

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

22 June 2021

*(Opinion of the Biocidal Products Committee –
Admissibility – Competence of the Board of Appeal)*

Case number	A-008-2021
Language of the case	English
Appellants	Koppers Denmark ApS, Denmark Koppers International B.V., the Netherlands Rain Carbon bvba, Belgium Rain Carbon Germany GmbH, Germany Bilbaína de Alquitranes S.A., Spain Centrala Obrotu Towarami Masowymi DAW-BYTOM Sp. z o.o., Poland
Representatives	Ruxandra Cana, Eléonore Mullier and Hannah Widemann Steptoe & Johnson LLP, Belgium
Contested Act	Opinion of the Biocidal Products Committee (ECHA/BPC/274/2020) on the application for renewal of the approval in product type 8 of the active substance creosote, as set out in the minutes dated 2 March 2021 of the 37 th Biocidal Products Committee Meeting of 1 to 4 December 2020

THE CHAIRMAN OF THE BOARD OF APPEAL

gives the following

Decision

Background to the dispute

1. The Appellants filed this appeal on 31 May 2021.
2. The Appellants state in their Notice of Appeal that they are contesting *'the Agency's actions and acts in the context of the evaluation of the renewal of the active substance creosote [...] under the Biocidal Products Regulation [...] for use as a wood preservative (product-type 8), including the Biocidal Product Committee Opinion (ECHA/BPC/274/2020)[...], as per the Minutes dated 2 March 2021 of the 37th BPC Meeting of 1-4 December 2020 [...]'*.

Admissibility – Competence of the Board of Appeal

Arguments of the Appellants

3. The Appellants argue that the Board of Appeal is competent to review the present appeal under Article 77 of 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; the 'Biocidal Products Regulation'). The Appellants argue that the Board of Appeal is also competent under the more general duty of review of administrative acts.
4. The Appellants argue that the Board of Appeal is competent to review the Agency's actions under the Biocidal Products Regulation in accordance with the case-law of the Court of Justice of the European Union. The Appellants argue that, according to that case-law, *'in principle, a body which has power to adopt a particular legal measure also has power to abrogate or amend it by adopting an actus contrarius, unless such power is expressly conferred upon another body'* (judgment in *Lagardère SCA and Canal+ v Commission*, T-251/00, EU:T:2002:278, paragraph 130 and judgment in *Lucchini v Commission*, T-91/10, EU:T:2014:1033, paragraph 108). According to the Appellants, the Board of Appeal is the only Agency body that can revoke the Agency's measures related to creosote and, in particular, the Biocidal Products Committee Opinion communicated to the European Commission.
5. The Appellants argue that the Board of Appeal's competence in the present case is also recognised in Article 93(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; the 'REACH Regulation').

Findings of the Chairman of the Board of Appeal

The Contested Act

6. In the present case, the Appellants are challenging the Opinion of the Biocidal Products Committee (ECHA/BPC/274/2020) on the application for renewal of the approval in product type 8 of the active substance creosote (the 'Biocidal Products Committee Opinion'). The Appellants specify that they are challenging the Biocidal Products Committee Opinion as set out in the minutes dated 2 March 2021, and modified on 8 April 2021, of the 37th Biocidal Products Committee Meeting of 1 to 4 December 2020. It is that version of the Biocidal Products Committee Opinion that the Appellants label *'the contested measure'*. In addition, the Appellants state that they are seeking the annulment of *'the contested measure'*.
7. The fact that the Biocidal Products Committee Opinion is the act contested in the present proceedings is also supported by the Appellants' argument in the Notice of Appeal concerning the calculation of the three months' time limit for lodging an appeal set out in Article 92(2) of the REACH Regulation. The Biocidal Products

Committee Opinion was adopted on 4 December 2020. However, according to the Appellants, since the minutes of the Biocidal Products Committee meeting are dated 2 March 2021, and were modified on 8 April 2021, and the appeal was lodged on 31 May 2021, the appeal was filed in due time.

The Board of Appeal's competence

8. Under Article 77(1) of the Biocidal Products Regulation, '*[a]ppeals against decisions of the Agency taken pursuant to Articles 7(2), 13(3), 43(2) and 45(3), Article 54(3), (4) and (5), and Articles 63(3) and 64(1) shall lie with the Board of Appeal set up in accordance with [the REACH Regulation]*'.
9. The Biocidal Products Committee Opinion was adopted under Article 14(3) of the Biocidal Products Regulation. Therefore, the Biocidal Products Committee Opinion was not adopted on the basis of any of the provisions listed in Article 77(1) of the Biocidal Products Regulation. The Board of Appeal's competence to decide on such appeals is also not found in any other legal instrument supplementing or amending the Biocidal Products Regulation.
10. Under Article 94(1) of the REACH Regulation, an action may be brought before the General Court of the European Union, in accordance with Article 263 of the Treaty on the Functioning of the European Union, against a decision of the Agency where no right of appeal lies before the Board of Appeal (see, to this effect, judgment of 8 May 2018, *Esso Raffinage v ECHA*, T-283/15, EU:T:2018:263, paragraphs 34 to 37). Under the second subparagraph of Article 77(1) of the Biocidal Products Regulation, Article 92(1) and (2) and Articles 93 and 94 of the REACH Regulation apply to appeal procedures lodged under the Biocidal Products Regulation.
11. Consequently, the Board of Appeal is not competent to decide on an appeal against the Biocidal Products Committee Opinion (see, to this effect, Case A-011-2019, *Sikma D Vertriebs GmbH und Co*, Decision of the Chairman of the Board of Appeal of 2 September 2019, paragraphs 3 to 7. See also Case A-012-2019, *Symrise*, Decision of the Chairman of the Board of Appeal of 16 September 2019, paragraphs 20 to 30, and Case A-013-2019, *Symrise*, Decision of the Chairman of the Board of Appeal of 16 September 2019, paragraphs 21 to 31).
12. The conclusion in the previous paragraph is not affected by the Appellants' argument that the Board of Appeal's competence in the present case is recognised in Article 93(3) of the REACH Regulation. According to that provision, '*[t]he Board of Appeal may exercise any power which lies within the competence of the Agency or remit the case to the competent body of the Agency for further action*'. However, as confirmed by the General Court of the European Union, Article 93(3) of the REACH Regulation '*governs solely the Board of Appeal's powers after having held that an action before it was well founded*' (see, for example, judgment of 20 September 2019, *BASF Grenzach v ECHA*, T-125/17, EU:T:2019:638, paragraph 66). Therefore, that provision does not in any way determine which Agency decisions fall within the competence of the Board of Appeal.
13. The Appellants' argument set out in paragraph 4 above, according to which only the Board of Appeal is competent to revoke the Biocidal Products Committee Opinion, must also be rejected. As stated in the previous paragraph, under Article 93(3) of the REACH Regulation, the Board of Appeal may exercise '*any power which lies within the competence of the Agency or remit the case to the competent body of the Agency for further action*'. However, for the purposes of the present case, the Board of Appeal is only competent to exercise its powers in relation to appeals against the Agency decisions adopted on the basis of the Articles set out in Article 77(1) of the Biocidal Products Regulation and in certain other legal instruments supplementing or amending that Regulation.

Conclusion on the appeal

14. Under Article 93(2) of the REACH Regulation, the Chairman of the Board of Appeal may dismiss an appeal within 30 days of it being filed if he considers the appeal to be inadmissible.
15. Pursuant to Article 11(1)(c) 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), an appeal is inadmissible if it is not brought against a decision referred to in Article 77(1) of the Biocidal Products Regulation.
16. In view of paragraphs 6 to 15 above, the Board of Appeal is not competent to decide on the present appeal. Therefore, the appeal must be dismissed as inadmissible.
17. Under Article 4(3) of Commission Implementing Regulation (EU) No 564/2013 on the fees and charges payable to the European Chemicals Agency pursuant to the Biocidal Products Regulation (OJ L 167, 19.6.2013, p. 17), if an appeal is dismissed as inadmissible the appeal fee is not refunded.

On those grounds,

THE CHAIRMAN OF THE BOARD OF APPEAL

hereby:

- 1. Dismisses the appeal as inadmissible.**
- 2. Decides that the appeal fee will not be refunded.**

Antoine BUCHET
Chairman of the Board of Appeal

Alen MOČILNIKAR
Registrar of the Board of Appeal