

## Announcement of appeal<sup>1</sup>

<b>Published on</b>	4 September 2019
<b>Case</b>	A-009-2019
<b>Appellant</b>	Solvay Solutions UK Limited, United Kingdom
<b>Appeal received on</b>	19 July 2019
<b>Subject matter</b>	A decision taken by the European Chemicals Agency pursuant to Article 63(3) of Regulation (EU) No 528/2012 concerning the making available on the market and use of biocidal products (OJ L 167, 27.6.2012, p. 1; the 'Biocidal Products Regulation')
<b>Keywords</b>	<i>Biocidal products – Data sharing dispute – Permission to refer – Compliance with the reasoning of the Board of Appeal in a previous decision</i>
<b>Contested Decision</b>	DSH-63-3-D-0020-2016/Re1
<b>Language of the case</b>	English

## Background of the case

The Agency adopted the Contested Decision on 6 May 2019 pursuant to Article 63(3) of the Biocidal Products Regulation. The Contested Decision grants a prospective applicant for inclusion in the list established under Article 95 of the Biocidal Products Regulation permission to refer to scientific studies on tetrakis(hydroxymethyl)phosphonium sulphate (2:1) (EC No 259-709-0) submitted by the Appellant.

The Agency adopted the Contested Decision in consequence of a re-examination of the dispute following the decision of the Board of Appeal of 7 March 2018 in Case A-014-2016, *Solvay Solutions UK*. By that decision, the Board of Appeal had annulled a previous decision of the Agency concerning the same data-sharing dispute due to a manifest error of assessment, and had remitted the case to the Agency for re-examination.

## Remedy sought by the Appellant

The Appellant requests the Board of Appeal to declare the appeal admissible and well-founded, annul the Contested Decision and order the Agency to refund the appeal fee.

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<sup>1</sup> Announcement published in accordance with Article 6(6) of Regulation (EC) No 771/2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency, as amended by Commission Implementing Regulation (EU) 2016/823.

## **Pleas in law and main arguments**

The Appellant makes the following claims.

- The Agency infringed Articles 62 and 63 of the Biocidal Products Regulation by not establishing whether the prospective applicant still had an interest in obtaining permission to refer to the data at issue. According to the Appellant, this failure also infringed its property rights.
- The Contested Decision is vitiated by misuse of powers and infringes the principle of *res judicata* because its reasoning contains a new argument that was not addressed by the Board of Appeal in *Solvay Solutions UK*.
- The Agency infringed the principle of contractual freedom by disregarding the mutual agreement between the prospective applicant and the Appellant according to which establishing chemical similarity was a pre-condition to data sharing.
- The Agency violated Article 18 of Commission Regulation (EC) No 771/2008 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) by failing to comply with the Board of Appeal's reasoning in *Solvay Solutions UK*.
- The Agency breached the Appellant's right to be heard on the implications of the Board of Appeal's decision in *Solvay Solutions UK* in the context of the re-examination.
- The Agency's decision was adopted on the wrong legal basis. In particular, the Agency should have referred to Article 18 of Commission Regulation (EC) No 771/2008 together with Articles 62 and 63 of the Biocidal Products Regulation.
- The Agency infringed Article 63(3) of the Biocidal Products Regulation in three ways. First, it adopted the Contested Decision after the expiry of the time-limit of 60 days foreseen in Article 63(3) of the Biocidal Products Regulation, counting from the date of the Board of Appeal's decision in *Solvay Solutions UK*. Second, it adopted the Contested Decision despite the fact that the prospective applicant had not paid the Appellant a share of the cost of the data within the time-limit of 60 days foreseen in that same provision. Third, it adopted the Contested Decision despite the fact that the share of the costs which the prospective applicant paid was not proportionate.

## **Further information**

The rules for the appeal procedure and other background information are available on the 'Appeals' section of the Agency's website:

<http://echa.europa.eu/web/guest/regulations/appeals>