

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

21 May 2014

(Registration – Rejection of registration due to wrongly declared SME status – Use of languages – Good administration)

Case number	A-002-2013
Language of the case	French
Appellant	Distillerie DE LA TOUR France
Representative	Corinne Imbach Strasbourg France
Contested Decision	SUB-D-2114235940-52-01/F of 22 January 2013 adopted by the European Chemicals Agency (hereinafter the 'Agency') in accordance with Article 20(2) 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') and Article 3(6) of the Commission Regulation (EC) No 340/2008 on the fees and charges payable to the European Chemicals Agency (OJ L 107, 17.4.2008, p. 6, as amended by Commission Implementing Regulation (EU) No 254/2013, OJ L 79, 21.3.2013, p. 7; hereinafter the 'Fee Regulation')

THE BOARD OF APPEAL

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

Registrar: Sari HAUKKA

gives the following

Decision

RELEVANT LEGISLATION

1. Article 20(2) and (5) of the REACH Regulation provides:

'2. The Agency shall undertake a completeness check of each registration in order to ascertain that all the elements required under Articles 10 and 12 or under Articles 17 or 18, as well as the registration fee referred to in Article 6(4), Article 7(1) and (5), Article 17(2) or Article 18(2), have been provided. The completeness check shall not include an assessment of the quality or the adequacy of any data or justifications submitted.

The Agency shall undertake the completeness check within three weeks of the submission date, or within three months of the relevant deadline of Article 23, as regards registrations of phase-in substances submitted in the course of the two-month period immediately preceding that deadline.

If a registration is incomplete, the Agency shall inform the registrant, before expiry of the three-week or three-month period referred to in the second subparagraph, as to what further information is required in order for the registration to be complete, while setting a reasonable deadline for this. The registrant shall complete his registration and submit it to the Agency within the deadline set. The Agency shall confirm the submission date of the further information to the registrant. The Agency shall perform a further completeness check, considering the further information submitted.

The Agency shall reject the registration if the registrant fails to complete his registration within the deadline set. The registration fee shall not be reimbursed in such cases.

[...]

5. An appeal may be brought, in accordance with Articles 91, 92 and 93, against Agency decisions under paragraph 2 of this Article.'

2. Article 74(3), third subparagraph of the REACH Regulation provides *inter alia* that 'a reduced fee shall be set for [small- and medium-sized enterprises] SMEs'.
3. Article 104(1) of the REACH Regulation provides:
'Regulation No 1 of 15 April 1958 determining the languages to be used in the European Economic Community shall apply to the Agency.'
4. Article 1 of Council Regulation No. 1 of 15 April 1958 determining the languages to be used by the European Economic Community of 15 April 1958 (OJ, English Special Edition 1952-1958, p. 59), as in force at the time of the Contested Decision (hereinafter 'Regulation No 1'), lists French among the official languages and the working languages of the institutions of the Union. Article 2 of this Regulation provides:
'Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.'
5. Article 3 of Regulation No 1 provides:
'Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.'
6. Article 3(6) of the Fee Regulation provides:

'Where the payment is not made before expiry of the deadline provided for in paragraph 5 [14 calendar days from the date on which the invoice is notified to the registrant by the Agency], the Agency shall set a second deadline for the payment. Where the payment is not made before expiry of the second deadline, the registration shall be rejected.'

7. Articles 13(3) and (4), second subparagraph of the Fee Regulation provide:

'3. The Agency may request, at any time, evidence that the conditions for a reduction of fees or charges or for a fee waiver apply.

[...]

4. (second subparagraph) Where a natural or legal person that has claimed to be entitled to a reduction has already paid a reduced fee or charge, but cannot demonstrate that it is entitled to such a reduction, the Agency shall levy the balance of the full fee or charge as well as an administrative charge.'

8. Article 41 of the Charter of Fundamental Rights of the European Union (hereinafter 'the Charter') is headed 'Good administration' and provides in particular, at paragraph 4, that:

'Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.'

9. Article 51(1) of the Charter provides:

'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union [...].'

SUMMARY OF THE FACTS

Background of the dispute

10. On 19 November 2010, the Appellant submitted to the Agency a registration dossier for ethanol. This dossier was submitted electronically via REACH-IT in a combination of English and French. In its REACH-IT submission the Appellant declared that it was a medium sized enterprise, as defined by Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (hereinafter 'Recommendation 2003/361/EC'). Consequently, the Appellant paid a reduced registration fee and the Agency confirmed the registration.
11. By letter dated 18 August 2011, the Agency initiated, in accordance with Article 13(3) of the Fee Regulation, a small- and medium-sized enterprise (hereinafter 'SME') verification process in order to verify whether the Appellant qualified as an SME at the time of submitting the registration dossier. The Agency requested the Appellant to provide certain documentary evidence regarding the size of the enterprise, namely information about its ownership structure, copies of its annual financial accounts and information related to the headcount of the company. The Appellant was requested to submit the relevant documents within 21 calendar days of the date of the letter. The Appellant was informed that if it failed to provide sufficient evidence of its SME status the Agency would require the Appellant to pay the balance of the full fee as well as an administrative charge. This letter was written in English. It stated, however, that supporting documents could be submitted in any language of the European Union.
12. Between September 2011 and December 2011 the Appellant and the Agency exchanged the following correspondence, all in English:

- (i) In an email of 13 September 2011, the Appellant sent to the Agency documents that (according to it) confirmed its SME status.
 - (ii) The following day, on 14 September 2011, the Agency sent to the Appellant a letter referring to the Agency's earlier letter of 18 August, and stating that no reply had been received within the deadline laid down by that letter. The Agency letter of 14 September contained a final notice to submit the requested evidence within 10 calendar days of the letter.
 - (iii) On 15 September 2011 the Agency sent an email to the Appellant, replying to its email of 13 September 2011 and requesting the Appellant to provide further documents related to the SME verification process by 24 September 2011.
 - (iv) The Appellant replied on 26 September 2011 by providing some of the requested documents.
 - (v) On 11 November 2011 the Agency sent to the Appellant an email informing it that certain documents the Agency requested were still missing, and requesting the Appellant to provide them by 24 November 2011.
 - (vi) In an email of 1 December 2011, the Appellant replied to the Agency's request of 11 November 2011.
 - (vii) On 2 December 2011 the Agency sent an email to the Appellant informing it that the provisional assessment of the Agency showed that the Appellant was not an SME.
13. In an email of 28 February 2012, the Agency reminded the Appellant that it was still waiting for some additional information that it had requested in regard to the verification of the Appellant's SME status. The Agency also informed the Appellant that its provisional assessment showed that the Appellant did not qualify as an SME but was a large enterprise. The Agency requested the Appellant to reassess its company size and, if it considered that the Agency was incorrect, to provide any further documents that would show that it actually had SME status. The additional information was required to be sent to the Agency by 15 March 2012. This email was also written in English.
14. On 5 June 2012, the Agency sent to the Appellant a letter, written in English, containing the Agency's conclusions following the SME verification of the Appellant. On the basis of the documents it received from the Appellant in the course of the SME verification process, the Agency's preliminary conclusion was that the Appellant should have been classified as a 'large' enterprise. The Agency requested the Appellant, if it considered that its company size was different from that determined by the Agency, to submit its arguments with supporting documents within 14 days of the date of the letter. Otherwise, the Agency's letter stated that the Appellant would be charged the appropriate registration fee as well as an administrative charge.
15. On 20 July 2012, the Agency adopted Decision SME(2012) 2704 (hereinafter the 'SME decision'), concluding that the Appellant did not meet the conditions required by Recommendation 2003/361/EC to be classified as medium-sized as declared by the Appellant when submitting its registration. The SME decision stated that the Agency would be sending the Appellant two invoices, one for an 'additional amount' reflecting the correct level of registration fees for a large enterprise, and another invoice for an administrative charge. The amount of the administrative charge was specified in the SME decision, but the 'additional amount' was not. The Appellant was also informed that the consequence of not paying the additional amount of the registration fee would be the rejection of its registration dossier. This decision was submitted to the Appellant in English and mentioned that an action for a review of the legality of the SME decision could be brought before the General Court of the European Union.

16. On 23 July 2012 the Agency subsequently issued an invoice requesting the payment of a sum of EUR 20 700 euros for the administrative charge. This invoice was written partly in French and partly in English. The Agency also issued an invoice dated 26 July 2012, written in English, requesting a sum of 2 587 euros for the 'additional amount', representing, in the case of the Appellant, the difference between the SME and non-SME registration fees.
17. On 4 August 2012, the Appellant addressed to the Agency an email, written in French, providing information on its turnover in relation to the registered substance and expressing its concerns about the allegedly disproportionate burden of the administrative charge compared with the actual benefit from the production and sale of the registered substance.
18. On 4 September 2012 the Agency wrote a letter to the Appellant, written in English referring to its previous invoice of 26 July 2012, and stating that the additional amount requested had not been paid. The Agency said that this was a 'final payment reminder' and that the due date for payment would be extended to 5 October 2012. The letter stated that if the Appellant failed to pay the full amount of the registration fee corresponding to its 'true enterprise category' then the registration would be rejected under Article 20(2) of the REACH Regulation. The letter did not refer to the Appellant's email of 4 August 2012.
19. On 22 January 2013, the Agency adopted the Contested Decision rejecting the Appellant's registration of ethanol. The Contested Decision was written in English. The Contested Decision stated that in light of the SME verification process it was clear that the Appellant had declared the wrong company size. The Contested Decision stated that the Agency had sent a subsequent payment reminder extending the deadline for the payment of the additional amount of the fee to 5 October 2012, but no payment had been received. As a result, the Contested Decision rejected the Appellant's registration for ethanol. The Agency's decision of 26 November 2010 finding the registration to be complete and assigning a registration number was revoked and replaced by the Contested Decision. The Contested Decision cited Article 5 of the REACH Regulation, and stated that the Appellant must cease its manufacture, import or use of the substance.
20. By letter dated 13 February 2013, written in French, a lawyer representing the Appellant wrote to the Agency. The letter requested the Agency to send to the lawyer, and to the Appellant's managers, the French translation of the Contested Decision and related supporting documents. The lawyer also requested that the SME decision and its translation be sent to them, further stating that the Agency had not yet correctly notified that decision.
21. By letter sent on 7 March 2013, the Agency informed the Appellant that it was checking the Agency's processing of the Appellant's case and that it would respond to the Appellant as soon as possible. This letter was written in French. On 18 March 2013, the Agency addressed to the Appellant's representative a letter, written in French, summarising the circumstances relating to the Appellant's registration and the SME verification process. The letter can be summarised as follows:
 - (i) The Appellant had declared itself a medium enterprise when it submitted its registration dossier.
 - (ii) As the registration dossier was in French and English, the Agency was entitled to choose English in replying to the Appellant, under Article 2 of Regulation No 1. The Appellant was able to communicate in English.
 - (iii) The decision of 20 July 2012 had found that the Appellant was not a small or medium sized enterprise and that the proper registration fee had not yet been

paid. That decision (according to the Agency) set out the consequences of non-payment of the appropriate registration fee.

- (iv) As the full registration fee due remained unpaid, the previous registration decision was revoked by the decision of 22 January 2013.

Procedure before the Board of Appeal

22. On 19 April 2013, the Appellant lodged the present appeal at the Registry of the Board of Appeal. The appeal was lodged in French.
23. By way of the present appeal, the Appellant requested the Board of Appeal to annul the Contested Decision rejecting the registration of the Appellant and revoking the registration number granted to the Appellant. The Appellant also asked the Board of Appeal to make certain other findings and to cancel the Agency's invoice imposing an administrative charge.
24. On 25 June 2013, the Agency submitted its Defence.
25. On 29 July 2013, the Appellant, after being invited by the Board of Appeal, presented a number of observations on the Defence.
26. On 13 September 2013, the Agency submitted a letter reacting to the Appellant's observations to the Defence. The Agency considered that some of the Appellant's arguments were inadmissible because they were not raised in the Notice of Appeal. In addition, the Agency requested the possibility to reply to the Appellant's observations. The Agency was not invited to submit observations on the Appellant's observations to the Defence.
27. On 15 October 2013, the Board of Appeal sent a number of questions to the Parties. The Appellant submitted its reply on 14 November 2013 and the Agency replied on 19 November 2013. On 4 December 2013, the Registry received a letter from the Appellant reacting to the Agency's reply of 19 November 2013. The Board of Appeal considered that the Appellant's submission constitutes an unsolicited submission and decided that it should not be registered. As a result, it was sent back to the Appellant.
28. On 7 January 2014, the Parties were notified of the Board of Appeal's decision to close the written procedure. Neither of the Parties requested a hearing.
29. On 31 January 2014, the Parties were informed that the Board of Appeal considered that it was not necessary to hold a hearing in the present case.

ARGUMENTS OF THE PARTIES

The Appellant's arguments

30. The Appellant seeks primarily the annulment of the Contested Decision and the cancellation of the Agency's invoice imposing an administrative charge.
31. The Appellant supported its claim with the following pleas of law and fact:
 - (i) The Contested Decision breached the principle of sound administration because full and accessible information, related to determining the size and status of an enterprise, was not available on the Agency's website in all the European Union languages. In particular, the fact that such information, essentially of a technical and legal nature, was inadequate, unclear or not available in French is a circumstance which justifies the mistake the Appellant made in determining its size. The Appellant cannot be held responsible for any mistakes due to the

Agency's deficiencies. In view of the complexity of the registration formalities, and the fact that the relevant information was not available in French, the Agency should in all fairness have allowed the Appellant to rectify the information concerning its status without levying the administrative charge.

- (ii) The Contested Decision breaches the principle of legality and legal certainty. The Appellant argued that Recommendation 2003/361/EC has no binding force, as the Fee Regulation simply refers to it without incorporating its provisions. Consequently, the Contested Decision is unlawful.
 - (iii) The Contested Decision violates the principle of equality of arms, the right to be heard by an independent and impartial tribunal, the right to a fair trial, and the principle of equity of procedure. In the SME verification process leading to the imposition of an administrative charge, amounting to a penalty, the Agency is in fact both the judge and an interested party because it is the Agency that carries out the checks and determines whether or not an enterprise is entitled to a fee reduction and decides on the action to be taken following the checks. Moreover, in the event of an appeal, the Appellant argues that there are no guarantees about the Board of Appeal's independence and impartiality from the Agency.
 - (iv) The Contested Decision infringes the principle of proportionality and lacks a statutory basis for the scale of administrative charges. Any administrative charge should remain proportionate to the service effectively provided by the Agency. Moreover, the scale of administrative charges may only be set by a regulation and not by a decision of the Agency's Management Board [Decision of 12 November 2010 on the classification of services for which charges are levied (MB/D/29/2010 final)], since otherwise decision-making powers have been unlawfully delegated to it.
 - (v) The Contested Decision disregards the general principle of equal treatment. The Appellant argues that the administrative charge varies depending on the size of the enterprise concerned, creating a disparity in the treatment of different enterprises. In addition, the Appellant considered that the reduction in the administrative charge, since the Decision of the Management Board of 12 February 2013 [Decision amending Decision MB/D/29/2010 on the classification of services for which charges are levied (MB/21/2012/D final)], infringed the principle of equal treatment because the Appellant is being treated differently from other registrants. Consequently, the invoice imposing an administrative charge should be cancelled.
 - (vi) In the alternative, in accordance with the principle of sound administration, the principle of equity and the principle of equal treatment, the Appellant seeks:
 - a. the right to rectify the information concerning the Appellant company's status contained in its registration dossier, without the imposition of an administrative charge; or
 - b. the right to benefit from the changes introduced by the Agency Management Board's Decision of 12 February 2013, permitting an enterprise to rectify the declaration regarding their status and to receive a 50% reduction in the administrative charge; or
 - c. the right to reimbursement of the fees paid when it submitted its registration dossier.
32. In its observations on the Agency's Defence submitted on 29 July 2013, the Appellant argued, *inter alia*, that the Agency's process for verification of SME status has two connected phases. The first phase is concluded by the decision on the size of the enterprise. If a registrant does not pay the invoiced difference in registration fee

between that already paid and that required, the Agency in the second phase adopts a decision rejecting the registration. The second phase is therefore dependant on the first one. By contesting the rejection of the registration, the Appellant called into question the whole procedure that ended with the retroactive revocation of the registration decision.

Agency's Defence

33. In its Defence the Agency presents a number of arguments related to the admissibility of the Appeal as well as the substance of the case. The Agency's arguments can be summarised as follows:
- (i) The appeal is inadmissible regarding the invoice related to the administrative charge as an invoice cannot be subject to an appeal since it has no binding legal effect. Also, considering that the wording of Article 91(1) of the REACH Regulation explicitly refers to "decision of the Agency", only decisions can be subject to an appeal. Thus, the invoice is merely an ancillary document, and not a decision producing binding legal effects that can be subject to an appeal before the Board of Appeal;
 - (ii) The appeal is inadmissible as regards the Appellant's objections concerning the SME decision. That decision was taken under Article 13(3) and 13(4) of the Fee Regulation, and Article 91(1) of the REACH Regulation does not allow appeals against such decisions. Moreover, considering that the Appellant received the decision on 25 July 2012, the deadline for an appeal expired on 28 October 2012 while this appeal was lodged on 19 April 2013;
 - (iii) The appeal is inadmissible or, in the alternative, unfounded as it lacks arguments supporting the appeal against the Contested Decision. The Agency notes that none of the Appellant's arguments concern either the financial completeness check or the Contested Decision. The arguments in fact all concern either the SME verification process, the SME decision, or the ancillary invoice related to the administrative charge;
 - (iv) The Appellant is not disputing that it did not pay the correct registration fee corresponding to its enterprise size by the extended deadline. The Contested Decision meets the conditions for rejecting the registration dossier according to Article 20(2), subparagraph 3, of the REACH Regulation and Article 3(6) of the Fee Regulation. Based on these provisions, the Agency had to reject the registration dossier having implemented all the procedural guarantees provided by them.

REASONS

I. Claims under Examination

34. In support of its appeal, the Appellant claims that by adopting the Contested Decision, the Agency breached the principle of sound administration, the principles of legality and the strict interpretation of European Union law, the principle of legal certainty, the principle of equity and the principle of equality. The Appellant requests the Board of Appeal to annul the Contested Decision and the Agency's invoice imposing an administrative charge.
35. In the circumstances of the present case, the Board of Appeal considers it appropriate to examine first the Appellant's claim alleging infringement of the principle of sound

administration by, among others things, not using the French language during the procedure that resulted in the adoption of the Contested Decision.

1. Claim alleging infringement of the principle of sound administration related to the Agency's failure to use French during the procedure leading to the adoption of the Contested Decision

36. The Appellant argues that the Agency has not complied with the principle of good administration. In particular, the Appellant complains that throughout the SME verification process related to the enterprise size status of the Appellant, the Agency communicated with it in English. Furthermore, information related to the Agency's processes is not available in French.
37. The Board of Appeal will first examine whether in its dealings with the Appellant, the Agency correctly observed the requirements of Article 104(1) of the REACH Regulation which provides that Regulation No 1 applies to the Agency.
38. According to the Agency, in its letter to the Appellant's representative of 22 April 2013, the language it uses for any communication relating to a specific dossier is the language appearing in the registration dossier concerned. It adds that where a registration dossier contains information submitted in several official Community languages, the Agency chooses one of those official languages for the purposes of communicating with the registrant and adopting its decisions.
39. The Agency argues that it was therefore entitled to use English throughout the procedure as the Appellant used English as one of the languages when submitting the registration dossier. Furthermore, the Agency states that the Appellant used English throughout the SME verification process
40. The Agency argued that it was, pursuant to Article 2 of Regulation No 1, entitled to write to the Appellant in English as the Appellant had submitted a registration dossier in which it used a mixture of English and French.

Findings of the Board of Appeal

41. The Board of Appeal observes that the Appellant is established in France, and it is uncontested that it submitted its registration dossier to the Agency using a mixture of English and French.
42. The Board of Appeal finds that the Agency's reliance on Article 2 of Regulation No 1 is incorrect. That article refers to a 'reply' to earlier 'documents'. The Board of Appeal considers that this rule was drawn up to cover cases of correspondence between a person subject to the jurisdiction of a Member State and an EU institution. The SME verification process, as in the present case, is in fact a process started by the Agency and cannot therefore be considered as a 'reply' under Article 2 of the Regulation No 1. The Board of Appeal further observes that it is inappropriate to consider the notifications sent and decisions taken in the course of this administrative procedure that may lead to the granting or rejection of a registration, such as the SME verification process, as a 'reply' to an earlier 'document'. Instead, the SME verification process must be seen as an administrative assessment leading to a formal decision and therefore not part of an ongoing correspondence that could be covered by the provision of Article 2 of the Regulation No 1.
43. The Board of Appeal also notes that the last communication from the Appellant before the Contested Decision was the email of 4 August 2012, which was in French. So even the Agency's interpretation of Regulation No 1 would not justify writing a 'reply' in English to an email in French.

44. Furthermore, the Agency's interpretation of Regulation No 1 ignores Article 3 thereof, which provides that '*Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.*' The European Court of Justice has interpreted this provision to mean that '*Community institutions are under a duty to send an undertaking to which a decision is addressed a copy of that decision in the language of the Member State to which this undertaking belongs.*' (see judgment in *Suiker Unie*, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, EU:C:1975:174, paragraph 114). In this particular case, this means that a document addressed by the Agency to the Appellant whose company is registered in France should be, in accordance with Article 3 of Regulation No 1, drawn up or made available to the Appellant in French. The Board of Appeal considers this particularly important when a document is capable of adversely affecting a person's interests, such as in the present case the Contested Decision itself or prior to that the SME decision.
45. In the present case, there is evidence that the Appellant was able to communicate with the Agency in English during 2011, and only started to use French in its communications with the Agency in its email of 4 August 2012. However, the Board of Appeal notes that the fact that the Appellant was able to communicate in English does not remove the Agency's duty to comply with Article 3 of Regulation No 1.
46. The Board of Appeal observes that a registrant may agree to receive Agency's documents in a language other than that of its own Member State. However, such an agreement would have to be explicit and based on a genuine choice. It would have to be shown that the Appellant was made aware that it had a right to conduct correspondence with the Agency in one language and receive all documents from the Agency in this language, and that it consciously waived this right by agreeing to communication in, for example, English. No such explicit agreement was made in this case. The SME verification process began with a letter from the Agency to the Appellant in English. The fact that the Appellant replied in English, and continued to use English in later correspondence, does not constitute an adequate agreement of the Appellant to receive documents in English.
47. The Board of Appeal also notes that the possibility of an agreement, similar to the one referred to in the previous paragraph, is also mentioned in Article 13 of the Code of Good Administrative Behaviour for the Staff of the European Chemicals Agency (MB/11/2008, version applicable at the time of the Contested Decision). This states that any member of the public who writes to the Agency in one of the European Union official languages must receive an answer in the same language, unless that person has agreed to receive the answer in another language. Furthermore, the Board of Appeal notes that where a registration dossier is submitted using two languages of the European Union, as in the present case, the Agency cannot unilaterally decide, based on reasons of its own convenience, which of those languages should be used when processing the registration dossier in question. The Board of Appeal notes that the vast majority of registration dossiers are likely to include some parts in English. This alone cannot be the basis for the Agency choosing to communicate with registrants in English.
48. Having regard to the above, the Board of Appeal finds that in the circumstances of the present case the Agency's actions, leading to the adoption of the Contested Decision, breached Article 3 of Regulation No 1 and consequently failed to comply with Article 104(1) of the REACH Regulation. This breached an important rule of law, and also breached the principle of good administration. In fact, the right of EU citizens, and legal persons established in the EU, to choose a language for their dealings with EU bodies is a specific right, which is given by Regulation No 1 and also enshrined in Article 20(2)(d) of the Treaty on the Functioning of the EU and Article 41(4) of the Charter. The latter provision makes it clear that there is a link between the language

rules applying to EU bodies (such as the Agency) and the principle of good administration. As a result, the Appellant's plea concerning the violation of the principle of good administration is founded, insofar as it concerns the Agency's use of English without obtaining the prior agreement of the Appellant. Consequently, the Board of Appeal annuls the Contested Decision.

49. Moreover, as a result of the above conclusion, the Board of Appeal considers that this infringement of Article 3 of Regulation No 1 has also vitiated all the previous administrative acts leading to the adoption of the Contested Decision. Consequently, the Agency should repeat the administrative process related to the verification of the enterprise size of the Appellant and carry it out in accordance with the requirements of Regulation No 1, which is applicable to the Agency pursuant to Article 104(1) of the REACH Regulation.
50. In this regard, the Board of Appeal notes that the Agency argues that the SME decision had been taken under Article 13(3) and (4) of the Fee Regulation and concluded that Article 91(1) of the REACH Regulation does not allow the Board of Appeal to review such decisions of the Agency.
51. However, the Board of Appeal observes that the SME verification process is undertaken to establish whether a registrant paid the appropriate registration fee corresponding to the enterprise's size at the time of registration. The Board of Appeal finds that checking that a registrant paid the appropriate fee is part of the completeness check pursuant to Article 20(2) of the REACH Regulation. In practice, the Agency checks if a fee has been paid as part of the completeness check and only verifies if the correct fee has been paid at a later date as a matter of administrative convenience. Whilst the SME verification process is undertaken after the completeness check it is, as explained above, nonetheless a part of the overall registration process. The Agency would not carry out SME verifications if this was not required to ascertain that the registrant has provided all the elements required for a registration under the REACH Regulation, and in particular the correct registration fee.
52. In that regard, the Board of Appeal considers that Article 20(2) of the REACH Regulation, by providing that 'the completeness check [of a registration] shall not include an assessment of the quality or the adequacy of any data or justifications submitted' does not make any distinction between the technical completeness check of a registration and the financial completeness check of the registration. As noted above, the Agency checks if a fee has been paid as part of the completeness check and only later verifies if the correct fee has been paid. This distinction between 'technical completeness' and 'financial completeness' has been created by the Agency so that it could process registrations in accordance with the requirements and deadlines provided by the REACH Regulation. The fact that the SME verification is performed after the decision granting the registration number is adopted is principally based on this circumstance. Namely, that it is administratively convenient to complete the financial check at a later point in time.
53. The Board of Appeal however notes that whilst the Agency should seek to set up its administrative processes in the most efficient manner, those processes should also be set up in a manner which appropriately recognises the legitimate rights and interests of the persons that may be affected by the Agency's actions.
54. Consequently, in relation to the SME verification process that may lead to the adoption of a decision declaring that a registrant is not an SME and may result ultimately in a decision rejecting a registration and revoking a registration number, such as the Contested Decision in the present case, the Agency's administrative processes should be set up in a manner that does not alter the system of legal redress against decisions that the Agency adopts in relation to the completeness check of a registration. Such is the situation in the present case where the Agency claims that an SME decision may

not be challenged before the Board of Appeal whilst a decision rejecting a registration may be.

55. Consequently, the Board of Appeal sees the SME verification process not as an autonomous process outside the scope of review of the Board of Appeal but as part of the completeness check pursuant to Article 20(2) of the REACH Regulation which ultimately leads to a registration decision, which is under the scope of review of the Board of Appeal according to the Article 91(1) of the REACH.
56. In view of the circumstances of the present case, particularly in relation to the established breach of Article 104(1) of the REACH Regulation, the Board of Appeal therefore concludes that the Agency carries out the SME verification process solely for the purposes of the registration process under the REACH Regulation, in order to establish whether a registrant paid the correct registration fee corresponding to the size of the enterprise concerned at the time of registration.
57. Considering the above, the Agency should be ordered to repeat the administrative process related to the verification of the enterprise size of the Appellant and carry it out in accordance with the requirements of Regulation No 1 that applies to the Agency pursuant to Article 104(1) of the REACH Regulation. For the avoidance of doubt, the Board of Appeal has only examined the SME verification process as regards its compliance with Article 104(1) of the REACH Regulation. The Board of Appeal expresses no view on whether the Appellant is an SME, and leaves the Agency to decide this.

2. Other pleas raised by the Appellant

58. Since the Board of Appeal has found in favour of the Appellant and annulled the Contested Decision, the Board of Appeal does not consider it necessary to examine the other claims and pleas put forward by the Appellant in support of its appeal.

II. Other issues under examination

Refund of the appeal fee

59. In accordance with Article 10(4) of the Fee Regulation, the appeal fee shall be refunded if the appeal is decided in favour of an appellant.
60. As the Board of Appeal has decided the appeal in favour of the Appellant in the present case, the appeal fee shall be refunded on that basis.

Claim for reimbursement of appeal costs

61. In its Notice of Appeal, the Appellant requests the Board of Appeal to order the Agency to pay the Appellant's costs arising from the appeal proceedings.
62. The Board of Appeal observes that there is no legal basis in 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) for the reimbursement of costs that are not, as provided in Articles 17 and 21(1)(h) thereof, related to taking of evidence in appeal proceedings.
63. Consequently, and as in the present case no costs arose in relation to taking of evidence, the Board of Appeal rejects the Appellant's request for reimbursement of costs that it incurred in the appeal proceedings.

ORDER

On those grounds,

THE BOARD OF APPEAL

hereby:

Annuls Decision SUB-D-2114235940-52-01/F adopted by the Agency on 22 January 2013

Orders the Agency to repeat the administrative process related to the verification of the enterprise size of the Appellant and carry it out in accordance with the requirements of Regulation No 1, as provided for in Article 104(1) of the REACH Regulation.

Orders the refund of the appeal fee.

Rejects the claim for the reimbursement of costs incurred by the Appellant in the appeal proceedings.

Mercedes ORTUÑO
Chairman of the Board of Appeal

Sari HAUKKA
Registrar of the Board of Appeal