

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

11 February 2015

Application to intervene

(Interest in the result of the case – Evaluating Member State Competent Authority)

Case number	A-011-2014
Language of the case	English
Applicant	French REACH Competent Authority
Contested Decision	CCH-D-0000004804-72-03/F of 17 June 2014 adopted by the European Chemicals Agency pursuant to Article 41(3) 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')
Appellants	Tioxide Europe Limited, United Kingdom Cinkarna Metallurgical and Chemical Industry Celje d.d., Slovenia Cristal Pigment UK Limited, United Kingdom Du Pont Coordination Center, Belgium Evonik Industries AG, Germany Kronos International Inc., Germany Precheza a.s., Czech Republic Sachtleben Chemie GmbH, Germany Tronox Pigments (Holland) B.V., The Netherlands
Representative	Ruxandra Cana, Indiana de Seze and Anna Gergely Steptoe & Johnson LLP Belgium

THE BOARD OF APPEAL

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

Registrar: Sari Haukka

gives the following

Decision

Summary of the facts

1. On 16 September 2014, the Appellants lodged an appeal at the Registry of the Board of Appeal against the Contested Decision.
2. The Contested Decision was adopted on 17 June 2014 following a compliance check under the dossier evaluation procedure of the registration submitted by Tioxide Europe Limited for titanium dioxide.
3. The Appellants claim that the Board of Appeal should annul the Contested Decision in so far as it requests the submission of information related to phases, nanoforms, and surface treated nanoforms as part of the information on the identity of the substance registered by Tioxide Europe Limited.
4. By application received at the Registry of the Board of Appeal on 17 November 2014, the Applicant applied to intervene in the appeal proceedings in support of the European Chemicals Agency (hereinafter the 'Agency'). The Applicant claims that the Contested Decision is lawful, it clearly explains why the information requested is needed, and the appeal should therefore be dismissed as unfounded.
5. The Agency and the Appellants submitted their written observations on the application to intervene by documents lodged at the Registry of the Board of Appeal on 1 and 4 December 2014 respectively. The Agency supports the application to intervene of the Applicant. The Appellants objected to the intervention of the Applicant.

Arguments

Applicant's arguments

6. The Applicant claims an interest in the result of the case brought before the Board of Appeal. The Applicant's arguments may be summarised and broken down as follows:
 - (i) In accordance with Article 45 of the REACH Regulation, the Applicant was identified as the competent authority to conduct in 2015 the substance evaluation of titanium dioxide, which is the substance subject to the Contested Decision. The Applicant will be responsible for the outcome of this substance evaluation and therefore needs to be able to rely on sound and complete data. The outcome of the appeal proceedings will have an impact on the available data and the ability therefore of the Applicant to conduct the substance evaluation of titanium dioxide. This is in particular because the Appellants are challenging the requirement for Tioxide Europe Limited to provide specific information related to phases, nanoforms, and surface treatment of nanoforms, as part of the information on the identity of the registered substance. The submission or not of this information will directly affect the substance evaluation of titanium dioxide that the Applicant is to perform.
 - (ii) The Applicant is widely involved in the evaluation of nanomaterials at the European and international levels. The Applicant has '*a direct interest in guaranteeing that it has up-to-date information on nanomaterials and how they may be evaluated*'. In addition, the Applicant '*has implemented a national decree to monitor the manufacture, import and use of nanomaterials in France, in order to improve the state of knowledge on these substances. The adequacy of this national decree depends to some extent on the state of*

knowledge and expected knowledge about nanomaterials, to which the Contested Decision directly contributes'.

- (iii) Moreover, the Applicant has an interest in the outcome of the case as a co-decision maker of the Contested Decision. Any decision challenging the Contested Decision approved by the Applicant is challenging the Applicant's assessment of the Contested Decision under Article 51 of the REACH Regulation.

Appellants' arguments

- 7. The Appellants contend that the Applicant does not have an interest in the result of the case brought before the Board of Appeal. The Appellants' arguments may be summarised and broken down as follows:
 - (i) The role of the Applicant as the competent authority for the substance evaluation of titanium dioxide and the arguments submitted by the Applicant in this regard do not establish an interest in the outcome of the case. The dossier evaluation process has a different objective and is independent from the substance evaluation process.
 - (ii) The existence of national legislation on nanomaterials does not qualify to support the interest of the Applicant in the present proceedings. Similar arguments could be brought by any other Member States or stakeholders with an interest in nanomaterials. Such an interest in the general subject of nanomaterials, unrelated to the present appeal, does not support the right to intervene.
 - (iii) An intervener must show that it has an interest in the outcome of the case and that it is directly affected by the Contested Decision, not that it may have agreed with the Contested Decision when adopted. If it were otherwise, all 28 EU Member States would have to be accepted as interveners in similar proceedings. This would remove the role granted by 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') to the Board of Appeal to assess whether the required level of interest is met.

Reasons

- 8. The application to intervene has been made in accordance with Article 8(2), (3) and (4) of the Rules of Procedure.
- 9. Under Article 8(1) of the Rules of Procedure, any person establishing an interest in the result of the case submitted to the Board of Appeal may intervene in the proceedings before the Board of Appeal.
- 10. In accordance with Article 8(1) of the Rules of Procedure, there are no privileged applicants for the purposes of intervention in proceedings before the Board of Appeal. Any applicant wishing to intervene in a case brought before the Board of Appeal has to establish in its application that it has an interest in the result of that case.
- 11. 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 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 intervener is directly affected by the contested measure and whether its interest in the result of the case is established (see, by analogy, Case T-587/08, *Fresh Del Monte Produce v Commission*, EU:T:2010:42, paragraph 25 and the case-law cited therein).

12. The Applicant has stated, without being contradicted on this point by the Appellants or the Agency, that it is the competent authority pursuant to Article 45 of the REACH Regulation for the substance evaluation in 2015 of titanium dioxide, which is also the substance subject to the Contested Decision.
13. The Applicant has noted that it needs to rely on sound and complete data for the substance evaluation of titanium dioxide and that the outcome of the appeal proceedings will have an impact on the available data and the Applicant's ability to conduct the substance evaluation.
14. The Board of Appeal notes that, in the context of the present appeal, as is apparent from paragraph 3 above, the Appellants are challenging in essence the requirement for Tioxide Europe Limited to provide specific information related to phases, nanoforms, and surface treatment of nanoforms, as part of the information on the identity of titanium dioxide.
15. In this respect, it must be recalled that, according to Article 47(1) of the REACH Regulation:
'An evaluation of a substance shall be based on all relevant information submitted on that particular substance and on any previous evaluation under this Title. [...] In cases where a decision on an evaluation has been previously taken in accordance with Article 51 or Article 52, any draft decision requiring further information under Article 46 may be justified only by a change of circumstances or acquired knowledge.'
16. The Board of Appeal finds, from the wording of Article 47(1) of the REACH Regulation, that the dossier evaluation and the substance evaluation processes are clearly linked. This follows, in particular, from the fact that substance evaluation shall be based on *inter alia* any previous evaluation of the substance under Title VI of the REACH Regulation including dossier evaluation.
17. Consequently, the substance evaluation of titanium dioxide that the Applicant is to perform shall take into account *inter alia* any information submitted following the compliance check under the dossier evaluation procedure. In this regard, the Board of Appeal also observes that the present appeal proceedings concern in particular information on the identity of the substance, which is essential to substance evaluation.
18. In light of the above, the Board of Appeal finds that the interest in intervening on which the Applicant relies, as the competent authority for the substance evaluation of titanium dioxide, must be considered as a direct and existing interest in the result of the case within the meaning of Article 8(1) of the Rules of Procedure. Accordingly, the application to intervene should be allowed.
19. As the Applicant's direct interest has been already established following consideration of the Applicant's first argument, the Board of Appeal will not examine the other arguments raised as regards the application to intervene. However, for reasons of completeness, and without going into the merits of such arguments in the present case, the Board of Appeal notes that the mere participation as a Member State Competent Authority in dossier evaluation under Article 51 of the REACH Regulation does not automatically confer an interest in the result of an appeal against the decision resulting from the dossier evaluation at issue.

On those grounds,

THE BOARD OF APPEAL

hereby:

Grants the application of the French REACH Competent Authority to intervene in Case A-011-2014 in support of the Agency.

An appeal may be brought against this decision to the General Court or the Court of Justice in accordance with Article 263 of the Treaty on the Functioning of the European Union.

Mercedes Ortuño
Chairman of the Board of Appeal

Alen Močilnikar
On behalf of the Registrar of the Board of Appeal