

Announcement of appeal¹

Case	A-006-2011
Appellant	5N PV GmbH, Eisenhüttenstadt, Germany
Appeal received on	03/08/2011
Subject matter	A decision taken, and subsequent invoice sent, pursuant to Article 13(3) and 13(4) of the Fee Regulation <i>Administrative charge – SME status</i>
Contested decision	SME(2011) 0153 and invoice No. 10027733

Language of the case English

Remedy sought by the appellant

The appellant requests that the Board of Appeal should:

- annul the contested decision and withdraw the contested invoice or, as an alternative, declare the same to be unlawful,
- reimburse the appellant the fees for, and costs arising from, appeal proceedings.

Pleas in law and main arguments

The appellant pre-registered and subsequently registered two different substances with the European Chemicals Agency ('the Agency'). In each case the appellant claimed that it was entitled to a reduction of fees and charges as a small or medium-sized company (SME). Following its registration submissions, the appellant received the corresponding invoices from the Agency and paid both in due time.

In February 2011, based on Article 13(3) 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), ('Fee Regulation'), the Agency reviewed the conditions under which the appellant claimed to be eligible for the SME reduction and requested further information from the appellant to substantiate its claims. In response, the appellant informed the Agency by correspondence of 16 March 2011 that its mother company, 5N Plus Inc., no longer qualified as an SME due to significant growth during the two years following the appellant's pre-registrations. Based on the company's annual balance sheet it should now be regarded as large.

With the contested decision, dated 4 April 2011, the Agency concluded that the change in company size of the appellant had direct influence on the registrations affected by the

¹ Announcement published in accordance with Article 6(6) of Regulation (EC) No 771/2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency.

SME reduction. Hence, based on Article 13(4) of the Fee Regulation, the appellant was informed that it would receive a supplementary invoice per registration for the additional amount up to the correct level of registration fee (as set in the Fee Regulation) as well as an invoice for an administrative charge pursuant to Article 2, read in conjunction with Table 1, of the Annex to Agency Decision MB/D/29/2010 final on the classification of services for which charges are levied ('Charges Decision'). The contested invoice, dated 23 June 2011, levied an administrative charge of EUR 20,700.00 on the appellant.

The appellant contends that the Agency's decision to impose an administrative charge is unlawful and that the contested invoice should be withdrawn. The appellant argues that:

1. The appeal is admissible as its legal basis is covered by Article 20(2) REACH. According to the appellant's understanding, not only the type, quantity and use of a registered substance would influence the amount of the applicable registration fee but also the company size of the registrant. As the registration fee is part of the completeness check contained in Article 20(2) REACH, any decision adopted by the Agency in relation to this fee would also fall under the same Article, hence opening the way for an appeal before the BoA under Article 91(1) read in conjunction with Article 20(5) REACH;
2. The Charges Decision, and in particular its Article 2 and the associated Table 1 contained in the Annex, is illegal in the absence of a sufficiently defined legal basis. Whilst the Commission was empowered to adopt a regulation on fees associated with the activities of the Agency, the Commission should not have left the definition of administrative charges to the sole discretion of the Agency. By not defining the exact objective, content, scope and duration of the delegated power to impose administrative charges, Article 13(4) Fee Regulation is not compliant with the Treaty on the Functioning of the European Union (TFEU);
3. The founding provision of the Agency, i.e. Article 95 of the Treaty establishing the European Community (after adoption of the Lisbon Treaty Article 114(1) TFEU), does not empower the Agency to stipulate the contested administrative charge;
4. The administrative charge of EUR 20,700.00 imposed on the appellant is of such a magnitude that it has a punitive character. When adopting the contested decision the Agency disregarded the principles of appropriateness of fault and damage that are applicable when imposing punitive measures. Moreover, the Charges Decision does not allow for an examination of the individual case. Hence the individual responsibility of the addressee for any administrative charge has not been taken into consideration;
5. The appellant was not aware of its alleged wrongdoing before receiving the contested decision. The general information issued by the Agency on its web site on the requirement to update company profiles if they change size was not sufficient. Moreover, the Agency should have adopted a special provision on the classification of company size for companies whose financial year is not the same as the calendar year, as is the case with the appellant; and
6. The amount of the administrative charge levied on the appellant is not a deterrent but purely arbitrary. Moreover, the imposed administrative charge is inappropriate for the service provided by the Agency.

Further information

The rules for the appeal procedure and other background information are available on the "Appeals" section of ECHA's website:

http://echa.europa.eu/appeals/app_procedure_en.asp