

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

5 September 2012

Application to intervene

(Interest in the result of the case – Representative association – ECHA accredited stakeholder – Administrative practice)

Case number	A-003-2012
Language of the case	English
Applicant	European Coalition to End Animal Experiments (ECEAE)
	Represented by: Dr. Katy Taylor and Mr David Thomas 16a Crane Grove London N7 8NN United Kingdom
Contested decision	CCH-D-0000001752-76-06/F of 28 February 2012 adopted by the European Chemicals Agency (hereinafter the 'Agency') pursuant to Article 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')
Appellant	THOR GmbH Germany
Representative	Mr Martin Ahlhaus Noerr LLP Brienner Straße 28 80333 München Germany

THE BOARD OF APPEAL

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

Registrar: Sari HAUKKA

gives the following

Decision

SUMMARY OF THE FACTS

1. On 25 May 2012, the Appellant filed an appeal at the Registry of the Board of Appeal against the contested decision which was adopted on 28 February 2012.
2. On 9 July 2012, an announcement of the notice of appeal was published on the website of the Agency in accordance with Article 6(6) of 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 20 July 2012, the Applicant filed an application with the Registry of the Board of Appeal seeking to intervene in the proceedings in support of the Appellant.
4. On 25 July 2012, the application to intervene was served on the Appellant and the Agency.
5. The Appellant submitted its observations on the application to intervene by documents lodged with the Registry on 14 August 2012.
6. The Agency submitted its observations on the application to intervene by documents lodged with the Registry on 15 August 2012.

ARGUMENTS OF THE PARTIES

Applicant's arguments

7. The Applicant claims an interest in the result of the case brought before the Board of Appeal for the following reasons:
 - (a) ECEAE is Europe's leading alliance of animal protection organisations, representing people who are concerned about the use of animals in laboratories. It has organisation members in 22 European Union member states and is an accredited stakeholder organisation with the Agency working for the avoidance of animal testing. The Applicant is also an observer at the Member State Committee (MSC) and Risk Assessment Committee (RAC) meetings at the Agency. The Applicant also states that its representative, senior scientific advisor Dr. Katy Taylor, attended the 21st meeting of the MSC on 7-9 December 2011, but was not permitted to be present in the closed session of that meeting where the substance and the contested decision related to it were discussed.
 - (b) ECEAE supports the Appellant's contention that the Agency should have taken the updated dossier into account. It claims that if the updated dossier had been taken into consideration the result may have been that one or more of the required studies would not need to be carried out with obvious implications for, inter alia, animal welfare.

- (c) In addition, the Applicant argues that the MSC was in any event wrong to order the Appellant to carry out both a screening study and a pre-natal developmental toxicity study.

Appellant's arguments

- 8. The Appellant supports the application to intervene.

Agency's arguments

- 9. The Agency objects to the application to intervene and presented the following reasons for its objection:
 - (a) The Agency claims that in order to be granted leave to intervene ECEAE had to meet the four cumulative criteria for intervention set out in the case-law of the Court of Justice of the European Union (hereinafter the 'European Court of Justice'). In other words, according to that case-law, the Applicant must demonstrate that it represents an appreciable number of operators active in the sector concerned, its objects include that of protecting its members' interests, the case may raise questions of principle affecting the functioning of the sector concerned, and the interests of its members may therefore be affected to an appreciable extent by the judgment given.
 - (b) The Agency states that according to previous decisions of the Board of Appeal, accredited stakeholders of the Agency are required to establish the required interest in the result in each specific case.
 - (c) The Agency considers that, in this specific case, ECEAE has not met all the four cumulative conditions to allow a representative association to intervene. In particular the Agency considers that ECEAE has not met the third and fourth condition, i.e. whether the case may raise questions of principle affecting the functioning of the sector concerned and the interest of its members may therefore be affected to an appreciable extent by the judgement to be given.
 - (d) The Agency states that the European Court of Justice has only granted a right to intervene to representative associations which had members whose economic or legal situation could be affected by the outcome of the case in question. The Agency argues that there is no case-law addressing the question of whether an association representing a non-economic/non-legal interest (such as the protection of animal welfare) is entitled to intervene where the outcome of the appeal will not in any way change their legal or economical position, which according to the Agency is the case here.
 - (e) The Agency claims that the specific case at hand does not raise questions of principle affecting the functioning of ECEAE's members, unlike, for instance, the question of the use of read across to avoid unnecessary testing on vertebrate animals. Instead, the Agency considers that the present appeal concerns the procedural question of whether the Agency should take a new decision assessing the updated registration dossier submitted by the Appellant. In other words, the case concerns the procedural question regarding the moment in time when the Agency has to examine the updated registration dossier. The Agency concludes that the final outcome of this case therefore does not concern animal welfare, which is the non-economic interest protected by ECEAE and its members.
 - (f) In addition, the Agency claims that ECEAE raised an argument not raised by the Appellant, i.e. that the Agency was not entitled to request a screening study in addition to the pre-natal developmental toxicity study. The Agency also referred

to paragraph 51 of the Practice Directions to parties to appeal proceedings before the Board of Appeal of the European Chemicals Agency, which provides that interveners may not submit new pleas of law which would modify the subject-matter of the case.

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) of the Rules of Procedure provides further that an application to intervene must state the circumstances establishing the right to intervene and must be submitted within two weeks of publication of the announcement of the notice of appeal on the website of the Agency. Furthermore, pursuant to Article 8(3) the application must be limited to supporting or opposing the remedy sought by one of the parties. In addition, Article 8(4) lists the information the application shall contain.
12. The application complies with Articles 8(2), 8(3) and 8(4) of the Rules of Procedure and is therefore admissible.
13. The Board of Appeal shall 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.

Notion of 'interest in the result of the case' in proceedings before the Board of Appeal

14. Article 8(1) of the Rules of Procedure provides that '*[any] 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*'. In addition, 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 European Court of Justice (hereinafter the 'Statute'), 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 parallels between the Rules of Procedure and the Statute on this point, and notwithstanding the differences in the nature of proceedings before the Board of Appeal, on the one hand, and the European Court of Justice, on the other, the relevant case-law of the European Court of Justice concerning the assessment of applications to intervene provides the Board of Appeal with guidance when applying Article 8(1) of the Rules of Procedure. However, the differences between the procedures of the Board of Appeal and the European Court of Justice, the legal context in which they are applied, and the circumstances of each individual case shall also be taken into account by the Board of Appeal when deciding on applications to intervene.
17. According to the European Court of Justice's case-law, 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, the 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). In particular, it is necessary to ascertain

whether the Applicant is directly affected by the measure in question and whether his interest in the result of the case is certain (see the Order of the President of the General Court of 7 July 2004 in Case T-37/04 R *Região autónoma dos Açores v. Council of the European Union*, paragraph 59).

18. With regards to the possibility for representative associations to intervene, the European Court of Justice has consistently held that representative associations whose object is to protect their members' interests in cases raising questions of principle liable to affect those members are allowed to intervene. More particularly, an association may be granted leave to intervene in a case if it represents an appreciable number of those active in the field concerned, its objects include that of protecting its members' interests, the case may raise questions of principle capable of affecting those interests, and the interests of its members may therefore be affected to an appreciable extent by the judgment to be given (see, for instance, the 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 Akcros Chemicals Ltd v. Commission*, paragraph 14 and the case-law cited therein).
19. In its earlier decisions on applications to intervene by ECEAE, the Board of Appeal was in principle guided by the same four criteria applied in the European Court of Justice's case-law. In those decisions the Board of Appeal also held that, when applying those criteria, it must have regard to the specific context in which Article 8(1) of the Rules of Procedure is applied and that that provision should not be interpreted without having necessary and due regard to the REACH Regulation and the regulatory framework that underpins it. Furthermore, 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 within the Agency (see, for instance, Article 108 of the REACH Regulation). This involvement is foreseen to ensure that various different interests are taken into account in the Agency's decision-making.
20. The case-law of the European Court of Justice related to the intervention of representative associations deals primarily, although not exclusively (see for example Case T-37/04 R *Região autónoma dos Açores v. Council of the European Union*), with representative associations for particular interests that are composed of economic operators. It should be observed, however, that the Agency engages with representative associations with the status of Accredited Stakeholder Organisations that do not only represent the economic interests of their members. Having regard to these considerations, when interpreting Article 8(1) of the Rules of Procedure, the Board of Appeal takes the view that representative associations representing interests other than economic interests should have the possibility to intervene in appeals before it.

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

21. The Applicant states that it is an Accredited Stakeholder Organisation with the Agency. As such, the Applicant must, by implication, fulfil the five eligibility criteria set by the Agency for accredited stakeholders (see the Revised eligibility criteria for ECHA's Accredited Stakeholders, Doc: MB/34/2011). During the validation process for Accredited Stakeholder Organisations, the Agency, inter alia, verifies that a stakeholder has a legitimate interest in the areas of work of the Agency and that the stakeholder is representative in its field of competence. Noting that its status as an Accredited Stakeholder Organisation was accepted by the Agency, the Board of Appeal is satisfied as to the Applicant's representativity and its object, which is seeking to minimise the amount of animal testing under the REACH Regulation.

22. In particular having regard to its status as an Accredited Stakeholder Organisation, and in line with its previous decisions on applications to intervene, the Board of Appeal considers that the Applicant satisfies the criteria of being a representative association which aims to protect its members' interests, namely the reduction of animal testing.
23. Having established that the Applicant satisfies the first two criteria for admitting a representative association as an intervener in a case, the Board of Appeal needs to consider whether the present case raises questions of principle that are liable to affect the interests of the Applicant and its members to an appreciable extent.
24. As an initial step in this analysis, it is necessary to clarify the subject-matter of the appeal. In its notice of appeal, the Appellant contests the Agency's decision not to take into account the update of the dossier, which was filed before the issuance of the contested decision and contained an exposure based waiving strategy. The Appellant requests the Board of Appeal to order the Agency to evaluate, as a basis for the final decision, its latest submission so that it will know whether its waiving strategy is accepted and whether it is obliged to conduct the specific studies requested by the Agency in the contested decision. However, in the notice of appeal, the Appellant does not contest the requested studies as such but rather the legality of the administrative practice which lead to the dossier update not being taken into account.
25. As a result, the subject-matter of the appeal is not related to the necessity of testing on vertebrate animals but rather to the legality of an administrative practice. As stated in paragraph 17 above, it is in relation to that subject-matter that the required interest must be defined.
26. The Board of Appeal recognises that it is possible that an administrative practice which refuses to take into account dossier updates, which take place at later stages in the proceedings, can, in certain individual cases lead to requests for animal testing that could be avoided if the dossier update had been taken into account. However, a different question is whether the legality of such an administrative practice is a subject-matter in which the Applicant has sufficient interest in order to establish a right to intervene. In this respect, it should also be noted that it is not certain in this individual case that the administrative practice in question will eventually lead to animal testing that could have been avoided if the administrative practice had been different, as the necessity of the requested testing remains uncertain until the evaluation by the Agency of the dossier update and the waiving strategy included therein.
27. The Applicant claims in its application that if the administrative practice had been different, and the updated dossier had been taken into account, the result may be that one or more of the required studies would not need to be carried out. This means that in practice there is only a possibility that the testing requested in the contested decision is unnecessary as the waiving statement has not yet been evaluated by the Agency. Consequently, there is also only a possibility that testing on vertebrate animals would be avoided with a different administrative practice. Thus, although it cannot be ruled out that such an administrative practice could lead in certain cases to requests for testing on vertebrate animals that might ultimately prove to be unnecessary, the relation between the administrative practice at issue and the requirement for testing on vertebrate animals is not direct or certain.
28. Consequently, in order to decide whether the Applicant has a sufficient interest in the result of the appeal, the Board of Appeal needs to analyse whether the contested administrative practice and its potential consequences, with only a possibility of unnecessary animal testing, *as such* can be seen as a question of principle which affects the interests of ECEAE's members to an appreciable extent which justifies a right to intervene in the case.

29. In this case, while the Applicant is seeking to protect the interests of its members by campaigning for the reduction of animal testing, the subject-matter of the case is not about animal testing but rather about the legality of an administrative practice. As a result, the interest set out by the Applicant in its application is not related to the subject-matter of the case as such, but focuses only on the potential consequences thereof. Due to the uncertain connection between the subject-matter of the case and the interests of the Applicant's members, the Applicant's members are not affected to an appreciable extent by the judgement to be given.
30. As a result, the Board of Appeal finds that the case under appeal does not raise questions of principle which can be seen to affect the interests of the Applicant and its members to an appreciable extent. Consequently, the Applicant's interest in the result of the case is not established as required by Article 8(1) of the Rules of Procedure.
31. For the above reasons, the application to intervene submitted by the Applicant must be dismissed.

ORDER

On those grounds,

THE BOARD OF APPEAL

hereby:

Dismisses the application to intervene.

Mercedes ORTUÑO
Chairman of the Board of Appeal

Sari HAUKKA
Registrar of the Board of Appeal