

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

29 January 2019

*(One substance, one registration – Article 20 – Article 41 – Substance sameness –
Right to be heard)*

Case number	A-005-2017
Language of the case	English
Appellant	Thor GmbH, Germany
Representative	Martin Ahlhaus Noerr LLP, Germany
Intervener	Solvay Solutions UK Limited, United Kingdom
Representatives	Jean-Philippe Montfort and Thomas Delille Mayer Brown Europe-Brussels LLP, Belgium
Contested Decision	<i>'Communication to all registrants of the substance with EC 500-057-6 in relation to the joint submission obligation'</i> of 13 February 2017

THE BOARD OF APPEAL

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

Registrar: Alen Močilnikar

gives the following

Decision

Background to the dispute

1. On 22 October and 9 November 2010 respectively, Solvay Solutions UK Limited and Solvay Solutions UK Limited-3 registered separately tetrakis (hydroxymethyl) phosphonium chloride, oligomeric reaction products with urea (EC No 500-057-6, CAS No 27104-30-9). That substance was registered by those two registrants as a multi-constituent substance.
2. On 14 May 2013, the Appellant, Thor GmbH, registered a substance with the same name and identifiers as those referred to in the previous paragraph. The Appellant registered that substance as a UVCB (substance of unknown or variable composition, complex reaction products or biological materials).
3. On 24 May 2013, the European Chemicals Agency (the 'Agency') found the Appellant's registration to be complete and assigned it a registration number pursuant to Article 20(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; the 'REACH Regulation'; all references to Recitals, Articles and Annexes concern the REACH Regulation unless stated otherwise).
4. On 11 August 2014, information on the registrations for tetrakis (hydroxymethyl) phosphonium chloride, oligomeric reaction products with urea (EC No 500-057-6, CAS No 27104-30-9) was disseminated for the first time on the Agency's website.
5. On 13 March 2015, Commission Implementing Regulation (EU) 2016/9 on joint submission of data and data sharing (OJ L 3, 6.1.2016, p. 41; the 'Implementing Regulation') entered into force. The Implementing Regulation emphasised the importance of the principle of one substance, one registration. According to that principle, if there is more than one registrant for a substance the registrants should form a joint submission and submit data jointly (the 'joint submission obligation'). If a subsequent registrant intends to register a substance for which there is already a joint submission that registrant is required to join the existing joint submission.
6. On 9 February 2016, Solvay Solutions UK Limited created a joint submission for tetrakis (hydroxymethyl) phosphonium chloride, oligomeric reaction products with urea (EC No 500-057-6, CAS No 27104-30-9) in REACH-IT.
7. On 15 February 2016, Solvay Solutions UK Limited, as lead registrant for tetrakis (hydroxymethyl) phosphonium chloride, oligomeric reaction products with urea (EC No 500-057-6, CAS No 27104-30-9), submitted the lead registration dossier.
8. On 16 February 2016, Solvay Solutions UK Limited-3 updated its registration in REACH-IT to become part of the joint submission.
9. On 22 February 2016, Solvay Solutions UK Limited sent a letter to the members of the substance information exchange forum ('SIEF'), including the Appellant, entitled '*REACH Registration of the monomer, tetrakis (hydroxymethyl) phosphonium chloride, oligomeric reaction products with urea (CAS 27104-30-9) – Invitation to become a Member of the Joint Submission*'. The Appellant did not join the joint submission.
10. Between 3 May and 12 December 2016, the Appellant and Solvay Solutions UK Limited exchanged communications concerning the '*boundary composition*' of tetrakis (hydroxymethyl) phosphonium chloride, oligomeric reaction products with urea (EC No 500-057-6, CAS No 27104-30-9), classification and labelling, the price and conditions of purchasing a letter of access and '*the scope of the joint registration*'.
11. On 13 February 2017, the Agency addressed a communication (the 'Contested Decision') '*to all registrants of the substance with EC 500-057-6 in relation to the joint submission obligation*'. In the Contested Decision the Agency informs the Appellant and the other registrants of the substance '*with EC 500-057-6 that the joint submission obligation has been breached, because separate registrations have been submitted for the same substance*'. The Contested Decision requests all registrants of the substance with EC No

500-057-6 to jointly submit the information required for that substance by 20 August 2017. According to the Contested Decision:

'Concerning individual registrants, a failure to join the existing joint submission by 20/08/2017 would result in [the Agency] revoking its decision assigning a registration number to their registration and the rejection of this registration.

[...]

Members of the existing joint submission and individual registrants are required to make every effort to find an agreement to register jointly. If the negotiations fail, and the individual registrant considers to have made every effort to find an agreement with the members of the existing joint submission, the individual registrant must file a dispute to [the Agency] by 20/08/2017.

Should the individual registrant demonstrate that they have made every effort to find an agreement, [the Agency] may grant access to the joint submission and, if relevant, a permission to refer to the data that have been submitted jointly.

However, if [the Agency] finds that the individual registrant has not made every effort to find such an agreement, [the Agency] will revoke its decision assigning a registration number to the registration concerned and reject this registration.

[...]

If [the Agency] decides to revoke its decision assigning a registration number to the registration concerned and rejects this registration, the individual registrant concerned will have to cease importing or manufacturing the substance, unless they have a valid pre-registration and the quantities manufactured or imported per manufacturer or importer per year remain below 100 tonnes (see Articles 23(3) and 28(1)).'

12. On 14 February 2017, following discussions with the Agency, Solvay Solutions UK Limited changed the description in its registration for tetrakis (hydroxymethyl) phosphonium chloride, oligomeric reaction products with urea (EC No 500-057-6, CAS No 27104-30-9) from a multi-constituent to a UVCB substance.
13. On 1 March 2017, Solvay Solutions UK Limited informed the other SIEF members of the change of description of tetrakis (hydroxymethyl) phosphonium chloride, oligomeric reaction products with urea (EC No 500-057-6, CAS No 27104-30-9) in its registration.

Procedure before the Board of Appeal

14. On 15 May 2017, the Appellant filed this appeal.
15. On 14 July 2017, the Agency filed its Defence.
16. Between 6 September and 15 November 2017, the Board of Appeal decided to stay the proceedings following a request from the Appellant.
17. On 20 December 2017, Solvay Solutions UK Limited was granted leave to intervene in support of the Agency.
18. On 5 February 2018, the Appellant filed its observations on the Defence.
19. On 19 February 2018, the Intervener filed its statement in intervention.
20. On 19 March 2018, the Agency filed observations on the Appellant's observations on the Defence and replied to questions from the Board of Appeal.
21. On 20 March 2018, the Appellant and the Agency filed their respective observations on the statement in intervention.
22. On 12 June 2018, a hearing was held at the Appellant's request. At the hearing, the Parties and the Intervener made oral submissions and responded to questions from the Board of Appeal.

Form of order sought

23. The Appellant requests that the Board of Appeal:
 1. *'revokes or annuls the [Contested Decision] or alternatively orders the [Agency] to act to that effect'*, and
 2. orders the refund of the appeal fee.
24. In the event that the appeal is dismissed, the Appellant requests the Board of Appeal *'to order the Agency to prolong the deadline set out in the Contested Decision for another six months beginning with the day the [Board of Appeal's] decision is delivered'*.
25. The Agency, supported by the Intervener, requests the Board of Appeal to dismiss the appeal as inadmissible or as unfounded in its entirety.
26. The Intervener additionally requests the Board of Appeal to dismiss as unfounded the Appellant's request for a prolongation of the deadline in the Contested Decision.

Admissibility**Arguments of the Agency and the Intervener**

27. The Agency, supported by the Intervener, argues that the appeal is manifestly inadmissible and should be dismissed in accordance with 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, as amended by Commission Implementing Regulation (EU) 2016/823, OJ L 137, 26.5.2016, p. 4, the 'Rules of Procedure').
28. The Agency argues that the Contested Decision was not adopted pursuant to Article 20 or Article 41(1)(a), following the procedure set out in Articles 50 and 51, or any other article listed in Article 91(1).
29. The Agency argues that in its decision in Case A-022-2013, *REACheck Solutions*, the Board of Appeal confirmed the Agency's power under Article 20 to initiate a review of existing registrations to ensure respect of the joint submission obligation.
30. The Agency argues that the Contested Decision does not produce legal effects which are binding on, and capable of affecting the interests of, the Appellant by bringing about a distinct change in its legal position. The Contested Decision does not take a position on who is responsible for the breach of the joint submission obligation. Instead, *'it constitutes a preliminary statement of position, giving all registrants of the substance, including the Appellant, the possibility to address the apparent breach of the joint submission obligation'*. Only action taken by the Agency in relation to the Appellant's registration after the deadline set in the Contested Decision - that is the revocation of the registration decision and rejection of the Appellant's registration - could be open to challenge by the Appellant. Before such action is taken by the Agency, the Appellant's legal position is not altered.
31. The Agency argues that it is settled case-law that measures of a preliminary or purely preparatory nature cannot be the subject of an action for annulment.
32. The Agency argues that the obligation to make a joint submission stems directly from Article 11 of the REACH Regulation and Article 3 of the Implementing Regulation. The joint submission obligation does not therefore result from the Contested Decision. The Contested Decision presents a statement of fact, namely that the joint submission obligation is apparently breached as not all registrants of the substance with EC No 500-057-6 are in the joint submission.
33. The Intervener argues that, in the context of an appeal to the Board of Appeal, it is irrelevant whether or not the contested measure can affect the interests of the Appellant by bringing about a distinct change in its legal position. This criterion is only relevant for an action before the European Court of Justice. Article 91(1) specifies which Agency decisions can be appealed and does not allow any other Agency decisions to be appealed, even if they trigger legal effects.

Arguments of the Appellant

34. The Appellant argues that the Board of Appeal confirmed in its decision in Case A-022-2013, *REACheck Solutions*, that in order to comply with the information requirements of Annex VI a registration dossier must identify a lead registrant. Pursuant to Article 20(2), the Agency is entitled to assess whether registrants have complied with this requirement.
35. According to the Appellant, the Contested Decision is therefore a decision taken pursuant to Article 20 ('completeness check'). A decision taken under Article 20 is appealable to the Board of Appeal under Article 91(1). The fact that the Contested Decision is entitled '*communication*' cannot alter this fact.
36. The Appellant argues that, alternatively, Article 20(2) does not entitle the Agency to reassess the completeness of an existing registration dossier for which a registration number has been already assigned. The possibility for the Agency to verify whether a dossier complies with Article 11(1) is included in Article 41(1)(a) ('compliance check'). Decisions taken under Article 41(1)(a) are adopted according to the procedure set out in Article 51 and are therefore appealable pursuant to Article 91.
37. The Appellant argues that the Contested Decision is not a preparatory measure and creates legal effects. In particular, the Contested Decision states that if the Appellant does not join the joint submission or initiate a data sharing dispute its registration will be revoked.

Findings of the Board of Appeal

38. The Agency argues in essence that the appeal is inadmissible as it is not directed against an act which can be the subject of an appeal before the Board of Appeal. The Appellant argues that, although labelled '*communication*', the Contested Decision is in effect a decision taken pursuant to Article 20, or alternatively, Article 41.
39. According to Article 91(1), '*[a]n appeal may be brought [before the Board of Appeal] against decisions of the Agency taken pursuant to Article 9, Article 20, Article 27(6), Article 30(2) and (3) and Article 51*'.
40. Article 91(1) refers to '*Article 20*' without a reference to any of the paragraphs of that Article. Pursuant to Article 20(5) '*an appeal may be brought, in accordance with Articles 91, 92 and 93, against Agency decisions under paragraph 2 of this Article*'. It is therefore clear that all Agency decisions taken under Article 20(2) are appealable to the Board of Appeal.
41. Article 41(3) states that decisions under Article 41 '*...shall be taken in accordance with the procedure laid down in Articles 50 and 51*'. Pursuant to Article 91(1), decisions taken by the Agency under Article 51 are appealable. In addition, Article 51(8) provides that '*an appeal may be brought, in accordance with Articles 91, 92 and 93, against Agency decisions under paragraphs 3 and 6 of this Article*'. Consequently, decisions adopted pursuant to Article 41 are appealable to the Board of Appeal.
42. Pursuant to Article 11(1)(c) of the Rules of Procedure, an appeal is inadmissible if it is not brought against a decision referred to in Article 91(1) of the REACH Regulation.
43. The Contested Decision was not adopted by the Agency on the basis of either Article 20 or Article 41, or any of the other articles listed in Article 91(1).
44. However, the Board of Appeal will examine the Appellant's argument that the Contested Decision is a decision taken pursuant to Article 20, regardless of the fact that it is entitled '*communication*' (see paragraph 35 above).
45. The Board of Appeal has previously held, in the circumstances of the case in question, that the Agency should regard a new registration as being incomplete, pursuant to Article 20, if it is not submitted as part of the joint submission. In this event, the Agency should take the steps provided for under the third and fourth subparagraphs of Article 20(2), which include the possible rejection of a registration (Case A-022-2013, *REACheck Solutions*, Decision of the Board of Appeal of 15 March 2016, paragraphs 114 to 123).

46. The Contested Decision informs '*all registrants of the substance with EC 500-057-6 that the joint submission obligation has been breached, because separate registrations have been submitted for the same substance*'. Such a finding can therefore be made in a decision following a completeness check under Article 20(2).
47. The Contested Decision then sets out the consequences of a failure to remedy the breach of the joint submission obligation. The Contested Decision states that if the Appellant does not join the joint submission for the substance with EC No 500-057-6 or submit a data sharing dispute with the Agency by the deadline set in the Contested Decision, the Agency will revoke the decision assigning a registration number to its registration and reject that registration (see paragraph 11 above). As stated in paragraph 45 above, the Agency's power to reject a registration on the grounds that it is incomplete is found in Article 20(2).
48. Therefore, as the Contested Decision finds that the joint submission obligation has been breached and sets out the consequences for this breach, the Contested Decision is equivalent to a decision adopted pursuant to Article 20(2). Decisions taken pursuant to Article 20(2) are appealable under Article 91(1). The Contested Decision can therefore be the subject of an appeal before the Board of Appeal.
49. The system of remedies in the REACH Regulation would be circumvented if the Agency could adopt acts such as the Contested Decision but avoid review by the Board of Appeal (see, to that effect, Case A-019-2013, *Solutia Europe*, Decision of the Board of Appeal of 29 July 2015, paragraph 97).
50. The appeal is therefore admissible.

Pleas related to the legality of the Contested Decision

51. The Appellant raises the following pleas in support of its request for the Contested Decision to be annulled:
 1. Breach of the right to be heard;
 2. Breach of the principle of proportionality;
 3. Breach of the principle of good governance; and
 4. Breach of the procedural requirements set out in Articles 41, 50 and 51.
52. The Board of Appeal will examine together the first, third and fourth pleas as they all raise issues linked to the breach of the right to be heard and are supported by similar arguments.

Breach of the right to be heard, the principle of good governance, and the procedural requirements set out in Articles 41, 50 and 51

Arguments of the Appellant

53. The Appellant argues that its right to be heard was not respected as the Agency did not assess the '*details of the underlying registration process and previous discussions within the SIEF*'. The Appellant was therefore unable to explain to the Agency that it had registered tetrakis (hydroxymethyl) phosphonium chloride, oligomeric reaction products with urea (EC No 500-057-6, CAS No 27104-30-9) as a UVCB in 2013. This was after discussions on the identity of tetrakis (hydroxymethyl) phosphonium chloride, oligomeric reaction products with urea (EC No 500-057-6, CAS No 27104-30-9) within the SIEF and following earlier registrations by other registrants of a multi-constituent substance. In addition, the joint submission was only created in February 2016. The Appellant could not therefore have joined the joint submission at the time it submitted its registration.
54. The Appellant argues that the Agency did not take into consideration the discussions between the Appellant and the Intervener regarding substance identity and the fact that the substances registered by them are not the same.
55. The Appellant argues that if the Board of Appeal decides that the Contested Decision is a decision adopted pursuant to Article 41, following the procedure set out in Articles 50 and 51, the Agency has clearly disregarded the procedural requirements set out in those provisions.

Arguments of the Agency and the Intervener

56. The Agency argues that the Contested Decision invited the registrants of the substance with EC No 500-057-6 to contact the Agency should they have any questions concerning its content. The registrants therefore had the opportunity to submit to the Agency their views on the Contested Decision. The Appellant took advantage of this possibility and contacted the Agency expressing its concerns about the requirement to be part of the joint submission. The Agency responded to these concerns.
57. The Intervener argues that the underlying registration process and discussions on the sameness of a given substance is irrelevant to an assessment of whether the principle of one substance, one registration has been breached for that substance.

Findings of the Board of Appeal

58. The right to be heard is enshrined in Article 41 of the Charter of Fundamental Rights as part of the right to good administration.
59. In accordance with that right, the addressees of decisions which significantly affect their interests must be placed in a position to effectively make known their views on the information on which the authorities intend to base their decision (see judgment of 18 December 2008, *Sopropé*, C-349/07, EU:C:2008:746, paragraph 37).
60. Observance of the right to be heard ensures that the competent authority adopting a decision is able to take into account all relevant information. In order to protect their interests, the addressees of a decision must be able to correct an error, or submit information relating to their circumstances, which may have an impact on that decision.
61. However, a breach of the right to be heard results in the annulment of the decision only if, had it not been for such an infringement, the outcome of the procedure might have been different (see judgment of 3 July 2014, *Kamino International Logistics*, Cases C-129/13 and C-130/13, EU:C:2014:2041, paragraph 79).

The Agency's verification of the principle of one substance, one registration

62. The principle of one substance, one registration is implemented through the obligation for all registrants of the same substance to be a part of the joint submission for that substance. Although the Board of Appeal has found in this case that the Contested Decision, in the form adopted by the Agency, is equivalent to a decision adopted on the basis of Article 20(2) (see paragraph 48 above), it does not necessarily follow that this was the correct legal basis for the Agency's examination of whether the joint submission obligation was respected.
63. The Agency must not act independently of the legal framework established in the REACH Regulation by having recourse to an instrument other than those foreseen in the REACH Regulation (see judgment of 8 May 2018, *Esso Raffinage v European Chemicals Agency*, T-283/15, EU:T:2018:263, paragraph 108). The Board of Appeal must consequently examine which legal basis could have been used to adopt the Contested Decision.

Verification of the one substance, one registration principle under Article 20

64. As stated in paragraph 45 above, Article 20 can, in certain circumstances, be the correct legal basis to verify that registrants comply with the principle of one substance, one registration. The Board of Appeal has previously stated that, pursuant to the REACH Regulation and as confirmed in the Implementing Regulation, the Agency is responsible for ensuring that the joint submission obligation is respected. The Board of Appeal considered that Articles 10, 11 and 20, read together with Section 1 of Annex VI, are sufficient in themselves to empower and require the Agency to reject registrations made outside an existing joint submission (see Case A-022-2013, *REACheck Solutions*, Decision of the Board of Appeal of 15 March 2016, paragraphs 114 to 123).

65. However, as the circumstances under examination in Case A-022-2013 were different from those in the present case, it cannot be assumed that Article 20 is the only possible legal basis to ensure compliance with the principle of one substance, one registration. In Case A-022-2013, a lead registrant had lodged an appeal against an Agency decision granting a registration number to another registrant of the same substance. In that case, the appeal was filed within the time limit set out in Article 92(2), as the appeal was filed within three months of the lead registrant becoming aware of the Agency's decision accepting the separate registration (see paragraphs 52 to 58 of that decision).
66. The present case however concerns a registration that took place almost four years before the Contested Decision was issued. The Contested Decision was part of the Agency's approach to dealing with registrations for the same substance which have been granted registration numbers in accordance with Article 20(3) despite not being part of a joint submission.
67. If the Agency finds, after a registration number has been granted, that a registration is incomplete as it is not part of the relevant joint submission, it must carefully examine whether the circumstances of the individual case are such that Article 20 would be the correct legal basis to ensure compliance with the principle of one substance, one registration.
68. If the Agency finds that Article 20 is the correct legal basis and if it finds that a registration is incomplete as it is not part of a joint submission, pursuant to Article 20(2), the registrant concerned must be given a reasonable period to complete its registration by joining the joint submission or otherwise justify why it should not be part of the joint submission. The Agency must then perform a further completeness check, considering the information submitted by the registrant. If the registrant fails to complete its registration, for example by failing to join the joint submission, the Agency must take a decision pursuant to Article 20(2) rejecting the registration. This decision would be appealable to the Board of Appeal.
69. The procedure set out in Article 20(2), as described in the previous paragraph, ensures that a registrant's right to be heard is respected.

Verification of the one substance, one registration principle under Article 41

70. According to Article 41(1)(a), the Agency may verify that *'the information in the technical dossier(s) submitted pursuant to Article 10 complies with the requirements of Articles 10, 12 and 13 and with Annexes III and VI to X'*.
71. Section 1 of Annex VI, *'General registrant information'*, includes in Section 1.2 information regarding the *'[j]oint submission of data'*. Section 1.2 of Annex VI provides:
'Articles 11 or 19 foresee that parts of the registration may be submitted by a lead registrant on behalf of other registrants.
In this case, the lead registrant shall identify the other registrants specifying:
 – *their name, address, telephone number, fax number and e-mail address,*
 – *parts of the present registration which apply to other registrants.*
Mention the number(s) given in this Annex or Annexes VII to X, as appropriate.
Any other registrant shall identify the lead registrant submitting on his behalf specifying:
 – *his name, address, telephone number, fax number and e-mail address,*
 – *parts of the registration which are submitted by the lead registrant.*
Mention the number(s) given in this Annex or Annexes VII to X, as appropriate.'
72. The Agency may therefore, under Article 41(1)(a), verify that a registration dossier for a substance complies with Section 1 of Annex VI and the requirement regarding the joint submission of data. As a result, the Agency could verify whether the principle of one substance, one registration has been respected pursuant to Article 41(1)(a).

73. Under Article 41(3), the Agency may prepare a draft decision requiring a registrant to submit any information needed to bring the registration into compliance with the relevant information requirements. This may include information regarding the joint submission as required under Section 1 of Annex VI. Article 41(3) states that the Agency's decision must be taken in accordance with the procedure laid down in Articles 50 and 51.
74. Under Article 50(1), a registrant is given the opportunity to comment on the draft decision requiring additional information. The Agency must take those comments into consideration and, if necessary, amend the draft decision accordingly.
75. Article 51 provides the opportunity for the Member State competent authorities to provide proposals for amendment to the draft decision and for the registrant to comment on those proposals for amendment before the decision is adopted. The adopted decision is appealable to the Board of Appeal.
76. In addition, it must be recalled that, in accordance with Article 126, Member States are to lay down the provisions on penalties applicable for infringement of the provisions of the REACH Regulation and are to take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

Consequences of the Agency's failure to follow either Article 20 or 41

77. Articles 20 and 41 expressly provide for procedural steps which are aimed at ensuring that the right to be heard is respected. These are the only provisions in the REACH Regulation which allow the Agency to verify that a registrant has respected the principle of one substance, one registration.
78. It is uncontested that the Contested Decision was not adopted on the basis of Article 20 or 41, following the procedures set out in those Articles. It is therefore clear that the Agency has acted *ultra vires* and, by doing so, breached the procedural rights of the Appellant, including its right to be heard and the right to appeal.
79. However, as stated in paragraph 61 above, a breach of the right to be heard results in the annulment of the decision only if, had it not been for such an infringement, the outcome of the procedure might have been different (see judgment of 3 July 2014, *Kamino International Logistics*, Cases C-129/13 and C-130/13, EU:C:2014:2041, paragraph 79).
80. The Board of Appeal will therefore examine whether the outcome of the procedure might have been different had it not been for that irregularity.
81. In the present case, it is uncontested that separate registrations were submitted for a substance with EC No 500-057-6. These separate registrations may have been submitted contrary to the joint submission obligation.
82. However, the Contested Decision is based on the presumption that the addressees of that decision have all registered the same substance. During the present proceedings, the Agency confirmed that this presumption is based solely on the fact that the registered substances have the same EC identifier, which in this case is EC No 500-057-6. The Appellant, however, has consistently disputed the finding that all the substances that have been registered with EC No 500-057-6 are the same, due in particular to the different concentrations of formaldehyde in them.
83. It is clear from Article 1(3), read in conjunction with Recital 19, that the decision on which substance is being registered lies with the manufacturer or importer concerned (see Case A-008-2012, *PPH UTEX*, Decision of the Board of Appeal of 2 April 2014, paragraph 47). The Agency confirmed during the present proceedings that multi-constituent and UVCB substances are usually considered to be different substances for registration purposes. There are borderline cases where it is not clear whether a substance is a multi-constituent or UVCB substance and it is therefore not clear whether there is one substance or more. According to the Agency's Guidance for identification and naming of substances under REACH and CLP (version 2.1, May 2017), in these borderline cases it is for the registrant to decide whether the substance is a multi-constituent or UVCB substance. The Agency further clarified during the present proceedings that UVCB and multi-constituent substances must have different EC numbers.

84. Prior to the adoption of the Contested Decision, the Appellant registered a UVCB substance and the Intervener, the lead registrant, a multi-constituent substance. The Intervener changed its registration to indicate that the substance it was registering was a UVCB substance after the adoption of the Contested Decision (see paragraph 12 above).
85. At the time of adoption of the Contested Decision, following the Agency's own guidance, it was therefore not clear that the Appellant and the Intervener had in fact registered the same substance, despite the fact that they had used the same EC identifier. The Agency was not therefore in a position to conclude in the Contested Decision that the Appellant had registered the same substance as the Intervener. It is therefore not clear that, at the time of adoption of the Contested Decision, the Appellant had failed to meet its joint submission obligation. This uncertainty should have been resolved prior to the adoption of a decision and demonstrates the importance of following the correct procedure, with the procedural guarantees this entails.
86. Under the procedures for adopting decisions under Articles 20 and 41, the Appellant could have raised the arguments it makes in the present proceedings. For example, if the Agency had followed Article 20 or Article 41 the Appellant could have argued that the substances registered by the Appellant and the Intervener are not the same due, in particular, to the different concentrations of formaldehyde. The Agency would then have been able to take a decision based on all the relevant facts of the case as required by the principle of the right to be heard and the procedures set out in those Articles in order to guarantee that right (see paragraphs 59 and 60 above). In addition, as stated in paragraph 39 to 41 above, Agency decisions under Article 20(2) and Article 41 can be appealed to the Board of Appeal. During appeal proceedings a registrant could set out why it considers that the adopted Agency decision should not be upheld.
87. The approach adopted by the Agency, in issuing the Contested Decision, does not allow registrants to contest a conclusion by the Agency that they are registering the same substance. In this respect, in reply to a written question from the Board of Appeal, the Agency stated that it does not foresee any additional procedure between the expiry of the deadline indicated in the Contested Decision and the notification of a decision to revoke the decision assigning a registration number.
88. By failing to follow the procedures in Article 20 or Article 41 the Agency breached the Appellant's procedural rights, in particular the right to be heard and the right to appeal. The outcome of the procedure could have been different without this irregularity (see paragraphs 79 to 86 above). The Contested Decision must therefore be annulled and the case remitted to the Agency for further action. Further action should be on the basis of either Article 20 or Article 41, after an assessment of which of these legal bases is correct in the circumstances of the case.
89. As the Contested Decision has been annulled, it is not necessary to examine the Appellant's other pleas.

Refund of the appeal fee

90. Pursuant to Article 10(4) of Commission Regulation (EC) No 340/2008 on the fees and charges payable to the European Chemicals Agency pursuant to the REACH Regulation (OJ L 107, 17.4.2008, p. 6), the appeal fee is to be refunded if the appeal is decided in favour of an appellant.
91. As the appeal has been decided in favour of the Appellant, the appeal fee must be refunded.

On those grounds,

THE BOARD OF APPEAL

- 1. Annuls the Contested Decision of 13 February 2017.**
- 2. Remits the case to the competent body of the Agency for further action on the basis of Article 20 or Article 41.**
- 3. Decides that the appeal fee must be refunded.**

Mercedes ORTUÑO
Chairman of the Board of Appeal

Alen MOČILNIKAR
Registrar of the Board of Appeal