

**SUMMARY OF DECISION OF 25 MAY 2016 OF THE BOARD OF APPEAL OF THE
EUROPEAN CHEMICALS AGENCY**

CASE NUMBER: A-010-2014

(Dossier evaluation – Compliance check – Intermediate)

Factual background

Nordenhamer Zinkhütte GmbH (hereinafter the 'Appellant') uses diarsenic trioxide (hereinafter the 'Substance') to produce copper concentrate and to eliminate metal impurities from zinc. The Appellant considered this use of the Substance to fall within the definition of intermediates under Article 3(15) of the REACH Regulation (all references to Articles hereinafter concern the REACH Regulation unless stated otherwise) and submitted a registration dossier for the Substance as a transported isolated intermediate under Article 18.

The European Chemicals Agency (hereinafter the 'Agency') requested the Appellant to provide further information on its registration of the Substance pursuant to Article 36. After reviewing the information provided by the Appellant, the Agency concluded that the Appellant's dossier did not fulfil the conditions of Article 3(15) and that the Appellant should have submitted a full registration pursuant to Article 10.

Subsequently the Agency initiated a compliance check of the Appellant's dossier pursuant to Article 41 and adopted the Contested Decision. The Contested Decision found that the Appellant's use of the Substance did not qualify as an intermediate use.

The Appellant lodged an appeal seeking the annulment of the Contested Decision.

Main findings of the Board of Appeal

In its decision, the Board of Appeal noted that the Appellant disputed the Agency's interpretation of Article 3(15) according to which the intermediate status of a substance is assessed in relation to the '*main aim*' of the process in which a substance is used. In its interpretation of the definition of intermediate, the Agency considered that the Substance was not an intermediate as the '*main aim*' of the Appellant's manufacturing process was not the transformation of the Substance into another, in this case copper concentrate, but the production of purified zinc.

The Board of Appeal identified two cumulative criteria from the definition of an intermediate under Article 3(15). First, the substance must be manufactured for, and consumed in, a chemical process and; second, the substance must be intentionally transformed into another substance in that chemical process. The Board of Appeal observed that the dispute primarily concerned the interpretation of the second cumulative requirement.

To determine whether the Substance satisfied the second cumulative requirement under Article 3(15), the Agency needed to consider whether the Substance was transformed into copper residue/copper concentrate or whether it simply helped in their production. However, after finding that the '*the main aim of a production process*' in the Appellant's plant was the production of zinc, the Agency limited its assessment in this respect to determining whether the Substance was transformed into zinc. The Agency did not examine whether the Substance was intentionally transformed into copper residue/copper concentrate or any other substance. The Board of Appeal did not accept the Agency's interpretation of Article 3(15) because, first, Article 3(15) does not include a reference to '*the main aim of a production process*' as a consideration for a substance to qualify as an intermediate. Second, the Agency's interpretation ignored economic reality by failing to have regard to the fact that the

importance of a metal or mineral produced in a plant could vary depending on factors such as raw material inputs, market value and demand.

The Board of Appeal further noted that it was irrelevant whether the substance resulting from a manufacturing process was the only substance produced in a plant, the main substance of the plant in terms of revenue or quantity, or just one of many substances produced. The production of zinc was not the only goal of the Appellant's plant since it has been adapted to produce other substances. Furthermore, the Appellant chose to use the zinc electrolysis process because it intended to produce copper concentrate in addition to zinc.

The Board of Appeal concluded that the Agency misinterpreted Article 3(15) in the case at hand and erred in law in deciding that the Substance was not an intermediate on the basis that the production of copper residue and subsequently copper concentrate did not constitute the 'main aim' of the production process in the Appellant's plant.

In light of the above considerations, the Board of Appeal found that the Contested Decision failed to comply with Article 3(15). Consequently, the Board of Appeal upheld the appeal and remitted the case to the Agency for re-evaluation.

NOTE: The Board of Appeal of ECHA is responsible for deciding on appeals lodged against certain ECHA decisions. The ECHA decisions that can be appealed to the Board of Appeal are listed in Article 91(1) of the REACH Regulation. Although the Board of Appeal is part of ECHA, it makes its decisions independently and impartially. Decisions taken by the Board of Appeal may be contested before the General Court of the European Union.

Unofficial document, not binding on the Board of Appeal

The full text of the decision is available on the Board of Appeal's section of ECHA's website:
<http://echa.europa.eu/about-us/who-we-are/board-of-appeal>