

SUMMARY OF DECISION OF 4 APRIL 2019 OF THE BOARD OF APPEAL OF THE EUROPEAN CHEMICALS AGENCY

Case number: A-014-2017

(Scope of the Biocidal Products Regulation – Review Programme Regulation – Notification procedure – Food and feed)

Factual background

The Appellant manufactures and places on the market slug traps that use baits consisting of spirit drink which the Appellant identifies as brandy.

Food and feed used as repellents or attractants are outside the scope of the Biocidal Products Regulation¹ (the 'BPR'). The Review Programme Regulation² (the 'RPR') sets out the rules for the examination of existing active substances (the 'Review Programme'). The Review Programme had already started under the now repealed Biocidal Product Directive³ (the 'BPD'). The RPR lays down rules for notifying food and feed for inclusion in the Review Programme on the grounds that they benefited from a derogation for food and feed under the BPD but are now potentially within the scope of the BPR. The notification procedure had two steps.

First, any person with an interest in notifying food or feed for inclusion in the Review Programme was required to submit a declaration of interest to notify.

Second, once a successful declaration of interest was submitted, a notification for food and feed to be included in the Review Programme could be submitted.

The Appellant submitted a declaration of interest to notify brandy. The Agency accepted the Appellant's declaration of interest to notify brandy and acknowledged that brandy is eligible for inclusion in the Review Programme (the 'Decision on the Declaration of Interest'). The Appellant then submitted a notification for brandy.

The Agency rejected the notification because it found that the notification did not comply with the data requirements laid down in the RPR (the 'Contested Decision').

Main findings of the Board of Appeal

The Board of Appeal found that the Decision on the Declaration of Interest was a preparatory act to the Contested Decision. Therefore a mistake in the Decision on the Declaration of Interest could in turn affect the legality of the Contested Decision.

The Board of Appeal found that a declaration of interest to notify had to fulfil the eligibility criteria set out in the RPR (the 'eligibility criteria'). The eligibility criteria stated amongst other things that:

¹ 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).

² Commission Delegated Regulation (EU) No 1062/2014 on the work programme for the systematic examination of all existing active substances contained in biocidal products referred to in Regulation (EU) No 528/2012 of the European Parliament and of the Council (OJ L 294, 10.10.2014, p. 1).

³ Directive 98/8/EC of the European Parliament and of the Council concerning the placing of biocidal products on the market (OJ L 123, 24.4.1998, p. 1).

- the substance for which the declaration of interest is submitted has to be an existing active substance that was neither approved, nor included, in the Review Programme or Annex I to the BPR, and
- the product which consists of, contains or generates that existing active substance has to be a biocidal product within the scope of the BPR.

The Board of Appeal found that when accepting the Appellant's declaration of interest the Agency had not assessed whether brandy fulfilled the eligibility criteria. In particular, the Agency had not assessed whether the brandy bait is a biocidal product that falls within the scope of the BPR and whether the brandy bait consists of, contains or generates an existing active substance.

If the Agency had properly assessed whether the eligibility criteria were met, one of the possible outcomes could have been that brandy is not eligible for inclusion in the Review Programme. The notification for brandy would then not have been needed and the Contested Decision would not have been adopted.

The Board of Appeal therefore annulled the Contested Decision and remitted the case to the competent body of the Agency for re-examination.

NOTE: The Board of Appeal of ECHA is responsible for deciding on appeals lodged against certain ECHA decisions. The ECHA decisions related to biocidal products can be appealed to the Board of Appeal in accordance with Article 77 of the BPR. 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>*