manufacturing process for the Substance, the Substance should not be split into different fractions, and hence different registrations, notwithstanding that flue dust from the same plant and at the same extraction point can vary markedly in its chemical, mineralogical and physical composition. Therefore, the Agency's request for separate registrations for flue dust fractions extracted during different stages of the manufacturing process is contrary to the Guidance. The Appellant also argues that the Agency has applied more stringent criteria to substance identity information for the Substance than those set out in the Guidance for a substantially equivalent type of substances, namely slags. The

Appellant further maintains that it could legitimately have relied upon the existing CAS and EC numbers to determine that only one registration for flue dust was required pursuant to the REACH Regulation. Finally, the Appellant argues that the hazardous properties of the different flue dust fractions are the same which supports its contention that only one substance is manufactured;

- (ii) The Contested Decision infringes the principle of proportionality as requiring separate registrations for the individual substances contained in flue dust would be contrary to the objectives and purpose of the REACH Regulation and place an undue administrative burden on the Appellant. As these individual flue dust fractions have the same physical, chemical, hazard and safety characteristics, separate registration of these fractions would not bring any new information on the hazards posed or result in other risk management measures;
  - (iii) In its subsidiary plea for the partial annulment of the Contested Decision and replacement of the time limit set for providing the requested information, the Appellant argues that the time limit initially set by the Agency constitutes a breach of the principle of good administration, including the principle of proportionality and the duty of the European Union administration to act fairly and reasonably, and constitutes an abuse of power. The Appellant claims that the three month time limit granted by the Contested Decision as rectified, is also not sufficient. According to the Appellant, the Contested Decision implies that the Appellant would have to file separate registrations for substances collected at different extraction points and temperatures as in the Agency's view these should be considered different substances pursuant to the REACH Regulation. As this would entail significant additional work for the Appellant, and having regard to Article 21(1) of the REACH Regulation, the minimum time required to compile new registration dossiers is six months from the date of the decision of the Board of Appeal. Moreover, the time limit set by the Contested Decision was unfair and unreasonable insofar as it reduced, in effect, the Appellant's appeal time by one month. The Appellant considers that this also constitutes a misuse of power.
27. Subsequently, in its observations on the Agency's Defence submitted on 21 February 2013 and after the rectification of the Contested Decision, the Appellant argued, *inter alia*, as follows:
- (i) The purpose of the rectification is to 'satisfy' the Appellant and revise an otherwise unsound decision. In the rectification decision, the Executive Director has exceeded his competence under Article 93(1) of the REACH Regulation and has thus acted *ultra vires* by changing the wording of the reasoning rather than the operative part of the Contested Decision, as the operative part was changed only in relation to the time limit provided to submit the requested information;
  - (ii) The Appellant never agreed with the draft decision. The comments it made on 4 May 2012 and the registration update of 31 May 2012 were merely intended to avoid the Agency issuing a final decision. The comments submitted actually show that the Appellant continued to defend the view that flue dust is one substance and that only one substance should be registered. The Appellant also refers to the settlement proposal it made on 18 January 2013, containing a proposal for a dossier update with additional information on the identity of the Substance, and the subsequent rejection of that proposal by the Agency in a letter of 8 February 2013;

- (iii) The Contested Decision as rectified, although less explicit on the need to file additional registrations, does not rule out such a possibility, which if required would cause an unnecessary burden to the Appellant's economic interest;
- (iv) The Appellant did not introduce, in its Notice of Appeal, any new facts that would have fallen outside the factual basis that determined the content of the second draft decision adopted by the Agency after the update of the registration dossier on 31 May 2012. Even if that was the case, the consideration of new facts supporting a plea in law is all the more necessary when the Agency makes use of its power to rectify a contested decision;
- (v) The setting of the three-month time limit for the Appellant to update its registration and comply with the Contested Decision as rectified, is, taking into account the updated registration dossier, a breach of the principle of proportionality and constitutes an abuse of power.

### **Agency's Defence**

28. The Agency's arguments can be summarised as follows:

- (i) In accordance with the Contested Decision as rectified, the Agency has not concluded that the different fractions of flue dust are necessarily to be considered as different substances. Accordingly, the Contested Decision as rectified does not directly instruct the Appellant to submit new registrations for the different fractions of flue dust. However, in light of information in the Appellant's registration dossier, the Agency cannot conclude with full certainty whether one or several substances have been described. Therefore, the Agency requires the Appellant to provide suitable and necessary information to allow for the identification of the registered substance. More specifically, the Agency requires a better understanding of the parameters of the manufacturing process to establish and verify the name, identity and composition of the Substance given the large variations in the composition of the registered Substance at the different extraction points. In requiring the Appellant to further specify the identity of the Substance the Agency acted in line with the REACH Regulation and the Guidance;
- (ii) The Contested Decision has not placed an excessive burden on the Appellant as the required information could be expected to be readily available to the Appellant and it is needed to ensure compliance with the requirements for registration. The imposition of a requirement for the Appellant to define the Substance more precisely, which in turn will enable the Agency to verify the identity of the Substance, is not disproportionate. Therefore, the Agency considers that the Contested Decision is proportionate. The Agency disagrees with the Appellant's argument that the hazard profile should be the starting point for allowing substance(s) to be registered in one registration dossier as a single substance, as this would be contrary to the wording and objectives of the REACH Regulation;
- (iii) The Contested Decision as rectified does not depart from the information requirements for UVCB substances, as described in the REACH Regulation and the Guidance. Accordingly, the Agency has not infringed the principle of legitimate expectations. More specifically, according to recital 45 to the REACH Regulation, while UVCB substances can be registered in one registration dossier

provided that the '*[...] hazardous properties do not differ significantly and warrant the same classification*', the Agency considers that UVCB substances can be considered the same only if they are obtained from the same manufacturing process or if the differences in the manufacturing process warrant that the resulting compositions do not differ significantly and in a systematic manner. A significant difference in composition exists, *inter alia*, when two resulting substances have different hazard characteristics. As regards the present case, the Agency observes that the different constituents of flue dust described in the registration dossier could lead to different hazard profiles, depending on their concentration range, and it is not clear whether certain constituents that could trigger classification of a substance as hazardous are systematically present or absent in all compositions of the Substance. Thus, there is uncertainty as to how and whether the hazard profile could vary for different compositions. In light of this, the Agency maintains that the Appellant's argument that all fractions of flue dust would have the same hazard profile cannot be accepted. As regards the Appellant's arguments based on CAS and EC numbers, the Agency points out that these numerical identifiers have been drawn up for other purposes and for different regulatory regimes than that established by the REACH Regulation. Hence, they cannot serve as evidence to clearly establish substance sameness;

- (iv) Further, the Agency considers that the legality of the Contested Decision can only be appraised in light of information contained in the Appellant's registration dossier at the time the draft decision was notified to the MSCAs pursuant to Article 51(1) of the REACH Regulation, that is, on 14 June 2012. Any information on the manufacturing, composition, properties or use of the Substance submitted subsequent to the compliance check procedure, including in the Appellant's Notice of Appeal, is not relevant for the purposes of appraising the legality of the Contested Decision;
- (v) Finally, as regards the time limit set for the Appellant to submit the requested information, the Agency has extended the initial time to three months by the partial rectification decision, and it has thus addressed the Appellant's arguments that its right of appeal would have been curtailed. The Agency considers that a time limit of three months is proportionate as it can reasonably be expected that the required information is available to the Appellant. Furthermore, as the Agency's request for further information pursues a legitimate aim and as the three months time limit is proportionate, the Appellant's allegation of abuse of power is unfounded.

## **REASONS**

### **I. Admissibility of the appeal**

- 29. The appeal complies with Articles 91(1) and 92(1) and (2) of the REACH Regulation as well as Articles 6, 9, 10 and 14 of the Rules of Procedure. The appeal is therefore admissible.

### **II. Other preliminary issues**

- 30. Before examining the Appellant's substantive claims, the Board of Appeal will firstly examine certain procedural issues raised by the Parties during the present proceedings.

31. As regards the procedural issues raised, the Appellant questioned the lawfulness of the rectification of the Contested Decision by the Executive Director, while the Agency contended that the Board of Appeal needs to assess the Contested Decision against the information available to the Agency at the time of its adoption.

**1. Lawfulness of the rectification of the Contested Decision by the Executive Director**

32. In a letter dated 29 October 2012, the Executive Director informed the Appellant that the Agency had decided to rectify parts of the Contested Decision pursuant to Article 93(1) of the REACH Regulation. The letter states that the partial rectification concerns the deadline for submitting the required information to bring the registration into compliance. In that regard, according to the wording of the letter, the deadline has been extended from two to three months, to align it with the deadline to lodge an appeal. In addition, the letter states that '*... some editorial changes have been made to the statement of reasons*'.
33. In its Defence, the Agency stated that as a consequence of the partial rectification, the operative part of the Contested Decision remains unaffected as the Agency still requires more detailed information on the identity of the Substance. However, the Contested Decision as rectified no longer excludes the possibility that fractions of flue dust could be considered as the same substance, if this is supported by the necessary evidence.
34. The Appellant argued in its observations on the Defence that the purpose of rectification is to 'satisfy' the Appellant and to revise an otherwise unsound decision. It alleged that by adopting the Contested Decision as rectified, the Executive Director exceeded his competence under Article 93(1) of the REACH Regulation and has thus acted *ultra vires*. First, by changing the wording of the Contested Decision's reasoning rather than its operative part the Contested Decision has not been rectified and, second, the *ex ante* postponement of the compliance deadline that falls within the appeal period does not qualify as a rectification. The Appellant adds in that regard that the Contested Decision has not been rectified since by the time of the adoption of the Contested Decision as rectified, the original compliance deadline has passed and the Contested Decision had become effective.
35. The Board of Appeal will therefore first examine whether the rectification of the Contested Decision by the Executive Director was adopted in accordance with Article 93(1) of the REACH Regulation.
36. According to Article 93(1) of the REACH Regulation, a contested decision may be rectified by the Executive Director if, after consulting the Chairman of the Board of Appeal, the former considers the appeal to be admissible and well founded. The applicable provision does not, in principle, impose any limits on the extent of the rectification that the Executive Director may make.
37. The Board of Appeal therefore considers that it is within the Executive Director's discretionary powers to rectify any part of a contested decision, be it the operative part or the reasoning of the contested decision.
38. Furthermore, the Board of Appeal does not share the Appellant's view that the purpose of rectification is to 'satisfy' the Appellant and to revise an otherwise unsound decision. As regards the material aspect of rectification, the Board of Appeal considers that the powers of the Executive Director to rectify a contested decision are only limited by the legal consequences of the rectified decision.

39. As a result, a contested decision as rectified by the Executive Director, taken as a whole, should not place an appellant in a worse position than it was under the decision it is contesting. It follows that any outcome of the rectification of a contested decision, pursuant to Article 93(1) of the REACH Regulation, is permitted provided it does not place the appellant in a less favourable position than it would have been in had the contested decision not been rectified.
40. The Appellant claims that the Contested Decision as rectified does not rule out that the Appellant would need to file additional registrations. The Board of Appeal notes that one of the purposes that the Agency pursued with the Contested Decision as rectified was to obtain more information that would enable it to conclude on the identity of the Substance. As a result, while the Contested Decision as rectified does not exclude the possibility that the Appellant may be required to register separately different dust fractions of the Substance collected at different extraction points and temperature points, it does not require it either.
41. The Board of Appeal therefore considers that, by rectifying the reasoning part of the Contested Decision, the Appellant has not been placed in a less favourable position than it was before the Executive Director rectified the Contested Decision.
42. The Appellant's claim that the Contested Decision has not been rectified as it had become effective before the rectification had been made is also unfounded as an appeal lodged before the Board of Appeal has, pursuant to Article 91(2) of the REACH Regulation, suspensive effect. In the present case, the Contested Decision requested the Appellant to submit certain information by 1 October 2012. As the appeal against the Contested Decision, having suspensive effect on the Contested Decision, was lodged on 29 September 2012, the effects of the Contested Decision had not yet materialised.

## **2. Scope of the appeal after the rectification of the Contested Decision**

43. After finding that the Contested Decision has been rectified in accordance with the applicable rules, it is opportune for the Board of Appeal to examine whether the rectification in the present case has any bearing on the scope of the appeal.
44. Although the Appellant questioned the lawfulness of the rectification by the Executive Director it maintained that it had filed a full appeal against the Contested Decision as rectified.
45. The Board of Appeal therefore considers that the appeal has been filed against the Contested Decision as rectified, which, according to the text thereof, replaced the Contested Decision.
46. Accordingly, the Board of Appeal will review the lawfulness of the Contested Decision as rectified, by considering the merits of the appeal.

## **3. The Agency's contention that the Contested Decision needs to be examined against the information available to the Agency at the time of the adoption of that decision**

47. By contending that the Board of Appeal has to assess the Contested Decision against the information that was available to the Agency at the time the decision was taken, the Agency, in effect, requests the Board of Appeal not to consider in its decision-making any information that was unavailable to the Agency during the compliance check.

48. The Agency argued in its Defence that any information on the manufacture, composition, properties or use of the Substance, which appeared for the first time in the Notice of Appeal, could not affect the legality of the Contested Decision and cannot be relevant for the present appeal proceedings. During the hearing, when replying to one of the questions of the Board of Appeal, the Agency also claimed that new elements in the Notice of Appeal and the subsequent observations not only contained new arguments supporting the facts presented during the registration procedure, but also completely new facts which were not available to the Agency at the time the Contested Decision was adopted. The Agency further specified that, in particular, the facts related to the final stage of the manufacturing process, i.e. the collection of the Substance in one silo, were not presented to the Agency at the time of the adoption of the Contested Decision.
49. The Agency alleges that information on the manufacture, composition, properties, collection, storage or use of the Substance contained in the Notice of Appeal and supported by Annexes 1 and 2 thereto, titled *Illustration of manufacturing process* and *Expert note on flue dust variability of September 26, 2012* respectively (hereinafter the 'Annexes'), constitutes information that was not available to the Agency at the time of the adoption of the Contested Decision. As such, the Agency claims that this information could not affect the legality of the Contested Decision and cannot be relevant for the present appeal proceedings.
50. The Appellant claims that the Notice of Appeal and its Annexes do not contain any new facts that would have fallen outside the factual basis that determined the content of the second draft decision that was adopted after the update of the registration dossier of 31 May 2012. In that regard, the Appellant made a reference to the material already submitted to the Agency as part of the update and to the comments made earlier as regards the draft decision where the Appellant stated inter alia that '*the exhaust gases contain the particles, which are called 'flue dust'. The flue dust particles come with the exhaust gases and are collected in devices such as cyclones, baghouses or electrostatic precipitators.*' The Appellant contended that, the facts [related to the Substance and clinker manufacturing process] elaborated upon in the Notice of Appeal find their essence in the registration dossier. As such, those facts are related to the registration process and compliance check and should not be characterised as 'novel'. Moreover, their inclusion in the Notice of Appeal was necessary as the Agency failed to correctly interpret the facts that the Appellant submitted previously during the Agency's decision-making process.
51. When examining whether information or evidence submitted in support of the Notice of Appeal that was not available to the Agency during the decision-making procedure leading to the adoption of the Contested Decision is admissible, the Board of Appeal needs to ascertain whether such information or evidence supports new facts or is supporting facts already alleged during the Agency's decision-making procedure.
52. With regard to the disputed information contained in the Notice of Appeal related to the manufacturing, composition, properties, collection, storage or use of the Substance, the Board of Appeal accepts that the Appellant presented that information as it was of the opinion that the Agency had not correctly interpreted the facts previously submitted by the Appellant in the course of the registration process and compliance check. The Board of Appeal also considers that the Appellant presented the information regarding the use of the single silo for the collection of all fractions of flue dust with a view to further supporting its contention that the flue dust is a single substance.

53. Furthermore, whilst the Substance is a by-product of the manufacturing process for Portland cement clinker, the Appellant's description of the manufacturing process referred primarily to the manufacture of Portland cement clinker itself. In the circumstances of this particular case, the Board of Appeal can understand, in particular from the explanation given by the Appellant at the oral hearing, why the Appellant may have considered that the final collection step, occurring after the extraction of the flue dust fractions from the manufacturing process for the clinker, was not, strictly speaking, part of the manufacturing process. The Board of Appeal also appreciates, from the information submitted on the composition of the various flue dust fractions, why the Agency thought that more information may be needed from the Appellant for substance identity purposes.
54. Consequently, the Board of Appeal is of the view that the disputed information included in the Notice of Appeal, was intended to supplement and expand on the previous more general information on the manufacturing process of the Substance submitted by the Appellant to the Agency during the registration process and compliance check.
55. For the above reasons, the Board of Appeal therefore considers that, in this particular case, for the reasons given above, the Agency is not justified in claiming that the explanatory information on the manufacture, composition, properties, collection, storage or use of the Substance contained in the Notice of Appeal is inadmissible in the present proceedings. Consequently, that information is admissible.

### **III. Claims under examination**

56. In support of its appeal, the Appellant claims that by adopting the Contested Decision and later the Contested Decision as rectified, the Agency breached the principle of legitimate expectations and the principle of proportionality. In addition, according to the Notice of Appeal, the Appellant contends that by setting the time limit to comply with the Contested Decision at two months, a period that expires before the end of the time allowed to make an appeal, the Agency infringed the general principles of good administration, proportionality and the duty of a European Union body to act fairly and reasonably. According to the Appellant such Agency actions would constitute an abuse of power.
57. The Board of Appeal notes that the part of the Contested Decision granting a time limit of two months was rectified by the Agency. According to the text of the Contested Decision as rectified the time limit was extended from two to three months. However, in practice, the Contested Decision as rectified was notified to the Appellant on 29 October 2012 and required the Appellant to submit the information to the Agency by 1 November 2012, that is, three days after the notification.
58. In the circumstances of the case, the Board of Appeal considers it appropriate to examine first the claim alleging the unlawful setting of the deadline to comply with the Contested Decision as rectified.

#### **1. Claim alleging unlawful setting of the deadline to comply with the Contested Decision as rectified**

59. As stated in paragraph 45 above, the Board of Appeal is of the view that the appeal has been filed against the Contested Decision as rectified which replaced the Contested Decision.
60. The Board of Appeal considers that when the Executive Director decides to rectify a decision contested in appeal proceedings his discretionary powers to rectify that

decision must be exercised in accordance with the principle of good administration established in European Union law. The Board of Appeal will therefore examine whether the Agency's rectification of the Contested Decision complied with the principle of good administration.

61. Specifically for the Agency, the principle of good administrative behaviour is also laid down in the Agency's Code of good administrative behaviour for the staff of the [Agency] in their relations with the public (MB/11/2008 final). The right to good administration is also affirmed in Article 41 of the Charter of Fundamental Rights of the European Union (OJ C 83, 30.3.2010, p. 389).
62. In the present case, the principle of good administration requires in particular that when the Agency decides to rectify a contested decision it should take into consideration all the consequences that rectification may cause. Consequently, the Agency's administrative actions should pursue properly and efficiently the interests of the Agency while also appropriately recognising the rights and interests of the persons affected by the Agency's actions.
63. At the hearing, when invited by the Board of Appeal to present its views on the manner of extending the time limit to submit the required information when rectifying the Contested Decision, the Agency stated that the deadline was extended, not because the Agency intended to grant an extension of the time permitted to submit the required information, but because the Agency noticed that, being one month shorter than the period to appeal, the deadline of two months in the Contested Decision constituted a manifest legal error. The Agency also added that this appeal had encouraged it to change its administrative practice so that, in dossier evaluation decisions, registrants are now given at least three months to submit the required information.
64. Irrespective of the reasons which motivated the Agency to rectify the Contested Decision and the consequences of suspensive effect of an appeal, the Board of Appeal notes that, had the Appellant in the present case decided to withdraw the appeal, it would in practice have had only three days to comply with the Contested Decision as rectified.
65. For the above reasons, the Board of Appeal considers that, in the present case, by setting the deadline for the Appellant to submit the information required to bring its registration into compliance, where the deadline expired three days after the notification of the Contested Decision as rectified, the Agency omitted to appropriately consider that the Appellant may be interested in updating its registration dossier to bring it into compliance without continuing with the appeal proceedings. The, in effect, three day deadline to do so in all likelihood made this impossible. In these circumstances, the Agency's failure to appropriately consider the Appellant's rights and interests when rectifying the Contested Decision constitutes an infringement of the principle of good administration.
66. Having regard to the above, the Board of Appeal finds that the fact that the Agency's actions, when setting the deadline in the Contested Decision as rectified, unreasonably restricted the Appellant's ability to comply in a timely manner with the rectified decision, is such as to entail the annulment of the Contested Decision as rectified.
67. The Board of Appeal therefore annuls the Contested Decision as rectified and remits the case to the competent body of the Agency for re-evaluation of the registration dossier.

68. In the course of the present appeal proceedings supplementary information has been provided by the Appellant related to the manufacturing process of the Substance which further explains the information presented in the updated registration dossier. In accordance with the principle of good administration, and in particular the need for administrative efficiency, the Agency should re-evaluate the latest version of the registration dossier as submitted by the Appellant at the time of that re-evaluation.

## **2. Other pleas raised by the Appellant**

69. Since the Board of Appeal has found in favour of the Appellant and annulled the Contested Decision as rectified, the Board of Appeal does not consider it necessary to examine the other arguments and pleas put forward by the Appellant in support of its appeal.

## **IV. Other issues under examination**

### **1. Refund of the appeal fee**

70. In accordance with Article 10(4) of Commission Regulation (EC) No 340/2008 on the fees and charges payable to the European Chemicals Agency pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (OJ L 107, 17.4.2008, p. 6), the appeal fee shall be refunded if the appeal is decided in favour of an appellant.
71. As the Board of Appeal has decided the appeal in favour of the Appellant in the present case, the appeal fee shall be refunded on that basis.

### **2. Claim for reimbursement of costs**

72. In its Notice of Appeal, the Appellant requests the Board of Appeal to order the Agency to reimburse the Appellant's costs arising from the appeal proceedings.
73. The Board of Appeal observes that there is no legal basis in the Rules of Procedure for the reimbursement of costs that are not, as provided in Articles 17 and 21(1)(h) thereof, related to taking of evidence in appeal proceedings.
74. Consequently, and as in the present case no costs arose in relation to taking of evidence, the Board of Appeal rejects the Appellant's request for reimbursement of costs that it incurred in the appeal proceedings.

**ORDER**

On those grounds,

THE BOARD OF APPEAL

hereby:

**Annuls Decision CCH-D-0000002626-72-03/F/RECT adopted by the European Chemicals Agency on 29 October 2012.**

**Remits the case to the competent body of the Agency for re-evaluation of the registration dossier.**

**Orders the refund of the appeal fee.**

**Rejects the claim for the reimbursement of costs incurred by the Appellant in the appeal proceedings.**

Mercedes ORTUÑO  
Chairman of the Board of Appeal

Sari HAUKKA  
Registrar of the Board of Appeal