

SUMMARY OF THE DECISION OF 29 JANUARY 2019 OF THE BOARD OF APPEAL OF THE EUROPEAN CHEMICALS AGENCY

Case number: A-005-2017

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

Factual background

The principle of one substance, one registration was established by the REACH Regulation¹ and further emphasised in Commission Implementing Regulation (EU) 2016/9². 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.

In the present case, the Appellant requested the Board of Appeal to annul an ECHA communication (the 'Contested Decision') addressed to all registrants of the substance tetrakis(hydroxymethyl)phosphonium chloride, oligomeric reaction products with urea (EC 500-057-6). According to the Contested Decision, the joint submission obligation had been breached because separate registrations had been submitted for the same substance.

The Contested Decision stated that if the Appellant did not join the joint submission for the substance with EC No 500-057-6 or submit a data-sharing dispute with the Agency, the Agency would revoke the decision assigning a registration number to the Appellant's registration and reject that registration.

Main findings of the Board of Appeal

Admissibility

The Board of Appeal first examined the Agency's claim that the appeal was inadmissible as it was not directed against an act which can be the subject of an appeal before the Board of Appeal.

The Board of Appeal noted that the Contested Decision was not adopted on the basis of any of the articles listed in Article 91(1) of the REACH Regulation which sets out the decisions that may be appealed to the Board of Appeal. However, the Board of Appeal decided that, as the Contested Decision stated that the joint submission obligation had been breached and set out the consequences of this breach, the Contested Decision was equivalent to a decision adopted pursuant to Article 20(2) of the REACH Regulation. Since decisions taken pursuant to Article 20(2) are appealable under Article 91(1), the Contested Decision could therefore be the subject of an appeal before the Board of Appeal.

¹ 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).

² Commission Implementing Regulation (EU) 2016/9 on joint submission of data and data sharing (OJ L 3, 6.1.2016, p. 41).

Legality of the Contested Decision

The Board of Appeal confirmed that both Article 20 and Article 41 of the REACH Regulation allow the Agency to ensure that registrants comply with the principle of one substance, one registration. 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.

The Board of Appeal found that, since the Contested Decision was not adopted on the basis of either Article 20 or Article 41, the Agency had acted beyond its powers. Furthermore, by not following the procedures set out in one of those Articles, the Appellant's procedural rights, including the right to be heard and the right to appeal, had been breached.

The Board of Appeal also found that the outcome of the procedure leading to the adoption of the Contested Decision might have been different had the Agency followed the correct procedure. For example, the Appellant could have argued, as it did during the appeal proceedings, that the joint submission obligation had not been breached because the substances registered by the addressees of the Contested Decision are not the same.

The Board of Appeal therefore annulled the Contested Decision and remitted the case to the Agency for further action on the basis of either Article 20 or Article 41.

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>*