

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

8 November 2011

Application to intervene

*(Interest in the result of the case – Representative organisations – ECHA
accredited stakeholder)*

Case number A-005-2011

**Language
of the case** English

Applicant European Coalition to End Animal Experiments (ECEAE)

Represented by:

Dr. Katy Taylor
16a Crane Grove
London N7 8NN
United Kingdom

**Contested
decision** CCH-D-0000001396-72-03/F of 22 March 2011 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')

Appellant Honeywell Belgium N.V.
Belgium

Represented by:

Messrs. Herbert Estreicher and Marcus Navin-Jones
Keller and Heckman LLP
Avenue Louise 523
B-1050 Brussels
Belgium

THE BOARD OF APPEAL

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

Registrar: Sari HAUKKA

gives the following

Decision

SUMMARY OF THE FACTS

1. On 21 June 2011, the Appellant filed an appeal with the Registry of the Board of Appeal of the European Chemicals Agency (hereinafter the 'Registry') against the contested decision.
2. On 14 September 2011, an announcement of the notice of appeal was published on the Agency's website in accordance with Article 6(6) of the 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').
3. On 28 September 2011, the Applicant filed an application with the Registry seeking to intervene in the proceedings in support of the Appellant.
4. On 30 September 2011, the application to intervene was served on the Appellant and the Agency.
5. On 14 October 2011, the Appellant and the Agency submitted their respective observations on the application to intervene.

ARGUMENTS OF THE PARTIES

Applicant's arguments

6. The Applicant claims an interest in the result of the present case. The reasons put forward by the Applicant to support its claim that it has an interest in the result of the case can be summarised as follows:
 - (a) It is Europe's leading alliance peacefully campaigning on behalf of laboratory animals. The Applicant is an accredited stakeholder of the Agency, and it is the animal protection observer at the Agency's Member State Committee (hereinafter 'MSC') and Risk Assessment Committee (hereinafter 'RAC');
 - (b) The Applicant is the only coalition of animal protection groups that is concerned solely with animal testing issues. It has a team of toxicologists searching for scientific information to help avoid animal tests proposed under the REACH testing proposal system;
 - (c) The Applicant takes an interest in the Agency's final decisions in the field of dossier compliance checks and testing proposals with a view to

understanding the Agency's decisions and analysing the impact of REACH on animal testing;

- (d) The Applicant was present at the MSC meeting at which the contested decision was discussed. However, the Applicant was excluded from the closed session at which the details of the contested decision were discussed.

Appellant's arguments

- 7. The Appellant supports the application to intervene. The Appellant considers that there is no serious question as to the Applicant's right to intervene, noting that it is an accredited stakeholder at the Agency and the animal protection observer at the MSC and RAC.
- 8. More specifically, the Appellant considers that the result of the present case is likely to impact issues regarding animal testing. According to the Appellant, the result of the case is likely to impact, for instance:
 - (a) The opportunity afforded to registrants to engage in meaningful dialogue with the Agency and to provide additional testing data before new animal tests are required;
 - (b) The scientific and legal criteria that must be satisfied for the Agency to require further animal testing;
 - (c) The status of the rat as the preferred animal for 90-day sub-chronic testing for the purposes of the REACH Regulation;
 - (d) The absence of scientific protocols and test methods for further tests required by the Agency.

Agency's arguments

- 9. The Agency objects to the application to intervene. The reasons the Agency has put forward in support of its objection can be summarised as follows:
 - (a) The Applicant has not established a direct interest in the result of the case. More specifically, the Agency claims that the contested decision does not directly affect the Applicant and it does not create any legal obligations vis-à-vis the Applicant. Moreover, the Applicant has not claimed to be directly affected by the contested decision in its submission;
 - (b) The Agency claims that the Applicant's interests are general interests that any citizen of the European Union could claim to have. If this general interest were accepted as sufficient for the purposes of intervening in proceedings before the Board of Appeal, Article 8(1) of the Rules of Procedure would be rendered essentially meaningless. The Agency maintains that this could not have been the legislator's intention;
 - (c) Finally, the Agency argues that the Applicant is not interested in the result of the case. Rather, it is interested in the argumentation that led to the adoption of the contested decision and the Agency's general policy. According to the Agency, the Applicant's interest is to restrict the amount of animal testing and not whether in the specific case the Appellant is

legally required to perform a particular test. The same interest as ECEAE claims to have could be deemed to exist with respect to any registrant having to perform an animal test, regardless of the specific circumstances of its case. The Agency concludes that the Applicant does not have an interest in the result of the case but only in the pleas in law put forward and the policy issues that they address.

REASONS

10. In accordance with Article 8(1) of the Rules of Procedure, any person establishing an interest in the result of a case submitted to the Board of Appeal may intervene in that case.
11. Article 8(2) provides that an application to intervene must state the circumstances establishing the right to intervene and it must be submitted within two weeks of publication of the announcement of the notice of appeal on the Agency's website. Further, pursuant to Article 8(3) an application to intervene must be limited to supporting or opposing the remedy sought by one of the parties. In addition, Article 8(4) lists the information an application to intervene shall contain.
12. In the present case, the application complies with Articles 8(2), (3) and (4) of the Rules of Procedure.
13. The Board of Appeal must therefore examine whether the application also complies with Article 8(1) of the Rules of Procedure, in other words whether the Applicant has established an interest in the result of the present case.

The required interest in the result of the case

14. Article 8(1) of the Rules of Procedure provides that '*[a]ny person establishing an interest in the result of the case submitted to the Board of Appeal may intervene in the proceedings before the Board of Appeal*'. The Board of Appeal, when deciding on applications to intervene, must have regard to the interests of all parties involved, and the efficiency and proper course of proceedings before it.
15. The wording of Article 8(1) of the Rules of Procedure reflects Article 40 of the Statute of the Court of Justice of the European Union (hereinafter the 'Statute' and the 'European Court of Justice'), which provides that the right to intervene is open to '*(...) any other person who can establish an interest in the result of a case submitted to the Court*'.
16. Given the parallel between the Rules of Procedure and the Statute, and notwithstanding the difference in the nature of proceedings before the Board of Appeal, on the one hand, and the European Court of Justice, on the other, the judgments of the European Court of Justice can provide assistance in interpreting Article 8(1) of the Rules of Procedure.
17. By way of a preliminary observation, the European Court of Justice has consistently held that the required interest must be defined in relation to the subject-matter of the case, which is framed by the form of order sought by the parties. Further, for an application to intervene to be granted, an applicant must

establish a direct and existing interest in the form of order sought by the party whom it intends to support (see, for instance, Order of the President of the Second Chamber of the General Court of 5 October 2011 in Case T-454/10 *Associazione Nazionale degli Industriali delle Conserve Alimentari Vegetali v. Commission*, paragraphs 11 and 12).

18. The Board of Appeal also observes that the European Court of Justice has applied the concept of '*interest in the result of a case*' differently with respect to applications by natural and legal persons, on the one hand, and by representative associations, on the other hand (see, for instance, Order of the President of the Seventh Chamber of the General Court of 20 November 2008 in Case T-167/08 *Microsoft Corporation v. Commission*).
19. With respect to representative organisations, the European Court of Justice has consistently held that intervention is allowed to representative associations whose object is to protect their members' interests in cases raising questions of principle liable to affect those members (see, for instance, Order of the President of the Court of Justice of 17 June 1997 in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power plc and PowerGen plc v. Commission* [1997] ECR I-3491, paragraph 66, Order of the President of the Court of Justice of 28 September 1998 in Case C-151/98 P *Pharos SA v. Commission*, paragraph 6, and Order of the President of the Seventh Chamber of the General Court of 20 November 2008 in Case T-167/08 *Microsoft Corporation v. Commission*, paragraph 41; see also recently Order of the President of the Second Chamber of the General Court of 5 October 2011 in Case T-454/10 *Associazione Nazionale degli Industriali delle Conserve Alimentari Vegetali v. Commission*, paragraph 19).
20. The broad interpretation adopted by the European Court of Justice of the right of representative associations to intervene is intended to facilitate the assessment of the context of cases raising questions of principle while avoiding multiple individual interventions which would compromise the effectiveness and the proper course of the procedure (see, for instance, Order of the President of the Court of Justice of 17 June 1997 in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power plc and PowerGen plc v. Commission* [1997] ECR I-3491, paragraph 66).
21. The Board of Appeal finds that these considerations may also be relevant for assessing the interest of a representative association for the purposes of Article 8(1) of the Rules of Procedure.
22. However, when interpreting Article 8(1) of the Rules of Procedure, the Board of Appeal must also have regard to the specific context in which Article 8(1) of the Rules of Procedure is applied, that is the REACH Regulation and the regulatory framework that underpins it. In particular, the REACH Regulation seeks to promote various interests, including the protection of human health and the environment, ensuring competitiveness and innovation, the protection of workers' health, and to replace, reduce or refine animal testing. To this effect, the REACH Regulation foresees the involvement of stakeholders in the Agency's work through consultations and in the workings of the committees that are established under the auspices of the Agency (see, for instance, Article 108 of the REACH Regulation). This involvement is to help ensure that the different interests are considered in the Agency's decision making.
23. In light of the foregoing, the case-law that the Agency has cited in support of its objection to the application to intervene is not decisive for the purposes of

assessing the Applicant's interest in the result of the present case. Neither of the two cases to which the Agency has referred related to representative associations.

The Applicant's interest in the result of the present case

24. As regards the present application, the Board of Appeal observes, first, that the Applicant claims to represent 19 animal protection organisations in the Member States of the European Union. The Applicant also claims to be the only coalition of animal protection groups in Europe that is concerned solely with animal testing issues, with an interest in minimising the impact of the REACH Regulation on animal testing numbers.
25. Secondly, the Applicant is an accredited stakeholder at the Agency. As such, the Applicant must, by implication, meet the criteria set by the Agency for accredited stakeholders and have a legitimate interest in the Agency's work.
26. Thirdly, the Applicant claims to be the animal protection observer at the MSC and RAC meetings, as a regular participant. In fact, the Applicant claims to have been present at the open session of the MSC meeting at which the draft contested decision was discussed.
27. The Appellant and the Agency have not disputed the above claims.
28. In light of the above considerations, the Board of Appeal finds that the Applicant must be considered as being representative of organisations that are concerned with animal testing issues and seeking to minimise the amount of animal testing.
29. The Applicant campaigns on behalf of its members to minimise the impact of the REACH Regulation on animal testing. To this effect it, inter alia, participates regularly at the MSC and RAC meetings, at which the Agency's draft decisions on testing proposals and dossier compliance checks are discussed. Both types of draft decisions can involve vertebrate animal tests, and therefore they relate directly to those interests for which the Applicant campaigns. The Applicant must therefore be considered as having the object to protect the interests of its members whose common object is to minimise animal testing.
30. The Board of Appeal clarifies that the above finding do not signify that intervention by representative associations pursuant to Article 8(1) of the Rules of Procedure would be limited to accredited stakeholders, or even more narrowly to accredited stakeholders that participate in the Agency's committee workings. Nor does it mean that accredited stakeholders are accepted to intervene in proceedings before the Board of Appeal without the required interest being assessed in each specific case. Rather, the Board of Appeal notes that in certain cases accredited stakeholders may be considered to satisfy more readily the required interest for intervening in proceedings before the Board of Appeal.
31. The Board of Appeal also finds that the present case raises questions of principle that are liable to affect the interests of the Applicant and its members. The Appellant contests the Agency's decision to request further information following the conduct of a specific animal study. More specifically, the Appellant contests, inter alia, the Agency's competence to request further animal testing

where the REACH information requirement has been satisfied from test results on another animal species and where there are no recognized international test methods or protocols for the requested animal study. The Appellant also claims that the requested test is otherwise unprecedented and another test could and should have been conducted first.

32. The Board of Appeal considers that these issues raise questions of principle regarding the Agency's powers to request additional information under Section 8.6.4 of Annex X to the REACH Regulation by requiring the conduct of additional vertebrate animal studies. As such, these issues affect the interests of a representative organisation that is concerned with animal testing issues and seeks to minimise animal testing in general, and more specifically in the context of the REACH Regulation.
33. In this respect, it is relevant to recall that one of the stated objectives of the REACH Regulation is to reduce testing involving vertebrate animals. In accordance with Recital 47 to the REACH Regulation, '(...) *it is necessary to replace, reduce or refine testing on vertebrate animals*'. The Recital further provides that '(...) *the Agency should ensure that reduction of animal testing is a key consideration in the development and maintenance of guidance for stakeholders and in the Agency's own procedures*'. This objective also underlies many provisions of the REACH Regulation, including the rules on joint registrations and compulsory sharing of data as well as the use of alternative methods to generate scientific information. In fact, this is a key priority, to which effect the '[p]articipation of stakeholders and initiatives involving all interested parties should be sought' (see Recital 40 to the REACH Regulation).
34. In light of the above considerations, the Board of Appeal rejects the Agency's arguments raised in support of the objection to the application to intervene. As noted above, the Agency's claims that the contested decision was not addressed to the Applicant, or that it does not create legal obligations vis-à-vis the Applicant are not relevant for the purposes of establishing an interest within the meaning of Article 8(1) of the Rules of Procedure for a representative association. Furthermore, for the purposes of deciding on the present application, the Applicant is not required to be directly affected by the contested decision (see paragraphs 19-22 to this Decision).
35. Further, contrary to the Agency's claims, the Applicant's interest is not a general interest that could be established by any citizen in the European Union. As explained above, the Applicant is an accredited stakeholder that participates regularly in the working of the MSC and RAC committees seeking to minimise the amount of animal testing conducted. In this specific case, this fact clearly sets the Applicant's interest apart from any general or collective interest (see, by analogy, Order of the President of the First Chamber of the General Court of 26 February 2007 in Case T-125/03 *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission*, paragraph 16). Moreover, contrary to the Agency's statement, the Applicant has not stated that it has a general interest in the annulment of the contested decision.
36. Further, accepting the application to intervene will not render Article 8(1) of the Rules of Procedure essentially meaningless as stated by the Agency. In this specific case, the Board of Appeal finds that the Applicant's participation in the Agency's work as an accredited stakeholder and its interest in minimising animal testing in the sphere of the REACH Regulation establish the required

interest in the result of the present case. Contrary to the Agency's claims, it is clear that these circumstances do not apply with respect to every citizen.

37. For the above reasons, the application to intervene submitted by the Applicant must be granted.

ORDER

On those grounds,

THE BOARD OF APPEAL

hereby:

- 1. Grants the application to intervene in Case A-005-2011 in support of the Appellant.**
- 2. Instructs the Registrar to arrange for a copy of the procedural documents to be served on the intervener after any confidentiality issues have been resolved.**
- 3. Allows the intervener a period of one month to lodge further observations on the pleas in law and arguments upon which it relies after copies of the procedural documents have been served.**

Mercedes ORTUÑO
Chairman of the Board of Appeal

Sari HAUKKA
Registrar of the Board of Appeal