

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

29 September 2015

Application to intervene

(Interest in the result of the case – Member State Competent Authority)

Case number	A-018-2014
Language of the case	English
Applicant	Swedish Chemicals Agency (KEMI)
Contested Decision	SEV-D-2114285478-33-01/F of 19 September 2014 adopted by the European Chemicals Agency pursuant to Article 46(1) 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	BASF Grenzach GmbH, Germany

THE BOARD OF APPEAL

composed of Mercedes Ortuño (Chairman), Andrew Fasey (Technically Qualified Member and Rapporteur) and Rafael López Parada (Legally Qualified Member)

Registrar: Sari Haukka

gives the following

Decision

Summary of the facts

1. On 17 December 2014, the Appellant filed an appeal at the Registry of the Board of Appeal against the Contested Decision.
2. On 3 March 2015, an announcement of the appeal was published on the website of the European Chemicals Agency (hereinafter 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. The Appellant claims that the Board of Appeal should modify the Contested Decision insofar as it obliges the Appellant to conduct testing on the persistence of triclosan (hereinafter the 'Substance') and permit the Appellant to conduct OECD TG 309, as further specified by the Appellant, instead; and annul the Contested Decision insofar as it requires the Appellant to conduct, first, an Enhanced Developmental Neurotoxicity Study (OECD TG 426 with relevant elements of a Extended One-Generation Reproductive Toxicity Study, OECD TG 443), second, a Fish Sexual Development Test (OECD TG 234) and, third, a cardiotoxicity literature review.
4. By application received at the Registry of the Board of Appeal on 16 March 2015, the Applicant applied to intervene in the appeal proceedings in support of the European Chemicals Agency (hereinafter the 'Agency').
5. After being invited to submit their respective observations on the application to intervene, the Appellant submitted its observations on 1 April 2015, objecting to the application to intervene of the Applicant. The Agency submitted its observations on 7 April 2015, supporting the application.

Arguments

Applicant's arguments

6. The Applicant claims an interest in the result of the case brought before the Board of Appeal. The Applicant's arguments may be summarised as follows:
 - (i) In accordance with Article 52(1) of the REACH Regulation (all references to Articles hereinafter concern the REACH Regulation unless stated otherwise), the Applicant, as the competent authority of a Member State, received the draft decision to the Contested Decision with a request to provide proposals for amendment;
 - (ii) Further to Article 51(2), the Applicant reviewed the draft decision, and agreed to the conclusions of the evaluation. In accordance with Article 51(4), as other Member State Competent Authorities (hereinafter the 'MSCA') submitted proposals for amendment, the draft decision was referred to the Member State Committee (hereinafter the 'MSC'). The Applicant had appointed a member to the MSC. The MSC unanimously approved the draft decision and the Contested Decision was adopted;
 - (iii) In view of the previous considerations, the Applicant has, in accordance with Article 8(1) of the Rules of Procedure, a clear interest in the outcome of this case as it has contributed to the decision-making of the Contested Decision and any appeal therefore challenges the conclusions the Applicant agreed to during the process leading to the adoption of the Contested Decision; and

- (iv) The Applicant submits that it considers that the Contested Decision is lawful and clearly explains why the requested information is needed. Therefore, the Appellant's appeal should be dismissed as unfounded. The Applicant adds that without seeing the actual notice of appeal it is not possible for it to provide any further reaction to the pleas that the Appellant raises in its notice of appeal.

Arguments of the Appellant and the Agency

7. The Appellant opposes the application to intervene submitted by the Applicant on the grounds that the latter failed to establish a sufficient interest in the result of the case.
8. The Appellant argues that the mere fact that a MSCA has contributed to the decision-making of the Contested Decision does not establish a direct, existing interest in the ruling on the forms of order sought and is therefore insufficient for the purpose of Article 8(1) of the Rules of Procedure. The Appellant notes that both the draft decision and the Contested Decision were taken by the Agency that is a regulatory body ultimately responsible for the decision. As a result, any interest that the Applicant might derive from its contribution to the decision-making is necessarily of an indirect and not direct nature. Moreover, the Applicant failed to establish how the form of order sought by the Appellant directly affects the legal situation of the Applicant who offered no arguments as to how its rights may be impeded by the decision resulting from the appeal.
9. The Appellant further argues that the application to intervene is incomplete as the Applicant failed to adequately detail any plea in law and any argument of fact and law relied on and that it should be rejected on the grounds of Article 8(3)(e) of the Rules of Procedure.
10. The Agency supports the application to intervene and considers that the Applicant has established an interest to intervene in the present proceedings.
11. The Agency notes that pursuant to Article 51(7), if the MSC does not reach a unanimous agreement the European Commission prepares a decision in accordance with Article 133(3). Should that decision be challenged before the General Court, a Member State may be, pursuant to Article 40 of the Statute of the Court of Justice, permitted to intervene in the proceedings without needing to establish any interest. The Agency concludes that it would therefore be strange if a Member State would not be allowed to intervene in proceedings before the Board of Appeal because the decision was adopted by the Agency rather than by the Commission.
12. The Agency further notes that Member States are directly involved in the substance evaluation decision-making process. If a MSCA does not make a proposal for amendment it shows that it agrees with the content of the draft decision and it therefore has an interest to intervene in order to defend its agreement with the content of the Agency's decision.
13. The Agency adds that, pursuant to Article 85(1), Sweden appointed a member to the MSC, through which '*the Agency should aim to reach agreement amongst Member States [...]*'. This member was involved in the discussions that led to the unanimous agreement at the MSC and the subsequent adoption of the Contested Decision.

REASONS

14. 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.

15. 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.
16. The Board of Appeal observes at the outset that an application to intervene submitted by a competent authority of a Member State cannot be regarded as an application of a Member State within the meaning of Article 40 of the Statute of the Court of Justice of the European Union, where Member States are considered to be privileged applicants. Moreover, in accordance with Article 8(1) of the Rules of Procedure, there are no privileged applicants for the purposes of intervention in proceedings before the Board of Appeal. As a result, any applicant wishing to intervene in a case brought before the Board of Appeal has to establish in its application that it has an interest in the result of that case.
17. The Board of Appeal shall first examine whether the Applicant in the present proceedings has established an interest in the result of the case, and consequently whether its application to intervene complies with Article 8(1) of the Rules of Procedure
18. The concept of an interest in the result of the case, within the meaning of Article 8(1) of the Rules of Procedure, must be defined in light of the precise subject-matter of the dispute and be understood as meaning a direct, existing interest in the ruling on the forms 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 of the Board of Appeal. It is appropriate, in particular, to ascertain whether the intervener is directly affected by the contested measure and whether its interest in the result of the case is established (see, by analogy, Case T-587/08, *Fresh Del Monte Produce v Commission*, EU:T:2010:42, paragraph 25 and the case-law cited therein).
19. Furthermore, the Board of Appeal considers that the explicit reference to the 'result' of the case in Article 8(1) of the Rules of Procedure implies that the interest of the Applicant has to be established regarding the situation created once the Board of Appeal's decision has been adopted. Any interest prior to the adoption of the measure in this respect is therefore irrelevant.
20. In addition, the Board of Appeal observes that it is for an applicant to establish that it has an interest in the result of the case. Furthermore, the Board of Appeal considers that the interest in the result of the case needs to be articulated in a manner that enables the Board of Appeal to assess whether the interest is established as required by Article 8(1) of the Rules of Procedure. The Board of Appeal notes that this is also clearly set out in paragraph 48 of the Practice Directions to parties to proceedings before the Board of Appeal (adopted by the Board of Appeal on 8 March 2010) which provides *inter alia* that the application 'should contain a concise statement of the matters at issue in the proceedings which affect the person introducing the application'.
21. In the present case, the Applicant stated, without being contradicted on this point by the Appellant or the Agency that it, pursuant to Article 52(1) received the draft decision, and later pursuant to Article 51, its representative participated in the MSC at which the Contested Decision was adopted. The Applicant also stated that any appeal challenging the validity of the Contested Decision is also challenging the conclusions to which it agreed during the decision making process.
22. The Board of Appeal notes that, in the present case, the Applicant was not, pursuant to Article 45 of the REACH Regulation, the competent authority responsible for the

evaluation of the Substance that is subject to the Contested Decision. Furthermore, the potential annulment of the Contested Decision does not require the Applicant to re-evaluate the substance and, if necessary, prepare a new draft decision in accordance with Article 46 of the REACH Regulation, which could have an appreciable impact on its work and resource planning.

23. The Board of Appeal further notes that, considering the circumstances mentioned in paragraphs 21 and 22 above, the participation as a MSCA in adoption of decisions under substance evaluation under Article 52 does not automatically confer an interest in the result of an appeal against the decision resulting from the substance evaluation at issue.
24. The Board of Appeal considers that, in view of the information provided in the present application to intervene, the Applicant failed to establish an interest in the result of the case. In particular, the Applicant has not demonstrated that its legal position or economic situation may actually be directly affected by the operative part of the decision of the Board of Appeal (see, by analogy, the Order of the President of the Eighth Chamber of the General Court of 14 December 2010 in Case T-537/08, *Cixi Santai Chemical Fiber and Others v Council*, EU:T:2010:514, paragraphs 16 to 17).
25. Since the Applicant has not provided any other explanation with a view to establish its interest in the result of the present case, the Board of Appeal considers that the application to intervene submitted by the Applicant cannot be granted.
26. In view of the above, the Board of Appeal concludes that the application to intervene does not comply with the requirements of Article 8(1) of the Rules of Procedure and dismisses it, without there being a need to examine whether the application to intervene has been made in accordance with Article 8(2), (3) and (4) of the Rules of Procedure.

On those grounds,

THE BOARD OF APPEAL

hereby:

Dismisses the application to intervene.

Mercedes ORTUÑO
Chairman of the Board of Appeal

Sari HAUUKKA
Registrar of the Board of Appeal