

**SUMMARY OF DECISION OF 12 OCTOBER 2016 OF THE BOARD OF APPEAL OF THE
EUROPEAN CHEMICALS AGENCY**

Case number: A-008-2015

(Compliance check – Nanomaterials – Request for information – Legal certainty)

Factual background

On 16 March 2015, the Appellant, Evonik Degussa GmbH, lodged an appeal against an ECHA decision following a compliance check of its registration dossier for silicic acid, aluminum sodium salt (CAS No 1344-00-9, EC No 215-684-8; hereinafter 'the Substance'). The Contested Decision requested the Appellant to submit the following information:

- Name, molecular and structural formula or other identifier of the Substance (Sections 2.1 and 2.2 of Annex VI to the REACH Regulation);
- Composition of the Substance (Section 2.3 of Annex VI to the REACH Regulation); and
- Description of the analytical methods used to determine the identity and composition of the Substance (Section 2.3.7 of Annex VI to the REACH Regulation).

The Appellant requested the Board of Appeal to partially annul the Contested Decision.

Main findings of the Board of Appeal

In its Decision of 12 October 2016, the Board of Appeal examined the Appellant's plea that the Contested Decision violated the principle of legal certainty by using undefined and unclear terminology, specifically 'forms', 'grades' and 'nanofoms'.

The Board of Appeal observed firstly that the terms 'grades' and 'forms' used in the Contested Decision are not defined in the REACH Regulation or in the Agency's guidance. The Board of Appeal also found that the references to 'grades' and 'forms' in the Contested Decision, and the clarifications that the Agency provided during the decision-making process, were insufficient to clarify the meaning of those terms for the purposes of allowing the Appellant to understand what information was required by the Contested Decision. The Board of Appeal also found that the Agency inconsistently defined the meaning of 'grade' in the Contested Decision.

The Board of Appeal therefore concluded that the terms 'forms' and 'grades' were not clearly defined in the Contested Decision. On the contrary, the Contested Decision did not allow a diligent registrant to be sure with any degree of certainty what information it was required to provide to ensure compliance with the Contested Decision.

The Board of Appeal found secondly that, given the Agency's use of the term 'nanofom', the wording of the Contested Decision implied that the Agency started from a presumption that the Appellant intended to register the Substance both in 'bulk form' and as a nanomaterial within the meaning of Commission Recommendation 2011/696/EU on the definition of nanomaterial (OJ L 275, 20.10.2011, p. 38).

The Board of Appeal considered however that it should have been clear from the Appellant's registration dossier that the Appellant only intended to register the Substance as a nanomaterial. Consequently, requiring further information on 'nanoforms', while the Appellant had already provided information on the Substance it intends to register and which, according to the Appellant, is a nanomaterial within the meaning of Commission Recommendation 2011/696/EU, created uncertainty as to what additional information the Appellant was to provide. The Board of Appeal considered that this added to the uncertainty created by the use of the terms 'grades' and 'forms'.

In view of the above, the Board of Appeal found that the Contested Decision did not allow the Appellant to clearly ascertain how to ensure compliance with the requests set out therein. The Board of Appeal therefore found that the Contested Decision breached the principle of legal certainty.

The Board of Appeal also considered that the terms 'grades', 'forms' and 'nanoforms' were an integral part of the reasoning for all three information requirements set out in the Contested Decision. The Board of Appeal considered that those terms were inseparable from the content of the Contested Decision. The Board of Appeal was therefore unable to simply remove those terms from the Contested Decision and order the Appellant to comply with the remainder of the Contested Decision. The Board of Appeal therefore annulled the Contested Decision in its entirety and remitted the case to the Agency for further action.

NOTE: The Board of Appeal of ECHA is responsible for deciding on appeals lodged against certain ECHA decisions. The ECHA decisions that can be appealed to the Board of Appeal are listed in Article 91(1) of the REACH Regulation. Although the Board of Appeal is part of ECHA, it makes its decisions independently and impartially. Decisions taken by the Board of Appeal may be contested before the General Court of the European Union.

Unofficial document, not binding on the Board of Appeal

*The full text of the decision is available on the Board of Appeal's section of ECHA's website:
<http://echa.europa.eu/about-us/who-we-are/board-of-appeal>*