

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

17 December 2015

(Withdrawal of a contested decision – Refund of the appeal fee)

Case number	A-013-2015
Language of the case	English
Appellant	Evonik Degussa GmbH, Germany
Representative	Lucas Bergkamp, Hunton & Williams LLP, Belgium
Contested decision	CCH-D-2114289967-22-01/F of 27 January 2015 adopted by the European Chemicals Agency (hereinafter the 'Agency') pursuant to 41(3) 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')

THE BOARD OF APPEAL

composed of Mercedes Ortuño (Chairman), Andrew Fasey (Technically Qualified Member) and Sari Haukka (Legally Qualified Member and Rapporteur)

Registrar: Alen Močilnikar

gives the following

Decision

1. On 23 April 2015, the Appellant filed an appeal at the Registry of the Board of Appeal against the Contested Decision. The Contested Decision was adopted on 27 January 2015 and notified to the Appellant on the same day. The Appellant requested the Board of Appeal to annul the Contested Decision in its entirety and to order the Agency to refund the appeal fee.
2. By the Contested Decision, the Agency requested the Appellant to, amongst others, perform studies involving vertebrate animals and regarding aquatic toxicity. In support of the appeal, the Appellant submitted inter alia that the registered substance was an intermediate used exclusively under strictly controlled conditions.
3. On 26 May 2015, the Agency informed the Board of Appeal that the Executive Director has not used the opportunity provided in Article 93(1) of the REACH Regulation to rectify the Contested Decision and requested a stay of proceedings so that it could clarify with the Appellant whether the registered substance would qualify as an intermediate.
4. On 20 July 2015, the Board of Appeal decided to stay the present proceedings until 1 October 2015.
5. On 30 September 2015, the Agency informed the Board of Appeal that the Appellant had provided information related to the claimed intermediate status of the registered substance. After assessing the information, the Agency agreed that the substance in question fulfilled *'the criteria of an intermediate under strictly controlled conditions'*. As a result the Agency considered that the Contested Decision *'had lost its basis'*. The Board of Appeal was also informed that the Agency was preparing to withdraw the Contested Decision.
6. On 29 October 2015, the Agency informed the Board of Appeal that the Agency had decided to withdraw the Contested Decision, replacing it with the decision CCH-D-2114310492-61-01/F of 27 October 2015. The decision of 27 October 2015 states that the Agency, on the basis of new and substantiated factual information provided by the Appellant, confirms that the registered substance meets the criteria of a transported isolated intermediate and was being used under strictly controlled conditions.
7. On 10 November 2015, the Appellant was requested to inform the Board of Appeal whether or not it intends to continue with its appeal following the Agency's withdrawal of the Contested Decision.
8. In an email of 20 November 2015, the Appellant informed the Board of Appeal of its decision to withdraw the appeal and requested the refund of the appeal fee.
9. As the Appellant has decided to withdraw the appeal, the case can be closed.
10. However, as the Appellant has requested that the appeal fee should be refunded, the Board of Appeal has to examine whether Article 10(4) of Commission Regulation (EC) No 340/2008 of 16 April 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) (hereinafter the 'Fee Regulation') is to be applied in this case. Article 10(4) of the Fee regulation provides that the Agency shall *'refund the fee levied in accordance with paragraph 1 of this Article if the Executive Director of the Agency rectifies a decision in accordance with Article 93(1) of Regulation (EC) No 1907/2006, or if the appeal is decided in favour of the appellant'*.

11. In this regard, the Board of Appeal notes that the Appellant did not have any other legal remedy available to it but to lodge an appeal against the Contested Decision. This is because the change in status of its registration to that of a transported isolate intermediate being used under strictly controlled conditions was not taken into account by the Agency in the decision-making process and in the Contested Decision itself. Furthermore, all attempts by the Appellant to rectify the situation with regard to its registration status after the Contested Decision was adopted had failed. The Appellant therefore had no other legal remedy open to it but to submit an appeal.
12. In this respect, the Board of Appeal notes that the evidence of the case demonstrates that on 22 December 2014 the Appellant tried to change its registration dossier type to '*transported isolated intermediate registration dossier*' and to change the tonnage band for its standard registration dossier to between 1 and 10 tonnes per year. The attempt to change the dossier type failed the business rules check for two reasons and the tonnage downgrade failed the business rules check for one. The Appellant contacted the Agency on 15 January 2015 asking for support in making a change to the tonnage band. The Agency replied on 19 January 2015 asking the Appellant, who is the lead registrant for the substance in question, to send the Agency a formal written agreement of the other registrants agreeing to change the tonnage band. The Appellant provided the written agreement of the only other registrant for the same substance on the same day.
13. The Contested Decision was notified to the Appellant on 27 January 2015. On the same day, a few hours later, the Agency sent an email to the Appellant and informed it that the necessary changes were now implemented in the REACH-IT and that the Appellant should be able to submit an updated lead registration dossier for a lower tonnage band. The Appellant made the update on 2 February 2015. By letter of 10 February 2015, the Agency informed the Appellant that the registration update had been accepted covering the tonnage band between 1 and 10 tonnes per year and over 1000 tonnes per year as a transported isolated intermediate, the latter pursuant to Article 18 of the REACH Regulation.
14. The Appellant had also contacted the Agency on 2 February 2015 inquiring about the possibility of updating the registration dossier after receiving the Contested Decision. The Agency replied to the Appellant on 17 February 2015 informing it that '*technically you can now update the tonnage band information in your registration dossier, which you already have done on 2 February 2015*'. The Agency added that '*However, a change of the tonnage band is without prejudice to [the Contested Decision]*'.
15. The Appellant's representative contacted the Agency on 10 March 2015 regarding the reply of the Agency of 17 February 2015 and requesting the Agency to withdraw the Contested Decision. Having not received a reply, the Appellant's representative recontacted the Agency on 27 March 2015. On 22 April 2015, the Appellant retried to change its registration dossier to intermediate status but failed again the business rules check. It contacted the Agency by email the same day asking the Agency to change the business rules check in order to allow it to register the substance in question as an intermediate only.
16. On the same day, 22 April 2015, the Agency sent a letter to the Appellant requesting inter alia '*documentary evidence that [the Appellant] did not manufacture or import buta-1,2-diene with standard uses in higher quantities than 10 tonnes per annum since the date [the Appellant] registered [its] substance under the REACH Regulation*'.
17. Consequently, on 23 April 2015, when the Appellant lodged its appeal, it had not received any definitive reply from the Agency as to whether the update of its registration dossier type to transported isolated intermediate would be accepted and the Contested Decision withdrawn. This was despite its frequent contacts with the Agency since December 2014.

18. There is also no information in the documentary evidence submitted in the course of this appeal to demonstrate why the Agency could not have examined the Appellant's updated registration dossier and why it could not have adopted the decision to withdraw the Contested Decision before the appeal deadline, in accordance to Article 92(2) of the REACH Regulation, had expired.
19. As a result, the Board of Appeal considers that the specific circumstances of the present appeal justify the refund of the appeal fee to the Appellant in accordance with Article 10(4) of the Fee Regulation.
20. Consequently, the present appeal case should be closed and the Agency ordered to refund the appeal fee to the Appellant.

On those grounds,

THE BOARD OF APPEAL

hereby:

- 1. Closes appeal case A-013-2015.**
- 2. Orders the refund of the appeal fee.**

Mercedes Ortuño
Chairman of the Board of Appeal

Alen Močilnikar
Registrar of the Board of Appeal