

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

5 April 2017

Application to intervene

*(Interest in the result of the case – Representative association –
ECHA accredited stakeholder)*

Case number	A-009-2016
Language of the case	English
Appellant	Symrise AG, Germany
Representatives	Ruxandra Cana, Eléonore Mullier and Michel Michaux Steptoe & Johnson LLP, Belgium
Contested Decision	Decision of 30 June 2016 on the substance evaluation of climbazole, adopted by the European Chemicals Agency (hereinafter the 'Agency') pursuant to Article 46 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') The Contested Decision was notified to the Appellant through the annotation number SEV-D-2114340660-58-01/F
Applicant	PETA International Science Consortium Ltd, United Kingdom

THE BOARD OF APPEAL

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

Registrar: Alen Močilnikar

gives the following

Decision

Summary of the facts

1. The Appellant filed its appeal against the Contested Decision on 29 September 2016. The Contested Decision requests further information on the substance climbazole, including the performance of an extended one-generation reproductive toxicity study (OECD Test Guideline 443).
2. On 18 January 2017, an announcement was published on the website of the Agency in accordance with Article 6(6) of Commission Regulation (EC) No 771/2008 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, as amended by Commission Implementing Regulation (EU) 2016/823, OJ L 137, 26.5.2016, p. 4; hereinafter the 'Rules of Procedure').
3. On 1 February 2017, PETA International Science Consortium Ltd (hereinafter 'PISC') applied for leave to intervene in these proceedings in support of the Appellant.
4. The Appellant and the Agency submitted observations on the application for leave to intervene on 22 and 23 February 2017 respectively.

Arguments

Applicant's arguments

5. PISC claims to have an interest in the result of the case for the following reasons.
6. First, as an accredited stakeholder of the Agency, the PISC is representative in its field of competence and has a legitimate interest in the Agency's work. PISC's members and their individual supporters are concerned about animal testing issues and seek to minimise the amount of animal testing conducted.
7. Second, PISC's objectives include representing and thereby protecting its members' interests and those of their individual supporters, including their core interest in the reduction and ultimate elimination of the use of animals in regulatory testing and other scientific procedures both within and outside the European Union. PISC promotes and funds non-animal research methods and relevant methods and strategies for reducing and eliminating animal testing.
8. Third, PISC actively participates in the work of the Member States and certain committees, including attendance at the Member State Committee, and has considerable relevant scientific expertise.
9. Fourth, the appeal raises questions of principle which directly impact on issues regarding animal testing which may affect the interests of the Applicant and its members to an appreciable extent. These questions include:
 - the circumstances under which the Agency uses the substance evaluation procedure to request additional tests on animals,
 - whether the Agency may request tests on animals under the REACH Regulation for a substance whose only registered use is in cosmetics and, if so, the circumstances under which the Agency is permitted to do so,
 - whether a registrant can rely on results from tests on animals to assess risks to human health if data on a cosmetic ingredient cannot satisfy the information requirements of the REACH Regulation using only non-animal methods,
 - whether the Agency's request for tests on animals for a substance whose end use is in cosmetics is disproportionate and a breach of Article 25 of the REACH Regulation if it cannot be relied on by the registrant to demonstrate the safety of a cosmetic ingredient, and

- whether the Agency can adopt a decision without considering all available data.
10. Fifth, the outcome of the appeal will have an impact on the number of animals used for testing in relation to this case and future requirements under the REACH Regulation. As a result, the outcome of the appeal is of direct interest to and directly affects the Applicant, its members and their individual supporters in achieving the aim of the reduction and ultimate elimination of the use of animals in regulatory testing.

Arguments of the Appellant and the Agency

11. The Appellant does not object to the application.
12. The Agency objects to the application. It argues that, instead of the criteria used in its previous decisions, the Board of Appeal should apply by analogy the test developed by the European Court of Justice for examining applications to intervene by non-governmental organisations (hereinafter 'NGO') dedicated to the environment.
13. The Agency relies, in this regard, on the criteria set out in paragraph 73 of the order of the General Court of 21 October 2014, *Bayer CropScience v Commission*, T-429/13, EU:T:2014:920. According to those criteria, the requirement for an interest in the result of the case *'means either that the scope of the activities of [environmental NGOs] should coincide with that of the region and sector concerned by the proceedings before the General Court or, where the scope of their activities is wider, that they should be actively involved in protection programmes or studies relating to the region and sector concerned, the viability of which may be jeopardised if the contested measure were adopted'*.
14. According to the Agency, the scope of PISC's activities is wide and it has not shown that it is actively involved in any relevant programmes or studies. The Agency consequently argues that PISC has no interest in the result of the case and that the application for leave to intervene should be rejected.

Reasons

15. 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.
16. PISC is an accredited stakeholder organisation of the Agency. It is an NGO whose objects, as is apparent from its articles of association, include the reduction and ultimate elimination of animal testing.
17. When examining whether an NGO committed to the protection of animal welfare which is representative in its field and is also an accredited stakeholder of the Agency, has an interest in the result of an appeal case, the Board of Appeal has developed certain criteria in light of the practice of the European Court of Justice concerning the intervention of representative associations (see Case A-004-2012, *Lanxess*, Decision of the Board of Appeal of 26 September 2012 on the application to intervene by the European Coalition to End Animal Experiments, paragraphs 17 to 20).
18. The Board of Appeal has consistently held that a representative association may be granted leave to intervene in appeal proceedings if it represents an appreciable number of those active in the field concerned, its objects include that of protecting its members' interests, the case may raise questions of principle capable of affecting those interests, and the interests of its members may therefore be affected to an appreciable extent by the decision to be given (see, for instance, Case A-018-2014, *BASF Grenzach*, Decision of the Board of Appeal of 6 October 2015 on the application to intervene by PISC, paragraph 15). The interests in question may be non-economic as well as economic in nature (see the Decision of the Board of Appeal of 26 September 2012 in *Lanxess*, cited in the previous paragraph, paragraphs 19 and 29).

19. The Agency argues that a different test should be applied to appraising whether an applicant such as PISC has an interest in the result of the case, namely the test applied by the Court of Justice of the European Union to requests for leave to intervene submitted by environmental NGOs.
20. This argument must be rejected for the following reasons.
21. The Board of Appeal observes that the criteria for allowing entities such as PISC to intervene in appeal proceedings must take account of the regulatory system within which the Board of Appeal operates and the role accredited stakeholders have under the REACH Regulation (see, to that effect, the Decision of the Board of Appeal of 26 September 2012 in *Lanxess*, cited in paragraph 17 above, paragraphs 19 and 20).
22. It should be emphasised, in this regard, that an implementing regulation such as the Rules of Procedure must be given, if possible, an interpretation consistent with the provisions of the basic regulation (see, to that effect, judgment of 13 November 2014, *Spain v Commission*, T-481/11, EU:T:2014:945, paragraph 84).
23. Article 8(1) of the Rules of Procedure, which requires applicants to establish an interest in the result of a case in order to be granted leave to intervene, should therefore be interpreted consistently with the REACH Regulation.
24. The REACH Regulation foresees the involvement of stakeholders in the Agency's work through consultations and in the workings of the committees that are established within the Agency (see, for instance, Article 108 of the REACH Regulation). Such stakeholder involvement aims to ensure that different interests, including non-economic interests, are considered as part of the Agency's decision-making (see the Decision of the Board of Appeal of 26 September 2012 in *Lanxess*, cited at paragraph 17 above, paragraph 19; see also the Decision of the Board of Appeal of 6 October 2015 in *BASF Grenzach*, cited at in paragraph 18 above, paragraph 26).
25. It is moreover evident from its Articles 1(1) and 138(9) that the REACH Regulation seeks to promote alternative methods for the assessment of the hazards of substances. Recital 40 to the REACH Regulation provides, in this regard, that '*stakeholders should continue to contribute to the promotion of alternative test methods*', and '*participation of stakeholders and initiatives involving all interested parties should be sought*'.
26. In light of the above, the Board of Appeal considers that the criteria suggested by the Agency (see paragraph 13 above) would be unduly restrictive in the specific context of appeal proceedings under the REACH Regulation.
27. The Board of Appeal will therefore proceed to examine the application for leave to intervene submitted by PISC against the criteria set out in paragraph 18 above.
28. It is evident from its status as an accredited stakeholder organisation and from its articles of association that PISC is a representative association aiming to protect its members' interests, namely the reduction, and ultimately elimination, of animal testing. This is not disputed by the Agency.
29. It therefore remains to be examined whether the present case may raise questions of principle capable of affecting those interests.
30. The Board of Appeal observes, in this regard, that the present case may give rise to at least one question of principle capable of affecting the interests of PISC's members, namely which elements and pieces of information must be taken into account by the Agency in order to request vertebrate animal testing on a substance used in cosmetics.
31. In addition, it should be observed that PISC is actively involved in addressing the use of animals for cosmetics testing, including through filing complaints to the European Ombudsman on this issue.
32. For the above reasons, the Board of Appeal finds that PISC, in its capacity of representative association which aims to protect its members' interests, in particular

the reduction, and ultimate elimination, of animal testing, has established an interest in intervening in the present proceedings in support of the form of order sought by the Appellant.

33. Since the application for leave to intervene also complies with the remaining requirements of Article 8(1) to (4) of the Rules of Procedure it must be allowed.

On those grounds,

THE BOARD OF APPEAL

hereby:

- 1. Admits the application to intervene by PISC in Case A-009-2016 in support of the Appellant.**
- 2. Instructs the Registrar to arrange for copies of the non-confidential versions of the Notice of Appeal and the Defence to be served on the Intervener.**
- 3. Allows the Intervener a period of one month, following the serving of the Notice of Appeal and the Defence, to lodge a statement in intervention.**
- 4. Other procedural documents lodged in the present case will be served on the Intervener in due course.**

Mercedes ORTUÑO
Chairman of the Board of Appeal

Marc GOODACRE
on behalf of Alen MOČILNIKAR
Registrar of the Board of Appeal