

## Review of the structure of the Board of Appeal

38<sup>th</sup> meeting of the Management Board 17-18 June 2015

<b>Item</b>	10.2
<b>Action</b>	For decision
<b>Status</b>	Final - Public

### Proposal

The Working Group on the Board of Appeal (MBWG) recommends the Management Board (MB) to decide on a continuation of the current structure of the Board of Appeal (BoA).

Having reviewed the current structure and composition of the BoA, the MBWG recommends in particular that,

- In view of the continuously increasing workload for the BoA for which there are no indications that this workload will diminish, as well as
- the need to maintain the current high quality of BoA decisions in the most cost-efficient manner,

No justification could be found to abandon the current permanent structure of the BoA and replace it by a different organisational structure with a different composition.

### Background

#### Current structure of the Board of Appeal

The BoA consists of a full-time Chairman and two other full-time members, which have alternates. These functions are appointed by the MB on the basis of a list of candidates proposed by the Commission. The MB may also appoint additional members and their alternates if this is necessary to ensure that the appeals can be processed at a satisfactory rate. The term of office of the members of the BoA shall be five years, and it may be prolonged once. The REACH Regulation does, however, not explicitly specify whether the functions on the BoA shall be permanent staff positions in Helsinki or not<sup>1</sup>.

Annex 1 provides a list of the current composition of the three full-time members of the BoA and the appointed Alternate and Additional Members, who are not employed by ECHA. Once appointed Alternate and Additional Members can be designated by the Chairman of the BoA on an ad-hoc basis<sup>2</sup> and they are remunerated for their services on the basis of a MB decision which was revised in 2014<sup>3</sup>.

<sup>1</sup> See Articles 89 and 90 of the REACH Regulation (EC) 1907/2006

<sup>2</sup> Decision of the Board of Appeal of the European Chemicals Agency setting out the rules on the designation of alternate and additional members, see document BoA/03/2010

<sup>3</sup> Decision of the Management Board on the remuneration of the alternate and additional members of the Board of Appeal, adopted on 20 March 2014, see document MB/10/2014.

### Reason for review

In 2007, the MB endorsed an overall course of action for the structure and composition of the BoA<sup>4</sup>, in line with a proposal by the Secretariat. For that purpose, two different options had been examined, namely a full time working Chairman and members compared to an ad hoc solution. In this context it was highlighted that the choice for an ad hoc or permanent structure is predominantly determined by the estimate of the number of appeals, considering that the BoA members may not perform any other duty, according to the REACH Regulation<sup>5</sup>

As a consequence of the analysis, it was proposed to set up at least one full-time Board of three members for the first five years and to be prepared for the eventuality of a very large number of appeals by publishing at the same time vacancy notices for additional members to establish a roster of qualified candidates. By way of follow-up the Commission published vacancies on which basis the functions on the Agency's Appeal body were appointed.

After five years, in December 2012 / March 2013<sup>6</sup>, the MB duly assessed the structure of the BoA, and whether it was to be continued on a full-time basis or not. To that effect, the original assumptions were revisited. During an exchange of views, the findings of the MBWG were presented and the MB was informed of the views of the ED and the BoA Chairman. Following a well-informed discussion, the MB agreed to the recommendation of the MBWG to continue with the current structure of the BoA. At the same time another review scheduled for 2015.

Furthermore, it is a requirement of the Financial Regulation that all parts of the Agency are managed in accordance with the principle of sound financial management, that is to say, in accordance with the principles of economy, efficiency and effectiveness<sup>7</sup>.

### Rationale

When preparing this review, the MBWG observed that the number and the complexity of appeal cases have significantly increased since 2012. For statistics reference is made to the annual report of the Chairman of the BoA<sup>8</sup>. Moreover the MBWG observed that appeal cases not only relate to the REACH Regulation but also to the Biocidal Products Regulation<sup>9</sup>. The latter applies since 1 September 2013 and provides for the right to appeals against certain Agency decisions (although the number of appeals against these decisions was estimated to be – and are - relatively low). In addition the revocation of registration decisions following non-payment of administrative charges related to the verification of the SME-status of registrants under REACH has appeared to create an additional workload for the BoA and the Registry.

The workload of the BoA remains difficult to predict as it depends strongly on factors outside of its control, i.e. the decision of companies whether to appeal against an ECHA decision or not. Moreover, the possibility of rectification by the ED is an important factor that influences the workload. Despite the uncertainties in predictability of the number of appeal cases, the MBWG notes that the number of cases has been increasing over time, as has the size and the complexity of cases in terms of content and third parties' involvement. In particular cases relating to substance evaluation decisions, have proven to be increasingly more complicated

<sup>4</sup> MB/17/2007

<sup>5</sup> See Article 90(3) of the REACH Regulation (EC) 1907/2006

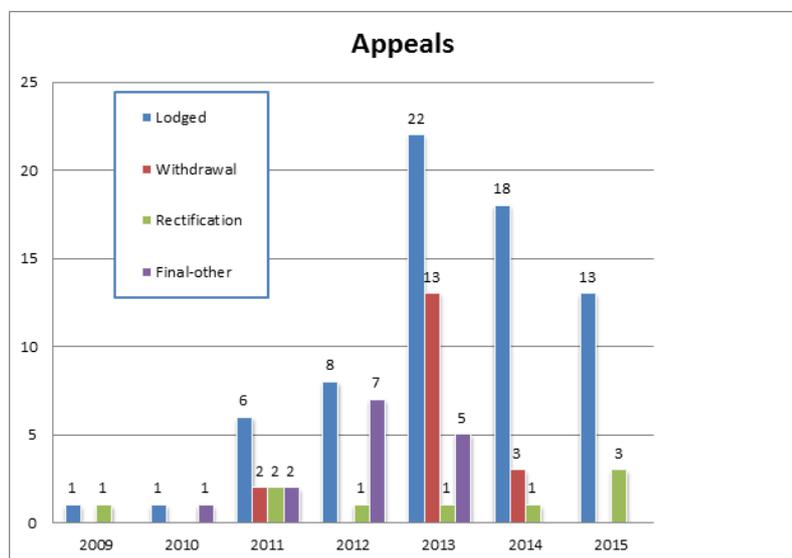
<sup>6</sup> See documents MB/64/2012 and MB/07/2013

<sup>7</sup> (1) Economy: resources used should be made available in due time, appropriate quantity and quality and at the best price; (2) Efficiency: best relationship between resources employed and results achieved; (3) Effectiveness: attaining the specific objectives set and achieving the intended results.

<sup>8</sup> See separate item on the agenda of the 38<sup>th</sup> Management Board meeting

<sup>9</sup> Regulation EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocide products

than anticipated both in terms of the issues raised and in the management of the process, including the number of procedural and other decisions. All this means that the appeals have taken more man hours to consider than was anticipated. The presence of interveners in several such cases has shown how the complexity of the management of the cases can increase.



### Resource aspects

The Chairman of the BoA and the two other members are employed as Temporary Agents. The average annual gross salary costs for the three members totals to currently to 572 212.43 EUR (excluding the pension contribution costs 73 129.68 EUR, which ECHA may need to pay for 2015). This amount excludes the overhead costs (office rental costs or IT equipment).

The BoA Registry staff is currently 6 temporary agents (1 Registrar, 2 lawyers, 2 legal assistants, 1 secretary – post to become vacant on 1 July 2015) and three contract agents (2 lawyers and 1 secretary). One of the two lawyers post is currently financed from the Biocides budget but, considering the requests for further staff cuts, may not be continued. Currently one of the temporary agent posts in the Registry is used for providing a secretary of the Chairman of the BoA. Together with the three BoA members, an overall number of 12 establishment posts are used by ECHA to provide a BoA.

ECHA caters for the possibility to deploy other staff to support the Registry or vice-versa whenever the number of appeal cases increases above the estimates or decreases below the estimates. No decrease has been observed since the last review, merely increases. The workload is, however, within the foreseen capacity of the Registry.

### Conclusion

Given the current workload for the BoA and the absence of any indication that this workload will decrease in the years to come, the MBWG is of the view that the current structure appears to be the most cost efficient structure possible and the best guarantee of consistency and high quality of the decisions. In the context of this analysis the MBWG has also taken due account of the fact that ECHA will in future depend to a high degree on EU subsidy and will have to continue decreasing the overall staffing numbers.

## Alternative options

Alternative options have been considered by the MB in 2012<sup>10</sup> and reassessed by the MBWG in the context of this review. This includes the options of a BoA without full-time members or a BoA with only one full-time Chair and a roster of non-permanent members.

### **OPTION B - FULL-TIME CHAIR, OTHER MEMBERS EXTERNAL**

DESCRIPTION: The Chair would be a full-time member (TA contract with ECHA); the other members would be external who are called to deal with appeals from a LQM and TQM list of members on a case-by-case basis

### **OPTION C - ALL MEMBERS DESIGNATED ON A CASE-BY-CASE BASIS**

DESCRIPTION: All members including the Chairman would have their principal activity outside ECHA and would be called to deal with the cases only when needed.

### **OPTION D – FULL CASE-BY-CASE APPROACH**

DESCRIPTION: Every time a full-time BoA member's contract comes up for prolongation (or after two terms have been served) the MB should consider whether the role in question should be filled by a full time member or by the use of AAMs. If it is decided that a full-time role is desirable, the MB will need to consider who should fill the post in question (i.e. the incumbent or by recruiting a new member).

The MBWG is of the view that no facts emerged in the course of the present review which would affect the assessment done in 2012/13. Hence, the MBWG recommends maintaining the current structure (**OPTION A**)

However, it should be noted that in December 2014<sup>11</sup> the Commission informed the Chair of the MB about its intention to amend the Commission Regulation which lays down the rules of organisation and procedure for the BoA<sup>12</sup>. The forthcoming amendments would include an amendment in a sense that the Registrar and its staff are appointed by the Chairman of the BoA directly. In view of this amendment the MBWG reviewed the administrative arrangements for safeguarding the independence of the BoA which are agreed and to be signed by the Chairman of BoA and the ED<sup>13</sup>. Moreover the Commission advised the Executive Director to delegate certain administrative powers to the Chairman of the BoA as regards the annual performance assessment of the Registrar, as well as decisions to delegate powers to the Registrar to appraise the registry staff. These envisaged organisational changes are, according to the MBWG, only justifiable, in case the MB confirms the current structure of the BoA (**OPTION A**). In case an ad hoc appeal body would be the most preferred option, the envisaged organisational changes would in fact not be logical.

By way of contrast, **OPTION A**, which is recommended to the MB, would be consistent with the intention of the Commission to amend its Regulation which lays down the rules of organisation and procedure of BoA in the sense described above. The reason is that for BoA as a collegial body, it seems important that the LQM and the TQM would have the same status of fully employed staff members as the Chair of BoA. Otherwise there would be a difference of status which could be prejudicial to the balance of the opinions of the three members of BoA.

<sup>10</sup> See document MB/64/2012

<sup>11</sup> Ref. Ares(2014)4227364 - 16/12/2014 – see annex 2

<sup>12</sup> Regulation (EC) No 771/2008

<sup>13</sup> MB/51/2009 final

## Drawbacks

The advantages and disadvantages of the different options for the structure of BoA were discussed by the MB in 2012/2013 (relating to costs of the different options, flexibility to react to changing circumstances and quality of the decisions)<sup>14</sup>.

### Attachments:

- Annex 1: List of Board of Appeal members and their mandates
- Annex 2: Letter from DG GROW of 16 December 2014 on the status of the Registry of the Board of Appeal and reply by the Chair of the Management Board

For questions: [mb-secretariat@echa.europa.eu](mailto:mb-secretariat@echa.europa.eu)

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<sup>14</sup> MB/64/2012

## Annex 1: List of BoA members with their terms of office

Name	Role	Term started	Term ends	Prolongation
Barry <b>DOHERTY</b>	LQAAM	15 Oct 2008	14 Oct 2013	14 Oct 2018
Rafael Antonio <b>LÓPEZ PARADA</b>	LQAAM	15 Oct 2008	14 Oct 2013	14 Oct 2018
Mercedes <b>ORTUÑO</b>	Chair	16 Apr 2009	15 Apr 2014	15 Apr 2019
Jonna <b>SUNELL-HUET</b>	TQAAM	16 May 2009	15 May 2014	15 May 2019
Arnold <b>VAN DER WIELEN</b>	TQAAM	16 May 2009	15 May 2014	15 May 2019
Christoph <b>BARTOS</b>	AltChair	15 Oct 2010	14 Oct 2015	
Ioannis <b>DIMITRAKOPOULOS</b>	AltChair	15 Oct 2010	14 Oct 2015	
Christopher <b>HUGHES</b>	AltChair	15 Oct 2010	14 Oct 2015	
Harry <b>SPAAS</b>	TQAAM	1 Dec 2010	31 Dec 2013	31 Dec 2018
Andrew <b>FASEY</b>	TQM	1 Mar 2011	29 Feb 2016	
Dimitrina <b>PETROVA</b>	LQM	1 Dec 2014 <sup>15</sup>	30 Nov 2019	
Angel-Manuel <b>MORENO</b>	LQAAM	15 Dec 2014	14 Dec 2019	
Sakari <b>VUORENSOLA</b>	LQAAM	15 Dec 2014	14 Dec 2019	

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<sup>15</sup> Probationary period until 31 August 2015

## Annex 2: Letters signed by Antti PELTOMAKI and Nina CROMNIER

Ref. Ares(2014)4227364 - 16/12/2014



EUROPEAN COMMISSION  
ENTERPRISE AND INDUSTRY DIRECTORATE-GENERAL  
Deputy Director-General

Brussels,  
ENTR/F1/MSL/al/Ares(2014)

Ms Nina Cromnier  
European Chemicals Agency  
Management Board  
Annankatu 18, P.O Box 400  
FI - 00121 Helsinki  
(by e-mail only)

**Subject: Status of the Registry of the ECHA Board of Appeal**

Dear Ms Cromnier,

At the June Management Board meeting, the Commission was asked to provide legal advice on ways to reinforce the independence of the ECHA Board of Appeal.

Let me first say that despite the fact that ECHA's Executive Director is doing its utmost to ensure the independence of the Board of Appeal, the Commission considers that additional measures must be taken in order to avoid the perception that the independence of the Board of Appeal could be at risk.

Indeed, currently the appointment, evaluation, promotion and mobility of the Registrar and the Registry staff are under the responsibility of ECHA's Executive Director, who can be at the same time a party before the Board of Appeal. The current arrangements make sense for a non-permanent Board of Appeal, but not for a permanent Board of Appeal with full-time members.

Following an in-depth legal assessment, the Commission considers that currently these issues deserve special attention in order to guarantee the independence and impartiality of the members of the Board of Appeal of ECHA.

As regards the appointment of the Registrar, the REACH Regulation leaves the choice of who should appoint the Registrar to the discretion of the Commission implementing powers. There is thus no need to re-open REACH to address the issue. Consequently, the Commission intends to amend the Commission Regulation (EC) No 771/2008 on the rules of procedure of

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the Board of Appeal and its organisation (hereafter the Rules of Procedure Regulation) in the sense that the Registrar of the Board of Appeal and its staff are appointed by the Chairman of the Board of Appeal directly.

As regards the yearly evaluation of the registrar and the Registry staff, as well as the management of the Registry staff by the Executive Director, the Commission also considers that the situation can be addressed without reopening REACH.

Consequently, the Commission considers that in addition to the planned amendment of the Rules of Procedure Regulation, appropriate measures can be taken directly by the Executive Director. These measures would consist of:

- i) a delegation of powers from the Executive Director of ECHA to the Chairman of the Board of Appeal concerning the yearly evaluation of the performance of the Registrar;
- ii) a delegation of powers from the Executive Director of ECHA to the Registrar concerning the yearly evaluation and performance and the management of the Registry staff.

The decision to delegate powers is of course a matter for the Executive Director to decide and would require only a modification of the current administrative arrangements between the Executive Director of ECHA and the Chairperson of the Board of Appeal.

I would be grateful if you could share this reply with the other members of the Management Board.

Yours sincerely,



Antti Peltomäki

Cc: Messrs Nies, Kwishout, Sadauskas (Members of the Working Group on the Board of Appeal of the ECHA Management Board)  
Mr Dancet (ECHA)



Helsinki, 22. 01. 2015

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**Subject: Status of the Registry of the ECHA Board of Appeal**

Dear Mr Peltomäki,

Thank you very much for providing the Commission analysis on the status of the Board of Appeal Registry.

The Management Board's Working Group on the Board of Appeal will discuss the follow-up of your letter together with the Secretariat and report back to the Management Board in its meeting of June 2015.

Yours sincerely,

Nina Cromnier  
Chair of the Management Board

Cc: Messrs Nies, Kwishout, Sadauskas (Members of the Working Group on the Board of Appeal of the ECHA Management Board)  
Mr Dancet (ECHA)