

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

15 March 2016

Application to intervene

Case number	A-022-2015
Language of the case	English
Applicant	The German Member State Competent Authority Represented by: Federal Institute for Occupational Safety and Health Germany
Contested Decision	Decision of 29 May 2015 on the substance evaluation of N,N-dicyclohexylbenzothiazole-2-sulphenamide adopted by the European Chemicals Agency pursuant to Article 46(1) and in accordance with the procedure laid down in Articles 50 and 52 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')
Appellant	Manufacture Française des Pneumatiques Michelin, France
Representative	Jean Philippe Montfort Mayer Brown Europe-Brussels LLP Belgium

THE BOARD OF APPEAL

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

Registrar: Alen Močilnikar

gives the following

Decision

Summary of the facts

1. On 10 November 2015, the Appellant lodged an appeal at the Registry of the Board of Appeal against the Contested Decision.
2. On 3 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 16 February 2016, the German Member State Competent Authority (hereinafter the 'Applicant' or the 'German Competent Authority') 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. On 24 February 2016, the application to intervene was served on the Appellant and the Agency for their observations.
5. The Agency submitted its observations on the application to intervene on 7 March 2016, supporting the application to intervene.
6. The Appellant submitted its observations on the application to intervene on 8 March 2016, opposing the application to intervene.

Arguments of the Applicant and the Parties

Applicant's arguments

7. The Applicant claims an interest in the result of the case brought before the Board of Appeal. The Applicant's arguments may be summarised as follows:
 - (a) The Applicant states that the Contested Decision was adopted in the context of the substance evaluation for N,N-dicyclohexylbenzothiazole-2-sulphenamide (hereinafter the 'Substance') performed by the German Competent Authority (i.e. the Applicant). The Applicant further states that in its role as the evaluating Member State the German Competent Authority prepared the draft decision and guided the dossier through the decision making process foreseen in Articles 50, 51 and 52 of the REACH Regulation. The Applicant observes that the different national authorities assisting it in the evaluation process spent over 1100 hours evaluating the substance.
 - (b) The Applicant states further that, pursuant to Article 48 of the REACH Regulation, it is required, once the substance evaluation is completed, to consider how to use the information obtained from the evaluation for the purposes of further risk management measures. The outcome of the substance evaluation is therefore directly related to the risk management options analysis that it is obliged to prepare for the Substance in due course, and affects its workload planning for future years.
 - (c) The Applicant points out that some of the pleas raised by the Appellant in the appeal challenge various elements based on the assessment of the Applicant and reflected in the draft decision prepared by it. The Appellant is therefore questioning the Applicant's assessment and in particular what information and how this further information should be generated to meet the concerns identified by the Applicant during the evaluation. The Applicant states further that it has established processes at national level for the evaluation of substances, for generating information, and for communicating potential information requests. As these processes are reflected in the Contested Decision, a decision of the

Board of Appeal following a challenge to it might affect the Applicant's procedures at national level and might have an adverse impact on ongoing and future substance evaluations performed by the Applicant.

- (d) The Applicant submits that an annulment of the Contested Decision, if the Board of Appeal so decides, would mean that it would need to re-evaluate the substance and possibly prepare a new draft decision pursuant to Article 46 of the REACH Regulation. The Applicant points out that the substance evaluations are planned and scheduled years in advance and that a potential new draft decision might lead it to re-assign resources which could adversely impact the timeline and sequence of substances evaluations in the upcoming years. The Applicant states further that a new draft decision would also have implications for its evaluating portfolio planning as other planned evaluations may have to be re-scheduled or postponed.
- (e) The Applicant also states that precedents set in a Board of Appeal decision as a result of the appeal could potentially have an adverse effect on the methodology and processes that the Applicant applies in the evaluation of substances. The Applicant adds that, through challenging its opinion, the Appellant contests a procedure which is regularly used during the substance evaluation process at national level, namely the request of additional exposure-related information originating from registered uses from the registrants of a substance as the recipients of a decision or draft decision.

Appellant's arguments

8. The Appellant objects to the application to intervene for the following reasons:

- (a) The Appellant states that the Applicant has not established an interest in the result of the case. The Appellant submits that the Applicant is neither the author nor an addressee of the Contested Decision and that, as held by the Board of Appeal for example in case A-005-2014 *Akzo Nobel and Others*, Decision of the Board of Appeal of 13 October 2014, an evaluating Member State does not enjoy any privileged position and has the obligation to establish that it has an interest in the result of the case.
- (b) The Appellant also states that the Applicant in referring to, the prioritisation of the substance pursuant to the REACH Regulation, the identified alleged potential concerns related to the Substance for evaluation under the same Regulation, the nomination of the Applicant as evaluating Member State, the procedure for evaluation followed and the potential outcome of the evaluation, only established an interest in the outcome in the evaluation of the substance which is different from an interest in the outcome of the appeal.
- (c) The Appellant submits that the Applicant merely describes an interest in relation to the pleas in law or arguments put forward by the Appellant and, as a consequence, not in the ruling on the forms of order sought in the appeal case as required by the case-law.
- (d) The Appellant claims that the assertion made by the Appellant that the potential annulment of parts the Contested Decision would mean that the Substance would need to be re-evaluated and a new draft decision prepared is not certain. The Appellant submits that the outcome of the annulment of a substance evaluation decision by the Board of Appeal does not necessarily lead to a remittance of the evaluation to the initial evaluating Member State.
- (e) The Appellant recalls that it is contesting the conclusions reached as regards some of the exposure scenarios detailed in the Contested Decision and in particular the conclusions according to which residues of the Substance may be released in the environment following its use in the production of parts of tyres.

The Appellant submits that if the Board of Appeal were to rule in its favour, no re-evaluation of the substance would a priori be needed and the rectification of these parts of the Contested Decision could allow the continuation of the evaluation of the Substance as it stands with the corrections requested by the Appellant. The Appellant also notes that the evaluation process as such has not been suspended by the present appeal.

- (f) The Appellant submits that for the Board of Appeal to accept the potential additional workload of the Applicant as justifying an interest to intervene would amount to recognition that an evaluating Member State under the REACH evaluation procedure would always have a right to intervene. No such privilege exists in the REACH Regulation.
- (g) The Appellant submits that the Applicant also failed to address in its application the substantive claims raised by the Appellant in the appeal even though these have been reflected in the appeal announcement as well as the Appellant's alternative request for rectification, thereby failing to demonstrate an interest on those core grounds.
- (h) The Appellant finally submits that the Applicant's argument addressing the admissibility of the Appeal exceeds the scope of the application to intervene laid down in Article 8(3) of the Rules of Procedure which states that 'the intervention shall be limited to supporting or opposing the remedy sought by one of the parties' when, in the absence of a Defence notified to the Appellant, it is not known whether the Agency has made arguments on the admissibility of the appeal.

Agency's arguments

- 9. The Agency supports the application to intervene for the following reasons:
 - (a) The Agency states that the Applicant is in a similar situation to the United Kingdom's Member State Competent Authority, the Health and Safety Executive (HSE), which was accepted as an intervener in case A-009-2014 *Albemarle Europe Sprl*, (unpublished Decision of the Board of Appeal of 5 December 2014 on the application to intervene) as the Applicant prepared the draft decision and guided the dossier through the substance evaluation process.
 - (b) The Agency adds that the outcome of the case may have a direct impact on how the Applicant assesses environmental exposure in the context of a risk management options analysis that the Applicant may prepare as part of its obligations under Article 48 of the REACH Regulation.

Reasons

- 10. The Board of Appeal will first examine whether the application to intervene has been made in accordance with Article 8(2), (3) and (4) of the Rules of Procedure.
- 11. In this respect, the Appellant claims that the Applicant has not restricted itself to supporting the remedy sought by the Agency as the Applicant raises questions about the admissibility of the appeal without seeing the defence. The Board of Appeal notes in this regard that Article 8(3) of the Rules of Procedure requests that the intervention shall be limited to supporting or opposing the remedy sought by one of the parties. However, an application for intervention in support of the Agency has to be lodged prior to the submission of the defence. Consequently, an applicant wishing to intervene in support of the Agency will not necessarily know what arguments the Agency will make as it has not seen the defence. The Applicant therefore faces an inherent difficulty in complying with Article 8(4)(e) of the Rules of Procedure. Covering the possible claims the Agency might raise cannot be considered to be an infringement of Article 8(3) of the Rules of Procedure at the stage of lodging an application to intervene.

12. Consequently, the Board of Appeal considers that the application to intervene has been made in accordance with Article 8(2), (3) and (4) of the Rules of Procedure and the arguments of Appellant referred to in paragraph 8(h) above can be rejected. The Board of Appeal shall next 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 case.
13. According to the case-law, the concept of an interest in the result of the case, within the meaning of Article 8(1) of the Rules of Procedure, 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 ruling on the forms 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 appropriate, 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*, EU:C:2015:682, paragraphs 6 and 7 and the case-law cited therein).
14. The Board of Appeal notes that, in the present case, the Applicant was the competent authority pursuant to Article 45 of the REACH Regulation responsible for the evaluation of the Substance that is the subject of the Contested Decision.
15. The Applicant stated in its application that it was involved in dialogues with registrants of the Substance who in turn kept the Appellant informed about the process, and that, together with mandated national institutions, it spent 1100 hours evaluating the substance. The Applicant states that it is responsible for follow-up work on risk management options pursuant to Article 48 of the REACH Regulation. The Applicant also states that the outcome of the appeal could mean that the evaluation procedure for the Substance is re-opened implying a re-evaluation of the Substance. The Applicant also points out the possible implications of the outcome of the appeal for other substance evaluation procedures to be carried out by the Applicant and for its overall planning and general methodology in carrying them out.
16. The Board of Appeal recalls that Articles 45, 46 and 52 of the REACH Regulation place a specific responsibility on the Member State competent authorities in carrying out the evaluation of substances. The Board of Appeal finds from the wording of these provisions that the submission of sound and complete data by the registrants during the substance evaluation process has an impact on the ability of the competent authority to conduct the substance evaluation. In the present case, the Appellant requests the annulment of the parts of the Contested Decision that require further information to be provided on i) assumptions underlying the environmental exposure assessment, ii) an environmental exposure assessment for the production and use of tyres and general rubber products and iii) environmental releases from the use of tyres, or, alternatively, the rectification of those parts of the Contested Decision. As a result, the outcome of the present appeal could have an impact on the available data and the Applicant's ability to complete the substance evaluation and to prepare the follow-up actions pursuant to Article 48 of the REACH Regulation.
17. The Board of Appeal therefore considers that the Applicant established an interest not only in the pleas in law but also in the result of the case.
18. Consequently, the present application to intervene differs from the application to intervene which was addressed in the decision of the Board of Appeal in case A-005-2015 and to which the Appellant refers to. In that case, the applicant to intervene had not established an interest in the result of the case as it had merely stated that it was the evaluating Member States without elaborating why it had an interest in the result of the case (see A-005-2014 *Akzo Nobel Industrial Chemicals GmbH and others*, Decision of the Board of Appeal of 13 October 2014 on the application to intervene, paragraphs 16 and 17).
19. As regards the Appellant's argument referred to in paragraph 8 (b) and (c) above, according to which the Applicant would not have an interest in the outcome of the

appeal but only on outcome of the evaluation of the substance, these arguments can be set aside as the Contested Decision concerns the evaluation of the substance. In fact, should the Appellant succeed in its claims, the scope of the information requested by the Contested Decision would be altered and consequently affect the Applicant's evaluation of the Substance as described in the paragraphs 15 and 16 above.

20. Concerning the arguments of the Appellant referred to in paragraph 8(d) and (e) above, claiming that it is not certain that a decision annulling the contested parts of the Contested Decision would lead to a re-evaluation of the substance, these arguments can be rejected as there is a possibility that the appeal would lead to a re-evaluation of the substance to some extent. As the outcome of the appeal cannot be prejudged, it is sufficient for an applicant to intervene to establish that there is a real possibility that the appeal could lead to a specific consequence.
21. As regards the Appellant's argument referred to in paragraph 8(a) and (f) above, according to which there are no privileged applicants for the purposes of intervention in proceedings before the Board of Appeal, the Board of Appeal notes that as the Applicant has established its interest in the result of the case, this argument is irrelevant. As regards the Appellant's argument referred to in paragraph 8(g) above, according to which the Applicant did not address the substantive claims raised in the appeal, the Board of Appeal recalls that applicants to intervene only need to show their interest in the possible outcome of the appeal and not on its substantive grounds.
22. For these reasons, the arguments of the Appellant objecting against the application to intervene can be rejected as unfounded. As a result, the application to intervene submitted by the Applicant must be granted.

On those grounds,

THE BOARD OF APPEAL

hereby:

- 1. Grants the application of the German Member State Competent Authority to intervene in Case A-022-2015 in support of the Agency.**
- 2. Instructs the Registrar to arrange for non-confidential copies of the procedural documents to be served on the German Member State Competent Authority.**
- 3. Allows the German Member State Competent Authority 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