

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

6 April 2016

Application to intervene

Case number	A-001-2016
Language of the case	English
Applicant	Thor GmbH, Germany
Contested Decision	DSH-63-3-D-0017-2015 of 8 January 2016 adopted by the European Chemicals Agency pursuant to Article 63(3) of Regulation (EU) No 528/2012 of the European Parliament and of the Council concerning the making available on the market and use of biocidal products (OJ L 167, 27.6.2012, p. 1; hereinafter the 'BPR')
Appellant	Troy Chemical Company B.V., the Netherlands
Representative	Darren Abrahams and Eléonore Mullier Steptoe & Johnson LLP Belgium

THE BOARD OF APPEAL

composed of Mercedes Ortuño (Chairman), Andrew Fasey (Technically Qualified Member) and Sari Haukka (Legally Qualified Member and Rapporteur)

Registrar: Alen Močilnikar

gives the following

Decision

Summary of the facts

1. On 13 January 2016, the Appellant lodged an appeal at the Registry of the Board of Appeal against the Contested Decision.
2. On 22 February 2016, an announcement of the Notice of Appeal was published on the website of the Agency in accordance with Article 6(6) of the 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 3 March 2016, Thor GmbH (hereinafter the 'Applicant') filed an application with the Registry of the Board of Appeal seeking leave to intervene in the appeal proceedings in support of the European Chemicals Agency (hereinafter the 'Agency').
4. The Applicant and the Appellant are parties to the data-sharing dispute which is the subject of the Contested Decision and the present appeal. The Applicant claims that it has a direct interest in the result of the case as the Contested Decision granted it permission to refer to certain of the Appellants's studies in the context of an application to be included on the list of suppliers of active substances and biocidal products maintained by the Agency pursuant to Article 95 of the BPR (hereinafter the 'Article 95 list').
5. On 11 March 2016, the application to intervene was served on the Appellant and the Agency for their observations.
6. On 23 and 25 March 2016 respectively, the Agency and the Appellant informed the Board of Appeal that they raised no objections to the application to intervene.

Reasons

7. 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 intervene in the proceedings before the Board of Appeal.
8. 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.
9. 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.
10. For the purposes of the present application, an 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 of the Board of Appeal. 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, Order of the Vice-President of the Court in *Etairia Larymnis Larko v Larko and Commission*, C-362/15 P(I), EU:C:2015:682, paragraphs 6 and 7 and the case-law cited therein).

11. In this respect, the Board of Appeal observes that the Applicant has applied to be included on the Article 95 list for the active substance, 3-iodo-2-propynylbutylcarbamate (EC No 259-627-5). The Appellant is already earlier included on that list for the same substance. In this context, the Applicant entered into data-sharing negotiations with the Appellant in order to gain permission to refer to certain studies owned by the Appellant. After the failure of these negotiations, permission to refer to these studies was granted to the Applicant by the Contested Decision which is the subject of the present proceedings. In particular, in its appeal, the Appellant requests the Board of Appeal to annul the Contested Decision in so far as it grants the Applicant permission to refer to certain studies owned by it. The present appeal can therefore influence the outcome of the Applicant's application to be included on the Article 95 list. Article 95(2) of the BPR lays down that '*As of 1 September 2015, a biocidal product consisting of, containing or generating a relevant substance, included in the list referred to in paragraph 1, shall not be made available on the market unless either the substance supplier or the product supplier is included in the list referred to in paragraph 1 for the product-type(s) to which the product belongs.*' Therefore, the non-inclusion of the Applicant on the Article 95 list would have the consequence of restricting its access to the market. The Board of Appeal finds that the Applicant, which is also the addressee of the Contested Decision, is therefore directly affected by the present appeal.
12. In view of the above, the Board of Appeal finds that the Applicant has established a direct, existing interest in the Board of Appeal's final decision on the present appeal. Consequently, the application to intervene submitted by the Applicant must be granted.

On those grounds,

THE BOARD OF APPEAL

hereby:

- 1. Grants the application of Thor GmbH to intervene in Case A-001-2016 in support of the Agency.**
- 2. Instructs the Registrar to arrange for non-confidential copies of the procedural documents to be served on Thor GmbH.**
- 3. Allows Thor GmbH a period of one month, following the serving of the procedural documents, to lodge observations on the Notice of Appeal and the Defence.**

Mercedes Ortuño
Chairman of the Board of Appeal

Alen Močilnikar
Registrar of the Board of Appeal