

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

13 March 2023

Application to intervene

(Interest in the result of the case – Addressee of the Contested Decision)

Case number	A-011-2022
Language of the case	English
Appellant	Biofa GmbH, Germany
Representatives	Christian Stallberg and Julia Eickbusch, Novacos Rechtsanwälte, Germany
Contested Decision	DSH-63-3-D-0028-2022 adopted on 28 October 2022 by the European Chemicals Agency under Article 63(3) of the Biocidal Products Regulation ¹
Applicant	Armosa Tech SA, Belgium
Representative	Koen van Maldegem Fieldfisher (Belgium) LLP, Belgium

THE BOARD OF APPEAL

composed of Antoine Buchet (Chairman and Rapporteur), Nikolaos Georgiadis (Technically Qualified Member), and Marijke Schurmans (Legally Qualified Member)

Registrar: Alen Močilnikar

gives the following

¹ Regulation (EU) No 528/2012 of the European Parliament and of the Council concerning the making available on the market and use of biocidal products (OJ L 167, 27.6.2012, p. 1). All references to Articles hereafter concern the Biocidal Products Regulation unless stated otherwise.

Decision

Summary of the facts

1. On 16 August 2022, Armosa Tech – a prospective applicant within the meaning of Articles 62 and 63 – submitted a dispute to the Agency under Article 63(3) concerning a failure to reach an agreement on data sharing with the Appellant. Data sharing had been sought for an application to be included in the list foreseen by Article 95 (**Article 95 list**) with respect to the product-type 18 of silicium dioxide².
2. On 28 October 2022, the Agency adopted the Contested Decision concluding that Armosa Tech had made every effort to reach an agreement on the sharing of data, whilst the Appellant had not.
3. The Agency therefore granted Armosa Tech permission to refer to the requested data subject to the receipt by the Agency of proof that Armosa Tech had paid the Appellant a share of the costs. The Contested Decision was addressed to Armosa Tech and was also sent to the Appellant.
4. On 16 December 2022, the Appellant lodged an appeal requesting the annulment of the Contested Decision.
5. On 17 January 2023, an announcement was published on the Agency's website in accordance with Article 6(6) of the Rules of Procedure³.
6. On 2 February 2023, Armosa Tech applied for leave to intervene in these proceedings in support of the Agency.
7. Armosa Tech claims that it has a direct interest in the result of the present case as the Contested Decision grants it permission to refer to certain of the Appellant's studies in the context of an application to be included on the list of suppliers of active substances and biocidal products maintained by the Agency under Article 95.
8. On 14 February 2023, the Agency informed the Board of Appeal that it has no objections to the application to intervene.
9. On 20 February 2023, the Appellant objected to the application to intervene.
10. The Appellant argues that, based on the fundamental right to effective legal protection and a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union (**Charter**), as well as the principle of equality of arms, leave to intervene should be applied restrictively. According to the Appellant, this is because leave to intervene results in the situation where one party is faced with two opposing parties and must therefore address pleadings from two opponents.
11. The Appellant argues that although the Board of Appeal has previously allowed interventions from one of the parties to a data sharing dispute, each application to intervene should be decided on a case-by-case basis. The Appellant argues that the data sharing dispute in the present case results from disagreements concerning violations of Article 95 and the data owner's rights. According to the Appellant, this is a far more fundamental issue than the issues that have arisen in previous data sharing disputes before the Board of Appeal.
12. The Appellant argues that Armosa Tech is not a neutral competitor acting in good faith due to its continued actions which include violations of Article 95.

² CAS No 61790-53-2.

³ 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).

Reasons

13. Under the first subparagraph of Article 8(1) of the Rules of Procedure, any person establishing an interest in the result of a case may intervene in the proceedings before the Board of Appeal.
14. The concept of '*an interest in the result of a case*', within the meaning of the first subparagraph of Article 8(1) of the Rules of Procedure, must be defined in the light of the subject matter of the dispute and be understood as meaning a direct, existing interest in the ruling on the form of order sought, and not as an interest in relation to the pleas in law or arguments put forward. The words '*result of a case*' refer to the final decision sought, as set out in the operative part of the future decision. In principle, an interest in the result of the case can be regarded as sufficiently direct only in so far as that result is capable of altering the legal position of the applicant for leave to intervene⁴.
15. Armosa Tech is the prospective applicant in the data sharing dispute which led to the Contested Decision which is now challenged in the present appeal proceedings. The Contested Decision grants Armosa Tech permission to refer to certain of the Appellant's data subject to the receipt by the Agency of proof that Armosa Tech paid the Appellant a share of the costs incurred. The information to which Armosa Tech has been granted permission to refer is necessary for its application to be included on the Article 95 list.
16. Consequently, the Board of Appeal's decision on the Appellant's request to annul the Contested Decision is capable of altering Armosa Tech's legal position.
17. It must therefore be concluded that Armosa Tech has an interest in the result of the present case within the meaning of the first subparagraph of Article 8(1) of the Rules of Procedure.
18. For the following reasons, the Appellant's arguments related to the right to effective legal protection and a fair trial under Article 47 of the Charter, as well as the principle of equality of arms⁵ are not capable of affecting the conclusion that Armosa Tech has an interest in the result of the present case and must therefore be granted leave to intervene.
19. First, the role of an intervener in appeal proceedings is limited and is, by its nature, an ancillary one⁶. Interveners do not have the same procedural rights as the parties and, in particular, they will not necessarily be requested to comment on all procedural documents and do not have the right to request that a hearing be held.
20. Furthermore, interveners are limited to supporting or opposing, in whole or in part, the remedy sought by one of the parties and may not submit new pleas of law which would modify the subject matter of the case.
21. Second, under Article 8(6) of the Rules of Procedure, after the statement in intervention has been lodged, the Chairman may prescribe a time-limit within which the parties may reply to that statement. That provision aims to ensure that the rights of the parties are respected, in full compliance with the Charter and the principle of equality of arms.
22. Third, under the second subparagraph of Article 6(5) of the Rules of Procedure, the Registrar of the Board of Appeal must inform addressees of Agency decisions of the lodgement of an appeal against those decisions. The principle objective of that provision

⁴ See order of the President of the Court of Justice of 22 September 2022, Mylan IRE Healthcare v Commission, C-237/22 P, EU:C:2022:726, paragraph 14.

⁵ See paragraph 10 above.

⁶ See the second subparagraph of Article 8(3) of the Rules of Procedure. See also paragraph 85 of the Practice directions to parties to appeal proceedings before the Board of Appeal of the European Chemicals Agency (28 February 2017).

is to ensure that addressees of Agency decisions are made of aware of appeals against those decisions so that they may apply to intervene if they so wish. The second subparagraph of Article 6(5) of the Rules of Procedure therefore supports the conclusion that addressees of Agency decisions have an interest in the result of appeals lodged against those decisions.

23. For the following reason, the Appellant's argument that Armosa Tech has not acted in good faith and continues to violate Article 95⁷ also cannot affect the conclusion that Armosa Tech, as addressee of the Contested Decision, has an interest in the result of the case.
24. The decision on whether to grant an application to intervene is limited to whether the applicant satisfies the criteria set out in Article 8 of the Rules of Procedure and in particular to whether the applicant has an interest in the result of the case. The Appellant's arguments referred to in the previous paragraph concern the substance of the case which the Board of Appeal may consider in deciding on the appeal itself. Those arguments are not relevant to the Board of Appeal's decision on whether Armosa Tech has an interest in the result of the case for the purpose of intervening.
25. As the application to intervene also complies with the requirements of Article 8(2) 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 Armosa Tech in case A-011-2022 in support of the Agency.**
- 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. The Chairman of the Board of Appeal will prescribe a period within which Armosa Tech may submit a statement in intervention.**

Antoine BUCHET
Chairman of the Board of Appeal

Alen MOČILNIKAR
Registrar of the Board of Appeal

⁷ See paragraphs 11 and 12 above.