

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

24 May 2018

(Withdrawal of appeal by appellant)

Case number	A-003-2017
Language of the case	English
Appellant	Cardolite Specialty Chemicals NV, Belgium
Representatives	Simon Tilling Burgess Salmon LLP, United Kingdom
Contested Decision	TPE-D-2114350280-62-01/F of 20 December 2016, adopted by the European Chemicals Agency pursuant to Article 40 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; the 'REACH Regulation')

THE CHAIRMAN OF THE BOARD OF APPEAL

gives the following

Decision

1. The Appellant put forward several testing proposals for its registration of the substance cashew (*Anacardium occidentale*) nutshell extract, decarboxylated, distilled (List No 700-991-6; the 'Substance').
2. The Appellant's testing proposals were based on a read-across between a group consisting of three 'grades' of cashew nutshell extract, of which the Substance is one. In particular, the Appellant proposed to read across to the Substance data from tests on another 'grade' of cashew nutshell extract.
3. On 20 December 2016, the Agency adopted the Contested Decision. It rejected the proposed read-across and required the Appellant to perform the tests at issue on the Substance itself.
4. On 20 March 2017, the Appellant filed this appeal.

5. On the same day, the Appellant filed two further appeals against decisions concerning testing proposals for two two other '*grades*' of cashew nutshell extract. These appeals were registered as Cases A-001-2017 and A-002-2017 respectively.
6. On 19 April 2017, the Agency informed the Board of Appeal that its Executive Director had decided to rectify the decision contested in Case A-002-2017 by withdrawing it in its entirety.
7. The Appellant requested the Board of Appeal to stay the present case until a new decision on the testing proposal which formed the subject of Case A-002-2017 has been adopted by the Agency '*and is either acceptable to the Appellant [...] or is appealed*'.
8. The Board of Appeal stayed the present case between 15 June 2017 and 31 March 2018.
9. On 3 July 2017, PETA International Science Consortium (PISC) applied for leave to intervene in the present case.
10. On 28 March 2018, the Agency issued a new decision (TPE-D-2114398036-43-01/F) on the Appellant's testing proposal that had formerly been the subject of Case A-002-2017.
11. On the same day, the Executive Director of the Agency issued an '*amending decision*' (the '*Amending Decision*') by which he aligned the deadline set in the Contested Decision to the deadline set in the new decision referred to in paragraph 10 above, namely 6 April 2020.
12. The cover letter to the Amending Decision states:
'As the Executive Director of ECHA, I have [...] decided pursuant to Article 93(1) of Regulation (EC) No 1907/2006 to amend the Decision of 20 December 2016 (Decision number TPE-D-2114350280-62-01/F) by aligning the deadline with the deadline set forth in decision of 28 March 2018 (Decision number TPE-D-2114398036-43-01/F)' (emphasis added).
13. The procedure followed for the adoption of the Amending Decision was the procedure for the examination of testing proposals under Articles 40, 50 and 51 of the REACH Regulation. As no Member State Competent Authority submitted proposals for amendment, the Amending Decision was adopted in accordance with Article 51(3) of that Regulation.
14. On 23 April 2018, following a request from the Board of Appeal, the Appellant submitted observations on whether the present appeal proceedings should continue.
15. The Appellant stated that it agrees with the substance of the amendment to the Contested Decision. However, it argued that the Executive Director does not have the power to rectify a contested decision after the expiry of the 30-day period provided for in Article 93(1) of the REACH Regulation.
16. The Appellant therefore requested the Board of Appeal to modify the Contested Decision itself, and order the refund of the appeal fee. In the alternative, should the Board of Appeal find that the Executive Director does have the power to modify a contested decision after the expiry of the 30-day period provided for in Article 93(1) of the REACH Regulation, the Appellant requests the Board of Appeal to close the case and order the refund of the appeal fee.
17. The Chairman notes that Article 93(1) of the REACH Regulation is worded as follows:
'If, after consultation with the Chairman of the Board of Appeal, the Executive Director considers [an] appeal to be admissible and well founded he may rectify the [contested] decision within 30 days of the appeal being filed in accordance with Article 92(2) [of the REACH Regulation].'
18. The 30-day period for rectification expired on 19 April 2017, which is before the date of the Amending Decision of 28 March 2018. It follows that Article 93(1) of the REACH Regulation cannot constitute the legal basis for the Amending Decision.

19. Nevertheless, even an administrative act which has created individual rights can be withdrawn under certain conditions (judgment of 12 September 2007, *González y Díez v Commission*, T-25/04, EU:T:2007:257, paragraph 97).
20. *A fortiori*, the Agency may withdraw a decision which has not created individual rights but rather obligations, or amend it in a way that is favourable to its addressees, provided that it follows the correct procedure.
21. In the present case, the amendment in question is favourable to the Appellant in that it extends the deadline for providing the information required by the Contested Decision. Indeed, the Appellant expressly agrees with the amendment.
22. Moreover, despite the fact that the cover letter to the Amending Decision cites Article 93(3) of the REACH Regulation (see paragraph 12 above), the Amending Decision was actually adopted under the procedure in Articles 40, 50 and 51 of the REACH Regulation (see paragraph 13 above). This same procedure had been used for the adoption of the Contested Decision in the first place.
23. It follows that the Amending Decision validly amended the Contested Decision.
24. Consequently, the present case must be deemed to have been withdrawn in accordance with the Appellant's request.
25. In accordance with Article 1b of Commission Regulation (EC) No 771/2001 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), as amended by Commission Implementing Regulation (EU) 2016/823 (OJ L 137, 26.5.2016, p. 4), where an appeal is withdrawn, the Chairman closes the proceedings.
26. Moreover, pursuant to 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 is refunded if an appeal is decided in favour of the appellant. As the Appellant has obtained full satisfaction, the appeal must be deemed to have been upheld and the appeal fee must be refunded.
27. Finally, there is no need for the Board of Appeal to decide on the application for leave to intervene submitted by PISC.

On those grounds,

THE CHAIRMAN OF THE BOARD OF APPEAL

hereby:

- 1. Closes appeal case A-003-2017.**
- 2. Decides that the appeal fee shall be refunded.**

Mercedes Ortuño
Chairman of the Board of Appeal

Alen Močilnikar
Registrar of the Board of Appeal