

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

**13 November 2014**

*(Registration - Rejection of registration due to wrongly declared SME status – Failure to pay supplementary registration fee – Duty of the registrant to act in a diligent manner – Restitutio in integrum)*

<b>Case number</b>	A-020-2013
<b>Language of the case</b>	English
<b>Appellant</b>	Ullrich Biodiesel GmbH Germany  Represented by: Jan-Hendrik Kompa Kaufungen, Kassel Germany
<b>Contested Decision</b>	SUB-D-2114258670-48-01/F of 22 August 2013 adopted by the European Chemicals Agency (hereinafter the 'Agency') pursuant to Article 20(2) of Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (OJ L 396, 30.12.2006, p. 1; corrected by OJ L 136, 29.5.2007, p. 3; hereinafter the 'REACH Regulation') and Article 3(6) of 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, as amended by Commission Implementing Regulation (EU) No 254/2013, OJ L 79, 21.3.2013, p. 7; hereinafter the 'Fee Regulation')

**THE BOARD OF APPEAL**

composed of Mercedes ORTUÑO (Chairman and Rapporteur), Andrew FASEY (Technically Qualified Member) and Rafael LÓPEZ PARADA (Legally Qualified Member)

Registrar: Sari HAUKKA

gives the following

## Decision

### RELEVANT LEGISLATION

1. Article 6(4) of the REACH Regulation provides:

*'A submission for registration shall be accompanied by the fee required in accordance with Title IX.'*

2. Article 20(2) of the REACH Regulation provides:

*'The Agency shall undertake a completeness check of each registration in order to ascertain that all the elements required [...], as well as the registration fee referred to in Article 6(4) [...] have been provided. The completeness check shall not include an assessment of the quality or the adequacy of any data or justifications submitted. [...]*

*If a registration is incomplete, the Agency shall inform the registrant [...] as to what further information is required in order for the registration to be complete, while setting a reasonable deadline for this. The registrant shall complete his registration and submit it to the Agency within the deadline set. [...]*

*The Agency shall reject the registration if the registrant fails to complete his registration within the deadline set. The registration fee shall not be reimbursed in such cases.'*

3. Article 3(1) and (5) to (7) of the Fee Regulation provides:

*'1. The Agency shall levy a fee, as provided for in paragraphs 2, 3 and 4 of this Article, for any registration of a substance under Article 6, 7 or 11 of [the REACH Regulation]. [...]*

*5. Fees due under paragraphs 1 to 4 shall be paid within 14 calendar days from the date on which the invoice is notified to the registrant by the Agency.*

*However, invoices linked to a registration of a pre-registered substance that is submitted to the Agency during the two months that precede the relevant registration deadline of Article 23 of [the REACH Regulation] shall be paid within 30 days from the date on which the invoice is notified to the registrant by the Agency.*

*6. Where the payment is not made before expiry of the deadline provided for in paragraph 5, the Agency shall set a second deadline for the payment. Where the payment is not made before expiry of the second deadline, the registration shall be rejected.*

*7. Where the registration has been rejected due to the failure of the registrant to submit missing information or due to his failure to pay the fee before expiry of the deadlines, the fees paid in relation to that registration before its rejection shall not be refunded or otherwise credited to the registrant.'*

4. Article 13(3) and (4) of the Fee Regulation provides:

*'3. The Agency may request, at any time, evidence that the conditions for a reduction of fees or charges or for a fee waiver apply. [...]*

*4. Where a natural or legal person that claims to be entitled to a reduction or a fee waiver cannot demonstrate that it is entitled to such a reduction or waiver, the Agency shall levy the full fee or charge as well as an administrative charge.*

*Where a natural or legal person that has claimed to be entitled to a reduction has already paid a reduced fee or charge, but cannot demonstrate that it is entitled to such a reduction, the Agency shall levy the balance of the full fee or charge as well as an administrative charge. [...]*

## **SUMMARY OF THE FACTS**

### **Background of the dispute**

5. In November 2010, the Appellant submitted a registration dossier for 'Fatty acids, C10-18 and C12-22-unsatd., C14-18 and C16-18-unsatd. alkyl esters' at the tonnage level of 1 000 tonnes or more per year.
6. In its REACH-IT account the Appellant declared that it is a 'small enterprise' and at that time it was not requested by the Agency to prove its size. The Appellant paid a reduced registration fee and the registration was confirmed by the Agency.
7. On 11 December 2012, the Agency initiated, in accordance with Article 13(3) of the Fee Regulation and further to Decision of the Management Board MB/D/29/2010, a small or medium-sized enterprise (hereinafter 'SME') verification process and contacted the Appellant requesting it to substantiate its claims relating to its SME status. In response, the Appellant submitted to the Agency a declaration that at the time of its registration it wrongly claimed to be a 'small enterprise', that the correct size of its enterprise would be large, and that consequently it was not eligible for the SME fee reduction.
8. As a consequence of the Appellant's declaration, the Agency concluded that the standard registration fee (for a non-SME enterprise) was due and requested the Appellant to pay the balance of the fee applicable to the correct enterprise size (hereinafter the 'supplementary registration fee'). The Agency's request was notified to the Appellant by means of a decision (hereinafter the 'SME verification decision') which was made available in the Appellant's REACH-IT account and in parallel was sent to the Appellant via registered mail. According to the delivery receipt, the Appellant received the SME verification decision by registered mail on 16 May 2013.
9. Regarding the supplementary registration fee, the SME verification decision stated in bold letters that '*ECHA will issue and send you one supplementary invoice [...] with the difference between the fee(s) already paid and the standard level of fees as laid down in the Fee Regulation*'. The decision added in bold letters the following passage: '*Please note that the new invoices will be sent to you shortly through the REACH-IT messaging system. Therefore, please check your REACH-IT message box frequently.*' In addition, the SME verification decision contained a separate section explaining the consequences of a failure to pay the supplementary registration fee in due time. In particular, the SME verification decision explained that such failure would result in the rejection of the registration concerned and the revocation of the Appellant's registration number.
10. An invoice for the payment of the supplementary registration fee was sent to the Appellant's REACH-IT account on 17 May 2013. On 25 June 2013, the Agency sent a

final payment reminder to the Appellant's REACH-IT account indicating an extended due date of 26 July 2013 and repeating the warning about the potential revocation of the Appellant's registration number if the supplementary registration fee was not paid in due time.

11. On 22 August 2013, since the Appellant had not paid the supplementary registration fee by the deadline set, the Agency adopted the Contested Decision stating that the registration dossier was incomplete due to the non-payment of the registration fee corresponding to the correct enterprise size. According to the Contested Decision, the Appellant's registration was therefore rejected and the registration number previously assigned to the Appellant's registration dossier was revoked.

### **Procedure before the Board of Appeal**

12. On 11 November 2013, the Appellant lodged the present appeal at the Registry of the Board of Appeal challenging the Contested Decision.
13. By way of the present appeal, the Appellant applies for *restitutio in integrum*. The Appellant requests the re-instatement of the registration number which was revoked by the Contested Decision and the provision of a new short deadline for the payment of the supplementary registration fee.
14. The Notice of Appeal was notified to the Agency on 18 November 2013. The Agency submitted its Defence on 20 January 2014.
15. By letter dated 18 February 2014, the Board of Appeal sent a number of written questions to the Parties. The Appellant was also invited to provide observations on the Agency's Defence. On 14 March 2014, the Agency submitted its reply. The Appellant submitted its observations and responded to the Board of Appeal's questions on 20 March 2014.
16. On 2 April 2014, the Parties were notified of the Board of Appeal's decision to close the written procedure. On 4 April 2014 and 14 April 2014 respectively, the Appellant and the Agency informed the Board of Appeal that they did not request a hearing in the present case. On 29 April 2014, the Parties were notified of the Board of Appeal's decision that it was not necessary to hold a hearing in this case.

### **ARGUMENTS OF THE PARTIES**

#### **Appellant's arguments**

17. In the Notice of Appeal, the Appellant claimed that a former member of its staff changed the password to the Appellant's REACH-IT account before leaving the company (hereinafter the 'former employee'). According to the Appellant, due to this change in personnel, the Appellant was not able to access its REACH-IT account at the time when the invoice for the supplementary registration fee and later the final payment reminder were made available in its REACH-IT account. As a result, the Agency's correspondence concerning the payment of the supplementary registration fee was not received by the Appellant on time for the payment.
18. After being expressly requested by the Board of Appeal to provide clarifications as regards the actions of the former employee and the Appellant's alleged inability to access its REACH-IT account during the relevant period for the payment of the

supplementary registration fee, the Appellant submitted that it 'is not able to make out all the facts'. The Appellant added that it learned for the first time on 26 September 2013 that the invoice and the final payment reminder for the supplementary registration fee were available on its REACH-IT account. More precisely, on that date, an association that had helped the Appellant with its registration obligations in the past informed the Appellant via e-mail that the invoice and the final payment reminder for the supplementary registration fee were available on the Appellant's REACH-IT account. In addition, the aforementioned association reset the password to the Appellant's REACH-IT account, and sent a copy of the invoice and the final payment reminder for the supplementary registration fee to the Appellant. The Appellant provided an excerpt of its electronic correspondence with the association to the Board of Appeal.

### Agency's arguments

19. The Agency submits that access to the Appellant's REACH-IT account was not blocked during the relevant period of time for the payment of the supplementary registration fee. Furthermore, the ECHA Helpdesk, which the Appellant would have needed to consult if its REACH-IT account was blocked, did not register any such request by the Appellant. According to the Agency, such a request would have been needed if the access to the REACH-IT account had been blocked or had become otherwise impossible due to the loss of the password, for example if the only knowledgeable person in the company had left the company without sharing the company's REACH-IT account password.
20. The Agency further claims that the Appellant could not have legitimately been unaware of the consequences of non-payment of the full registration fee. The Agency had duly informed the Appellant of the consequences of non-payment of the full registration fee in relation to its registration at several occasions during the SME verification process. In addition, the SME verification decision explained in a clear manner how the supplementary registration fee would be levied, that is, by sending an invoice via REACH-IT. Therefore, the Agency submits that, in light of the above, there are no grounds for an excusable error on the part of the Appellant and therefore for a *restitutio in integrum*.
21. In its reply to the questions of the Board of Appeal, the Agency explained, *inter alia*, its invoicing practice and the means it used for the notification of the SME verification decision in the present case. The Agency noted that, in accordance with its common practice, it notified the SME verification decision to the Appellant's REACH-IT account and, in parallel, it sent a copy of the SME verification decision to the Appellant by registered mail. The Agency explained that, as the SME verification decision may have important consequences for its addressee, the Agency sends it also by registered mail as an additional measure to ensure that its addressee is aware of the communication. In contrast, invoices are only made available to registrants via their REACH-IT account. According to the Agency, the invoice is merely an ancillary document to the SME verification decision that specifies the amounts to be paid and therefore does not produce distinct legal effects.

### REASONS

22. As a preliminary remark, the Board of Appeal notes that, in order to conclude on the merits of the present appeal it is necessary to consider the circumstances of the case. These include the means used by the Agency for the notification to the Appellant of

the necessary information for the payment of the supplementary registration fee and the actions taken by the Appellant after receiving the SME verification decision.

23. The Board of Appeal recalls that, according to the case-law of the Court of Justice of the European Union, questions falling within the scope of essential procedural requirements can be raised by the courts on their own motion (see, for example, Case C-272/12P *European Commission v Ireland and Others*, EU:C:2013:812, Judgment of 10 December 2013, paragraph 28). The Board of Appeal also recalls that, according to Article 93(3) of the REACH Regulation, the Board of Appeal may exercise any power that lies within the competence of the Agency. In light of the above, the Board of Appeal is competent to examine the means used by the Agency in the present case for the notification of the SME verification decision and the subsequent invoice, which contained the necessary information relating to the payment of the supplementary registration fee.
24. The Board of Appeal observes that the Agency notified the SME verification decision via REACH-IT as well as by registered mail to the Appellant. The SME verification decision informed the Appellant of its obligation to pay the supplementary registration fee, which corresponds to the full registration fee for a large enterprise minus the amount already paid by the Appellant when it submitted its registration dossier. The SME verification decision also indicated to the Appellant, in a clearly identifiable section and with the use of bold letters, that the Appellant will shortly receive the invoice for the payment of the supplementary registration fee in its REACH-IT account and it should therefore frequently check its REACH-IT account.
25. As indicated in the SME verification decision, the Agency notified the invoice relating to the payment of the supplementary registration fee only via REACH-IT. The Board of Appeal notes that, in the present case, the invoice contained crucial information for the payment of the supplementary registration fee, that is the exact amount to be paid and the deadline for payment. Importantly, the deadline for the payment of the supplementary registration fee was not included in the SME verification decision and was made available to the Appellant for the first time through the means of the invoice. In light of the above, the Board of Appeal considers that the invoice was inherently linked to the SME verification decision. Moreover, and given that the Appellant was informed for the first time of the payment deadline through the means of the invoice, the invoice cannot be considered as a merely ancillary document that does not produce legal effects, as argued by the Agency. Therefore, the Board of Appeal concludes that the invoice should have, in principle, been notified to the Appellant through the same means used for the notification of the SME verification decision, and in particular by registered mail, in order for the Agency to be in a position to ensure that the invoice has been received by the Appellant.
26. In this respect, the Board of Appeal also notes that neither the REACH Regulation nor any other relevant EU legislation provides a legal basis for the notification only via REACH-IT of acts having potentially serious adverse effects for their addressee. In addition, the terms and conditions that the Appellant had to adhere to when opening its REACH-IT account are silent as regards the possibility of notifying acts that can potentially have serious adverse effects for the Appellant via REACH-IT only. Furthermore, the Agency did not provide any proof that the Appellant had at any point during the SME verification process, or at any other time, accepted the notification via REACH-IT only of acts that can potentially have serious adverse effects for the Appellant, such as the revocation of its registration. Therefore, the Board of Appeal considers that the Agency erred by notifying the invoice solely via REACH-IT.

27. The Board of Appeal observes however that, in the present case, the Agency's conduct did not restrict the Appellant's opportunity to assert its rights and fulfil its obligations with respect to the payment of the supplementary registration fee. Therefore, the Agency's error cannot by itself lead to the annulment of the Contested Decision (see by analogy for example Case T-298/09, *Evropaiki Dynamiki v European Commission*, ECLI:EU:T:2011:496, Judgment of 20 September 2011, at paragraph 35, confirmed on appeal in Case C-629/11P, *Evropaiki Dynamiki v European Commission*, ECLI:EU:C:2012:617, Judgment of 4 October 2012, at paragraph 39). Indeed, as noted above, the SME verification decision informed the Appellant in a clear, easily identifiable section and with bold letters that the invoice for the payment of the supplementary registration fee would be sent shortly via REACH-IT. The invoice was in fact placed in the Appellant's REACH-IT account the day after the Appellant received the SME verification decision. The SME verification decision explicitly drew the Appellant's attention to the fact that the Appellant should check its REACH-IT account on a regular basis. The SME verification decision also informed the Appellant that the amount due is the difference between the amount already paid and the amount that should have been paid by the Appellant according to the Fee Regulation. Thus, the SME verification decision allowed the Appellant to identify the exact amount due and therefore to make initial payment arrangements. Importantly, the SME verification decision informed the Appellant in a clear manner of the consequences of non-payment of the supplementary registration fee in due time.
28. Moreover, the Board of Appeal recalls that every registrant has the duty to act in a diligent and prudent manner in fulfilling its obligations pursuant to the REACH Regulation (Decision of the Board of Appeal of 8 January 2014 in Case A-006-2012, paragraph 129). In addition, according to the case-law of the Court of Justice of the European Union, *'while the principle of respect for the rights of defence imposes on the [EU administration] a number of procedural obligations, it also implies a certain amount of diligence on the part of the party concerned. Accordingly, if the party concerned considers that its rights of defence have not been respected, or have not been adequately respected, in the administrative procedure, it is for the party to take the measures necessary to ensure that they are respected or, at the very least, to inform the competent administrative authority of that situation in good time'* (Case T-329/00, *Bonn Fleisch Ex- und Import GmbH v Commission*, EU:T:2003:48, Judgment of 27 February 2003, paragraph 47).
29. The Board of Appeal considers that the Appellant was under such a duty to act in a diligent manner in the circumstances of the case. The Board of Appeal considers that, in such circumstances, a diligent registrant could have foreseen that it would shortly receive the invoice for the payment of the supplementary registration fee via REACH-IT and that inaction on its side would result in the revocation of its registration. A diligent registrant should have reacted promptly to the receipt of an SME verification decision that the Agency sent directly to it by registered mail. As a minimum, a diligent registrant would have been expected to have informed the Agency of any factors that inhibit it from accessing its REACH-IT account, and therefore from accessing the relevant invoice. The Board of Appeal will thus examine as a next step whether the Appellant exercised the diligence required of it in the circumstances of the case after it received the SME verification decision by registered mail on 16 May 2013.
30. On the basis of the evidence submitted to it the Board of Appeal notes that, despite the clear instructions contained in the SME verification decision, for several months after having received the SME verification decision, the Appellant took no action whatsoever to ensure that it had the invoice referred to in the SME verification decision and consequently to fulfill its financial obligations. The Appellant failed to provide any evidence that it made efforts to access its REACH-IT account after having

- received the SME verification decision. It also failed to provide any evidence that it made efforts to get in touch with the Agency after having received the SME verification decision in order to inform the Agency of its alleged inability to access its REACH-IT account due to a change in personnel or to request that the invoices be sent via other means of communication.
31. The Board of Appeal observes that, in fact, it was only in September 2013, and on the initiative of the association that had helped the Appellant with its registration obligations in the past, that the REACH-IT account of the Appellant was checked and the invoice was retrieved. Moreover, from the evidence submitted to the Board of Appeal by the Appellant it can be concluded that the aforementioned association managed to access the REACH-IT account of the Appellant with the access password that the Appellant had created in the first place. Therefore, it can be confirmed that access to the REACH-IT account of the Appellant was not blocked during the relevant period for the payment of the supplementary registration fee.
  32. Similarly, the Board of Appeal observes that the Appellant failed to provide any evidence to support its claim that it was unable to open its REACH-IT account due to a change in personnel. In any event, the Board of Appeal observes in this respect that, according to the case-law of the Court of Justice of the European Union, human errors cannot be regarded as exceptional and unforeseeable events and therefore such errors constitute a failure to comply with the obligation to exercise due care (see, for example, Case T-314/10, *Constellation Brands Inc v OHIM*, EU:T:2012:329, judgment of 28 June 2012, paragraph 28). Moreover, *'it is the responsibility of every registrant to update the information concerning its user account details in REACH-IT. The Board of Appeal finds that it is reasonable to expect that the Appellant should have understood the importance of keeping the contact information in the REACH-IT up-to-date'* (Decision of the Board of Appeal of 27 February 2013 in Case A-005-2012, paragraph 34 and Decision of the Board of Appeal of 8 January 2014 in Case A-006-2012, paragraph 130). Similarly, the Board of Appeal considers that it is reasonable to expect that the Appellant should have understood the importance of keeping the REACH-IT password information up-to-date and readily available to the persons to which the Appellant gave access rights to its REACH-IT account.
  33. In light of the above, the Board of Appeal finds that the Appellant failed to fulfill its duty to act in a diligent manner in the circumstances of the case. In addition, the Appellant did not demonstrate due care in fulfilling its obligations under the REACH Regulation. The Board of Appeal therefore concludes that the inaction of the Appellant for several months after having received by registered mail the SME verification decision was the product of a free and voluntary decision on the part of the Appellant and cannot be attributed to the Agency's conduct as regards the means of notification used for the invoices.
  34. In accordance with consistent case-law of the Court of Justice of the European Union, the concept of excusable error, which must be strictly construed, *'can concern only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced trader'* (see, for example, the Order of the Sixth Chamber of the Court of Justice of the European Union of 21 September 2012 in Case C-69/12P *Noscira v OHIM*, EU:C:2012:589, paragraph 38). In light of the finding that the Appellant failed to exercise the diligence required in the circumstances of the case and that the error or negligence on the part of the Appellant was the product of a free and voluntary decision on its part and cannot be attributed to the Agency's conduct as regards the notification means used for the invoices, the Board of

Appeal considers that the Appellant's inability to access the invoices and pay the supplementary registration fee within the time-limit set by the Agency cannot be attributed to an excusable error.

35. As regards the Appellant's request for *restitutio in integrum*, the Board of Appeal observes that the REACH Regulation does not explicitly provide for such possibility. The Board of Appeal also notes that, according to the case-law of the Court of Justice of the European Union relating to decisions of the Office for Harmonisation in the Internal Market (OHIM), '*restitutio in integrum is subject to two requirements, the first being that the party has exercised all due care required by the circumstances, and the second being that the non observance by the party has the direct consequence of causing the loss of any right or means of redress*' (see, for example, Case T-326/11 *Brainlab AG v OHIM*, EU:T:2012:202, judgment of 25 April 2012, paragraphs 36 and 46).
36. Accordingly, even if the above case-law was applicable in the case at issue, the Applicant's request for *restitutio in integrum* could not be granted, as the Board of Appeal has already found that the Appellant did not exercise all due care required by the circumstances of the case.
37. Consequently, and in consideration of all the above, the Board of Appeal dismisses the appeal.

## ORDER

On those grounds,

THE BOARD OF APPEAL

hereby:

- 1. Dismisses the appeal.**
- 2. Decides that the appeal fee shall not be refunded.**

Mercedes ORTUÑO  
Chairman of the Board of Appeal

Sari HAUKKA  
Registrar of the Board of Appeal