

Announcement of appeal¹

Case	A-010-2014
Appellant	Nordenhamer Zinkhütte GmbH, Germany
Appeal received on	28 August 2014
Subject matter	A decision taken by the European Chemicals Agency (the 'Agency') pursuant to Article 41(3) of the REACH Regulation, in accordance with the procedure laid down in Articles 50 and 51 of the REACH Regulation
Keywords	<i>Evaluation – Compliance check – Request for further information – Definition of intermediate</i>
Contested Decision	CCH-D-0000003820-79-03/F
Language of the case	English

Remedy sought by the Appellant

The Appellant requests the Board of Appeal to annul the Contested Decision and to order the Agency to refund the appeal fee.

Pleas in law and main arguments

The Appellant operates a zinc electrolysis plant which extracts *inter alia* zinc and copper concentrate from raw materials. The Appellant claims that it uses diarsenic trioxide as a reactant in its production process where it is transformed into a substance denominated 'copper residue', a precursor of copper concentrate.

The Appellant is of the opinion that its use of diarsenic trioxide falls under the definition of intermediate according to Article 3(15) of the REACH Regulation. Hence, the Appellant submitted a registration dossier for diarsenic trioxide as a transported isolated intermediate under Article 18 of the REACH Regulation.

Subsequently, the Agency requested the Appellant to provide further information with regard to the registration of diarsenic trioxide as a transported isolated intermediate. The Agency reviewed the information provided by the Appellant and concluded that the dossier submitted by the Appellant for diarsenic trioxide does not fulfil the conditions of the definition of intermediate set out in Article 3(15) of the REACH Regulation.

Following a compliance check, the Agency adopted the Contested Decision. The Contested Decision finds that the use made of diarsenic trioxide in the Appellant's plant does not qualify as an intermediate use according to Article 3(15) of the REACH Regulation. 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.

Contested Decision concludes that the Appellant's registration for diarsenic trioxide should be a full registration pursuant to Article 10 of the REACH Regulation, and requests the Appellant to submit the information as set out in Article 10 of the REACH Regulation, pursuant to Articles 41(1)(a) and 41(3) of the REACH Regulation.

Relying on the definition of intermediate set out in Article 3(15) of the REACH Regulation and further clarified in Appendix 4 of the ECHA Guidance on intermediates, the Contested Decision notes that "the intermediate status of a substance is defined in relation to the 'main aim' driving the process where the substance is actually used". After analysing the four different processing steps resulting from the use of diarsenic trioxide in the Appellant's plant, the Contested Decision concludes that the use of diarsenic trioxide within the zinc electrolysis plant "is not to transform this substance into another substance" and that diarsenic trioxide "is not used for this main aim but to achieve another function". In particular, the Contested Decision concludes that the transformation of diarsenic trioxide into 'copper residue' cannot be the main aim of its use. The Agency considers that "the formation of the 'copper residue' is not deliberately manufactured but is a production residue resulting from the necessity to remove certain elements from the zinc sulphate solution before the zinc electrolysis is carried out". In addition, according to the Contested Decision, "the main aim of a production process can only be determined in relation to the manufacture of deliberate products, not in relation to production residues. Indeed, a production residue is simply an unavoidable output of the main process. As a residue is not a product deliberately produced, it cannot be the main aim of a production process".

The Appellant claims that the Contested Decision has deviated from the definition of intermediate set out in Appendix 4 of the ECHA Guidance on intermediates, and therefore is in violation of the principle of equal treatment. The Appellant argues that the Contested Decision has chosen an erroneous point of reference for the determination of the main aim in that – in contrast to the abovementioned definition – it does not refer to the process of transformation of diarsenic trioxide, but to its end result. According to the Appellant, the Contested Decision does not examine whether the main aim of the use of diarsenic trioxide is its transformation into 'copper residue', but whether the main aim of the process is to manufacture that very substance.

Furthermore, the Appellant claims that in order to determine the main aim of the use of an intermediate, one has to look at the specific chemical reaction for which it is used – not at the production process as a whole. But even if that was the case, the Appellant argues that the Contested Decision would still imply a manifest error of assessment of the main aim of the Appellant's use of diarsenic trioxide. Particularly, the principle developed by the Agency that precursors of a production residue cannot qualify as intermediates is legally wrong.

In the alternative, the Appellant claims that the Contested Decision violates the definition of intermediate set out in Article 3(15) of the REACH Regulation. The Appellant argues that this definition does not refer to the concept of 'main aim' contained in the ECHA Guidance on intermediates and applied in the Contested Decision. This argument is supported by a literal, systematic, generic and teleological interpretation. Therefore, according to the Appellant, its use of diarsenic trioxide manifestly falls under Article 3(15) of the REACH Regulation.

Further information

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

<http://echa.europa.eu/web/guest/regulations/appeals>