

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

13 October 2014

Application to intervene

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

Case number	A-005-2014
Language of the case	English
Applicant	European Coalition to End Animal Experiments (ECEAE) London United Kingdom Represented by: Katy Taylor and David Thomas London United Kingdom
Contested Decision	Decision of 26 February 2014 on the substance evaluation of carbon tetrachloride adopted by the European Chemicals Agency (hereinafter the 'Agency') pursuant to Article 46(1), and in accordance with the procedure laid down in Articles 50 and 52, 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 Decision was notified to the Appellants through the following annotation numbers: SEV-D-2114274040-63-01/F, SEV-D-2114274051-60-01/F, SEV-D-2114274042-59-01/F, SEV-D-2114274043-57-01/F, SEV-D-2114274049-45-01/F, and SEV-D-2114274050-62-01/F
Appellants	Akzo Nobel Industrial Chemicals GmbH, Germany Dow Deutschland Anlagengesellschaft mbH, Germany KEM ONE, France INEOS ChlorVinyls Ltd, United Kingdom Solvay Chimica Italia S.p.A., Italy Solvay Electrolyse France SAS, France
Representative	Jean-Philippe Montfort Mayer Brown Europe-Brussels LLP Brussels Belgium

THE BOARD OF APPEAL

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

Registrar: Sari HAUKKA

gives the following

Decision

SUMMARY OF THE FACTS

1. On 26 May 2014, the Appellants filed an appeal at the Registry of the Board of Appeal against the Contested Decision.
2. On 25 June 2014, 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 8 July 2014, the Applicant filed an application with the Registry of the Board of Appeal seeking leave to intervene in the proceedings. The Applicant supports the remedy sought by the Appellants.
4. On 9 July 2014, the Appellants and the Agency were invited to submit their observations on the application to intervene.
5. On 4 August 2014, the Agency submitted its observations on the application to intervene. The Appellants did not submit observations on the application to intervene.

ARGUMENTS OF THE APPLICANT AND THE AGENCY

Applicant's arguments

6. The Applicant claims an interest in the result of the case brought before the Board of Appeal for the following reasons:
 - (a) The Applicant states that it is Europe's leading alliance of animal protection organisations, representing people who are concerned about the use of animals in laboratories. It has 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 and Risk Assessment Committee meetings;
 - (b) The Applicant states that it was granted leave to intervene in previous cases before the Board of Appeal and that the Board of Appeal's reasoning in those appeals concerning the Applicant's suitability to intervene in those appeals applies with equal force to the present proceedings;
 - (c) The Applicant states that the test requested in the Contested Decision – an Extended One Generation Reproductive Toxicity Study (EOGRTS) by inhalation – will involve a large number of animals and can cause significant suffering to those animals, particularly when the inhalation route is employed. The Applicant states that it has an interest in ensuring that suffering of this nature and on such a large scale does not take place if it is not warranted, as do its members;

- (d) The Applicant considers that the appeal also raises wider questions of principle which are of central importance to animal welfare such as the Agency's margin of discretion in substance evaluation, the proper application of the Board of Appeal's final Decision in case A-005-2011, the status of EOGRTS, the weight of evidence, the stepwise approach and other procedural issues.

Arguments of the Agency

7. The Agency requests the Board of Appeal to dismiss the application to intervene.
8. In support of its request the Agency relies on case-law of the General Court related to applications to intervene submitted by non-governmental organisations for the protection of the environment (hereinafter 'environmental NGOs'), and in particular the Order of the Eighth Chamber of the General Court of 6 November 2012 in Case T-520/10, *Comunidad Autónoma de Galicia v Commission* (ECLI:EU:T:2012:581).
9. The Agency argues that the General Court's case-law on the scope of the interest of environmental NGOs in the result of the case is not defined by whether the result of the case relates to the protection of the environment. According to the Agency, the interest and involvement of the respective NGO has to be more case-specific. The Agency claims that, comparably, animal welfare NGOs have to demonstrate a more specific interest in the result of the case than that of the protection of animal rights. The interest has to be established directly in relation to the specific subject-matter of the case. According to the Agency, the subject-matter of the present case relates to whether further information was required to clarify reproductive toxicity concerns of the substance subject to the Contested Decision and, if so, whether the EOGRTS by inhalation was the appropriate choice to clarify that concern.
10. The Agency claims that, based on the case-law referred to in paragraph 8 above, the Applicant would have to demonstrate either (i) that its sphere of activity coincides with the subject-matter of the appeal, or (ii) if its field of activity is broader than the subject-matter of the appeal that it was actively engaged in programmes or studies concerning the subject-matter of the case and that the viability of such active engagement would be jeopardised by the adoption of the Contested Decision.
11. The Agency claims that, since the Applicant's sphere of activity is wider than the subject-matter of the case, it would need to satisfy the second of the criteria set out in the previous paragraph. The Agency claims further that the Applicant has not satisfied that criterion. According to the Agency, the general description of its activities in the sector of the protection of animal rights and involvement in general questions relating to Article 25 of the REACH Regulation do not fulfil the requirements established by the General Court in the abovementioned case law.

REASONS

12. 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 be granted leave to intervene in that case.
13. 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.
14. Since the application complies with Articles 8(2), 8(3) and 8(4) of the Rules of Procedure, the Board of Appeal shall 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.

15. In its observations on the application to intervene the Agency claims that the test developed by the General Court to assess whether an interest in the result of a case has been established by environmental NGOs (see paragraph 8 above) should also be employed by the Board of Appeal to assess the present application to intervene.
16. As stated by the Board of Appeal in previous intervention decisions, given the parallel between the Rules of Procedure and the Statute of the Court of Justice of the European Union, and notwithstanding the difference in the nature of proceedings before the Board of Appeal, on the one hand, and the Court of Justice of the European Union, on the other, the judgments of the Court of Justice of the European Union can provide assistance in interpreting Article 8(1) of the Rules of Procedure (see, for example, the intervention Decision of the Board of Appeal of 26 April 2012 in Case A-001-2012, paragraph 16).
17. The Board of Appeal considers, however, that the test developed by the Court of Justice of the European Union for assessing applications to intervene submitted by representative associations, and previously applied by the Board of Appeal, is more appropriate for assessing the present application to intervene than the test developed by the General Court specifically for assessing applications by environmental NGOs.
18. The Board of Appeal has adopted a broad interpretation of the right of representative associations to intervene in order to facilitate the assessment of the context of certain cases whilst avoiding multiple individual interventions which would compromise the effectiveness and proper course of the proceedings (see, by analogy, for example, the Order of the President of the Court 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 British Coal Corporation and Commission*, ECLI:EU:C:1997:307, paragraph 66).
19. According to the test applied by the Board of Appeal, a representative association whose object is to protect its members' interests in cases raising questions of principle liable to affect those members may be granted leave to intervene. More particularly, a representative 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, by analogy, for example, 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 Akros Chemicals Ltd v Commission*, ECLI:EU:T:2007:57, paragraph 14). The Board of Appeal will therefore assess the present application against those criteria.
20. In the present case, the Applicant 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, adopted by the Management Board on 21 June 2011, 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 the field of its competence.
21. In particular having regard to its status as an Accredited Stakeholder Organisation, the Board of Appeal considers that the Applicant satisfies the criteria of being a representative association which aims to protect its members' interests, in particular the avoidance of animal testing.
22. Having established that the Applicant satisfies the first two criteria for admitting a representative association as an intervener, the Board of Appeal will consider whether the present appeal raises questions of principle that are liable to affect the interests of the Applicant and its members to an appreciable extent.

23. In the present appeal the Appellants seek the annulment of the Contested Decision which requests them to carry out an EOGRTS by inhalation. The Appellants and the Applicant both claim that the requested test will require the use of a considerable number of animals. The Board of Appeal observes further that the Appellants claim *inter alia* that, by requiring an EOGRTS by inhalation, the Agency is requiring a study that is unnecessary and will cause the unnecessary sacrifice of vertebrate animals. According to the Appellants, the Agency also failed to demonstrate that testing on vertebrate animals is undertaken only as a last resort and that the fewest number of animals are used to obtain the objectives pursued. The final decision of the Board of Appeal in the present appeal may therefore have a direct effect on whether testing on vertebrate animals is necessary, and if it is, on the number of animals used in that testing.
24. Since the Applicant has an interest in the avoidance of animal testing the Board of Appeal considers that some of the questions raised in the present appeal can be considered to be questions of principle that are liable to affect the interests of the Applicant and its members to an appreciable extent. The application to intervene submitted by ECEAE must therefore be granted.
25. Whilst the application has been granted, the Board of Appeal considers it necessary to examine further the Agency's claim that on the basis of the criteria for assessing applications to intervene by environmental NGOs developed by the General Court for example in Case T-520/10, *Comunidad Autónoma de Galicia v Commission* (see paragraph 8 above), the application to intervene in the present application should be dismissed.
26. According to that case-law, the notion of interest in the result of the case must be defined in the light of the precise subject-matter of the dispute and be understood as meaning a direct, existing interest in the decision on the form of order sought and not as an interest in relation to the pleas in law and arguments put forward. The expression 'result' is to be understood as meaning the operative part of the final decision. It is necessary, in particular, to ascertain whether the Applicant is directly affected by the contested decision and whether its interest in the result of the case is established (see, by analogy, for example, the Order of the Fourth Chamber of the General Court of 25 February 2003 in Case T-15/02, *BASF v Commission*, ECLI:EU:T:2003:38, paragraph 26).
27. The General Court considers further, in assessing applications by environmental NGOs, that the requirement of a direct and existing interest in the result of the case implies that their field of activity coincides with the region and sector concerned by the proceedings before the Court, or, where they have a wider field of activity, that they are actively involved in protection programmes or studies regarding the region and the sector concerned the viability of which could be jeopardised by the adoption of the contested act (see for example the Order in Case T-520/10, *Comunidad Autónoma de Galicia v Commission*, cited in paragraph 8 above, paragraph 10).
28. As stated in paragraph 17 above, the Board of Appeal considers that the criteria developed by the Court of Justice of the European Union for assessing applications to intervene by representative associations should be applied in the present case. In response to the Agency's argument that to be granted leave to intervene the Applicant should demonstrate a more specific interest in the result of the case than the protection of animal rights, the Board of Appeal observes that, according to the application to intervene, the Applicant has in fact done so as its activities focus on the avoidance of animal testing, rather than on animal welfare in general, and are linked to the REACH Regulation in particular.
29. Furthermore, bearing in mind the Applicant's specific interest, the Board of Appeal considers that, even if it were to apply the General Court's criteria for assessing applications to intervene by environmental NGOs, the Applicant would in fact satisfy those criteria. More specifically, it is clear that the Applicant has been actively engaged in activities aimed at the reduction of testing on animals under the REACH Regulation

and that the Contested Decision, which requests testing on animals, would jeopardise the viability of those activities. Contrary to the Agency's arguments, the Board of Appeal considers that, for the purposes of appeal proceedings, it would be an unnecessarily restrictive interpretation of the General Court's case-law to consider that the Applicant's activities would have to be specifically focused on the particular test requested in the Contested Decision.

30. For the above reasons, the Board of Appeal finds that the Applicant has established an interest in intervening in the present proceedings in support of the form of order sought by the Appellants. The application to intervene submitted by the Applicant must therefore be granted.

ORDER

On those grounds,

THE BOARD OF APPEAL

hereby:

Admits the application to intervene by ECEAE in Case A-005-2014 in support of the Appellants.

Instructs the Registrar to arrange for copies of the non-confidential version of the procedural documents to be served on the Intervener.

Mercedes ORTUÑO
Chairman of the Board of Appeal

Sari HAUKKA
Registrar of the Board of Appeal