

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

**27 February 2013**

*(Administrative charge – SME status – Notification of the contested decision – Time limit for filing an appeal – Out of time – Inadmissibility)*

<b>Case number</b>	A-005-2012
<b>Language of the case</b>	English
<b>Appellant</b>	SEI EPC ITALIA SpA Italy
<b>Representative</b>	EcoMundo SAS 215, rue Jean-Jacques Rousseau 92136 Issy-les-Moulineaux Cedex France
<b>Contested decision</b>	SME(2011) 1275 of 28 November 2011 adopted by the European Chemicals Agency (hereinafter the 'Agency') and subsequent invoice No. 10029662 of 1 December 2011 sent pursuant to Article 13(3) and 13(4) of Commission Regulation (EC) No 340/2008 on the fees and charges payable to the European Chemicals Agency pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), (OJ L 107, 17.4.2008, p. 6; hereinafter the 'Fee Regulation')

**THE BOARD OF APPEAL**

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

Registrar: Sari HAUKKA

gives the following

## Decision

### RELEVANT LEGISLATION

#### *The Rules of Procedure*

1. Article 11(1)(b) 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') provides that an appeal shall be ruled inadmissible if the appellant has exceeded the time limit for submitting an appeal as set out in Article 92(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').

#### *The REACH Regulation*

2. Article 92(2) of the REACH Regulation provides:

*'The appeal, together with the statements of the grounds thereof, shall be filed in writing to the Agency within three months of the notification of the decision to the person concerned, or in the absence thereof, of the day on which it became known to the latter, unless otherwise provided in this Regulation.'*

### SUMMARY OF THE FACTS

#### *Background to the dispute*

3. On 30 November 2010, the Appellant submitted a registration dossier for a substance. In its REACH-IT account the Appellant stated that it is a 'medium enterprise' and at that time it was not requested by the Agency to prove its size. Consequently, the Appellant paid a reduced registration fee and the registration was confirmed by the Agency.
4. On 27 September 2011, the Agency initiated, in accordance with Article 13(3) of the Fee Regulation and further to Decision of the Management Board MB/D/29/2010, the small or medium-sized company (SME) verification procedure and contacted the Appellant requesting it to substantiate its claims related to its SME status. In response, on 22 November 2011, Mr Luca Paderno sent an email on the Appellant's behalf to the Agency stating that the Appellant is part of a large French group and thus could not be considered to be an SME.
5. On 28 November 2011, the Agency adopted the Contested Decision in which it considered the Appellant to be a large enterprise for the purposes of its registration submissions. Following its conclusion, the Agency issued and sent to the Appellant, inter alia, an invoice for the administrative charge. The contested invoice, dated 1 December 2011, levied an administrative charge of 20 700 euro on the Appellant.
6. The Contested Decision was communicated to the Appellant's REACH-IT account on the date of its adoption, i.e. on 28 November 2011.
7. On 4 May 2012, the Agency communicated to the Appellant's REACH-IT account a message referring to the final invoice reminder of the same date related to the Contested Decision.

*Procedure before the Board of Appeal and the remedy sought*

8. On 1 August 2012, the Appellant lodged a notice of appeal at the Registry of the Board of Appeal, seeking the annulment of the Contested Decision in so far as it imposes an administrative charge.
9. Further to the Registry's request, on 7 August 2012, the Agency provided the Board of Appeal with the Contested Decision, the related invoices and reminders, together with a brief description as to how the Contested Decision had been notified to the Appellant.
10. On 9 August 2012, the Board of Appeal invited the Appellant to respond to the Agency's account of the notification of the Contested Decision. The Appellant was in particular requested to indicate when and how it had received the Contested Decision.
11. The Appellant submitted its response on 27 August 2012.
12. On 1 October 2012, the Agency submitted the defence.
13. On 26 October 2012, since a member of the Board of Appeal was precluded from participating in the proceedings, the Chairman designated an alternate member, Mr Marc Pallemarts, to act in the present case as the legally qualified member of the Board of Appeal.
14. On 20 November 2012, the Board of Appeal requested the Appellant and the Agency to respond to certain questions related to the notification of the Contested Decision via REACH-IT, to the terms and conditions undertaken by the Appellant when opening its REACH-IT account and to certain particulars of the Appellant's REACH-IT account.
15. On 4 December 2012, the Agency and the Appellant submitted their respective replies to the request of 20 November 2012.
16. On 2 January 2013, the parties were notified that the Board of Appeal had decided to close the written procedure. Neither of the parties subsequently requested a hearing to be held.

**REASONS**

17. In its defence, the Agency raises two pleas of inadmissibility. First, the Agency contends that neither the Contested Decision nor the contested invoice is an act which can be appealed to the Board of Appeal. Second, the Agency submits that the appeal must be declared inadmissible as the time limit for lodging the appeal was clearly exceeded.
18. The Board of Appeal shall firstly consider the plea of inadmissibility based on failure to observe the time limit for bringing an appeal.
19. The Agency submits, in essence, that the notification of the Contested Decision to the Appellant occurred on 28 November 2011 when an email was sent to the Appellant's REACH-IT account. The Agency considers that the three-month period for bringing an appeal therefore came to an end on 28 February 2012. The Agency also claims that even if attention would be given to the Appellant's opening of the messages containing the Contested Decision or the contested invoice No 100296626 on 5 April 2012, the time period to appeal the decision would have ended on 5 July 2012. The Agency concludes that as the appeal was submitted on 1 August 2012 the time limit for lodging the appeal had already expired.
20. The Appellant claims, in essence, that it never received the Agency's email of 28 November 2011. Moreover, it later logged in to its REACH-IT account only because it was surprised not to receive any news from the Agency following the exchange of emails of 22 November 2011. It was at that time that the Appellant discovered the

Agency's final invoice reminder of 4 May 2012 that refers to the Contested Decision. The Appellant claims that, based on the three months period of appeal after the decision has been made known to the Appellant, it should be considered that the time-limit for bringing an appeal has been observed.

21. Under Article 92(2) of the REACH Regulation, the appeal must be brought within three months of the notification of the contested decision to the person concerned, or in the absence thereof, of the day on which it became known to the latter. In the present case, the Contested Decision is a decision which had to be formally notified to the Appellant.
22. According to the settled case-law of the Court of Justice of the European Union, the time limit for bringing an action for annulment is a matter of public policy since it was established in order to ensure that legal positions are clear and certain and to avoid any discrimination or arbitrary treatment in the administration of justice, and the judicature of the European Union must ascertain of its own motion whether it has been observed (see Case C-246/95 *Coen* [1997] ECR I-403, paragraph 21, and Joined Cases T-121/96 and T-151/96 *Mutual Aid Administration Services v Commission* [1997] ECR II-1355, paragraphs 38 and 39).
23. Having regard to the relevant case-law of the Court of Justice of the European Union, the Board of Appeal will ascertain whether, in the present appeal proceedings the Appellant observed the time limit for bringing the appeal against the Contested Decision.
24. When alleging that an appeal is out of time, as in the present case, it is the responsibility of the Agency, in view of the time limits fixed by Article 92(2) of the REACH Regulation, to provide evidence of the date on which the event causing time to begin to run occurred (see in that regard, for example, the Order of the Fifth Chamber of the General Court of 13 April 2000 in Case T-263/97 *GAL Penisola Sorrentina v Commission* [2000] ECR II-2041, paragraph 47).
25. In order to prove that the notification of the Contested Decision took place on 28 November 2011, the Agency relies on a document entitled 'Extract of data from REACH-IT – A-005/2012' (hereinafter the 'Extract of data'). The document shows that a communication related to the Contested Decision had been sent to the Appellant's REACH-IT account. In addition, the Agency submitted to the Board of Appeal a copy of the email of 28 November 2011 that it, in parallel, sent to info@sei-spa.com and to both email addresses of Luca Paderno [an employee of the Appellant] that the latter had previously used when communicating with the Agency. In the email, the Agency informed the Appellant that it has a message in REACH-IT and requested it to log in to its REACH-IT account.
26. It must be stated from the outset that the fact that the Agency sent a message to the Appellant's REACH-IT account and to the other email addresses related to the Appellant mentioned in the previous paragraph does not guarantee that that message was actually received by its addressee.
27. When notifying to its addressee an act adversely affecting the latter, such as the Contested Decision, the Agency should be able to produce evidence of the date on which the act was brought to the attention of its addressee. Such evidence should show the date of notification that caused the limitation period for submitting an appeal to run.
28. Considering the case at hand, it must be observed that when notifying the Contested Decision to the Appellant by emailing it to its REACH-IT account and to different email addresses of the persons related to the Appellant, it should be possible for the Agency to actually ask the Appellant to confirm by email receipt of the message or request for a read receipt from the IT system. This would enable the Agency to establish accurately the date on which the Contested Decision reached the Appellant or on which it opened the email.

29. As a consequence, the Board of Appeal considers that the Agency, which did not receive any confirmation of receipt and took no further action in order to establish whether and when the addressee of the Contested Decision actually received the email, is not able to prove the date on which the email was received or indeed that it was received at all.
30. The fact that the Agency refers in its submissions, first, to the Terms and Conditions of use and service of REACH-IT, which were in force from June 2008 until April 2010, and to which, according to the Agency, the Appellant agreed when opening its REACH-IT account, second, to the REACH-IT Industry User Manual – Part 1 and 3, and third, to the REACH-IT Frequently Asked Questions cannot change the above conclusions of the Board of Appeal. Referring to those documents, the Agency argues, in essence, that the documents clearly indicate that REACH-IT is the central system used for secure communication between the Agency and registrants. However, without showing in the case at hand that the Appellant, as a REACH-IT account holder, actually accepted the undertakings in relation to the notification of Agency's decisions as the Agency seems to suggest, the Board of Appeal is unable to attribute any significance to the previously mentioned documents.
31. Considering the above, where it is not possible to ascertain with any certainty the date on which the Appellant first became aware exactly what was in the measure that it is contesting and what were the reasons on which it was based, the period prescribed for initiating proceedings must be considered to have begun to run, at the latest, from the date on which it can be established that the Appellant had such knowledge (see, to that effect, *Case C-480/99 P Plant and Others v Commission and South Wales Small Mines*, [2002] ECR I-00265, paragraph 49).
32. In the present case, the Agency submitted the Extract of data from the Appellant's REACH-IT user account which was generated by the Agency's services. That document, which on its own is not sufficient proof as to the date of notification, shows that, on 5 April 2012, Mr Alan Kenny, who was designated by the Appellant as the user of its REACH-IT account, opened the email that the Agency had sent to the Appellant's REACH-IT account on 28 November 2011 and that contained the Contested Decision.
33. In its reply to the questions of the Board of Appeal, the Appellant itself confirmed that the message containing the Contested Decision had been opened by Mr Alan Kenny on 5 April 2012. The Appellant indicated however that the fact that Mr Alan Kenny opened the message is irrelevant as he was not the appropriate contact for the Appellant's REACH processes.
34. The Board of Appeal considers however that the Appellant cannot succeed with the above argument as it is the responsibility of every REACH-IT account holder to update the information concerning its user account details. In that regard, the Appellant had not removed the name of Mr Alan Kenny as a contact point in its REACH-IT account. As a result, as long as the Appellant's REACH-IT account mentioned Alan Kenny as a contact point, the Agency may consider him as the appropriate contact for the Appellant's REACH processes. In the present case, the Agency was therefore right to send the message containing a Contested Decision via REACH-IT to the email address of Mr Alan Kenny as his address was provided by the Appellant itself in its user account details.
35. In light of the content of the Extract of data produced by the Agency and taking into account that the Appellant conceded that it received the message containing a Contested Decision in its REACH-IT account, the Board of Appeal considers that the Agency has established that the Contested Decision was brought to the attention of the Appellant on 5 April 2012.
36. In the present case, in accordance with Article 23(1) and (2) of the Rules of Procedure, the period for commencing appeal proceedings therefore began to run on 6 April 2012, that is to say on the day following the date on which the Contested

Decision is considered to be notified, and ended with the expiry of the last hour of 5 July 2012.

37. The Appellant did not file its notice of appeal until 1 August 2012. The Appellant has therefore exceeded the time limit for submitting the appeal against the Contested Decision. Consequently, as it was brought after the expiry of the period for commencing appeal proceedings, the appeal does not comply with Article 92(2) of the REACH Regulation.
38. It follows from the above considerations that in accordance with Article 11(1)(b) of the Rules of Procedure the appeal must be rejected in its entirety as inadmissible on the ground that it was out of time.
39. In view of the above, it is not necessary to examine whether the Contested Decision or the contested invoice may be challenged in the proceedings before the Board of Appeal.

### **ORDER**

On those grounds,

THE BOARD OF APPEAL

hereby:

**Dismisses the appeal.**

Mercedes ORTUÑO  
Chairman of the Board of Appeal

Sari HAUKKA  
Registrar of the Board of Appeal