

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

10 October 2011

(Registration – Rejection – Late payment of registration fee – Extension of payment deadline – Notification of second deadline – Administrative procedure – Administrative practice – The Board of Appeal’s power of review – Principle of good administration – Legitimate expectations – Lack of clarity – Guidance – Admissibility of evidence – Admissibility of pleas)

Case number	A-001-2010
Language of the case	English
Appellant	N.V. Elektriciteits – Produktiemaatschappij Zuid-Nederland EPZ Borssele The Netherlands Represented by: C.H.M. Verwijs – van Fraassen N.V. Elektriciteits – Produktiemaatschappij Zuid-Nederland EPZ Zeedijk 32 4454 PM Borssele The Netherlands
Contested decision	SUB-D-2114130952-53-01/F of 24 September 2010 adopted by the European Chemicals Agency (hereinafter the ‘Agency’) pursuant to Article 20(2) 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; hereinafter the ‘REACH Regulation’)

THE BOARD OF APPEAL

composed of Mercedes ORTUÑO (Chairman), Mia PAKARINEN (Legally Qualified Member and Rapporteur) and Carlo LUPI (Alternate Technically Qualified Member)

Registrar: Sari HAUKKA

gives the following

Decision

1. By its appeal, the Appellant seeks the annulment of the contested decision insofar as the Agency decided not to reimburse the registration fee following the rejection of its registration.

RELEVANT LEGISLATION

2. The following provisions are relevant for the present decision.

The REACH Regulation

3. Article 6(4) of the REACH Regulation provides:

'A submission for registration shall be accompanied by the fee required in accordance with Title IX.'

4. Article 20(2) of the REACH Regulation provides that:

'The Agency shall undertake a completeness check of each registration in order to ascertain that all the elements required [...], as well as the registration fee referred to in Article 6(4), [...], have been provided. [...] The completeness check shall not include an assessment of the quality or the adequacy of any data or justifications submitted.'

[...]

If a registration is incomplete, the Agency shall inform the registrant, before expiry of the three-week or three-month period referred to in the second subparagraph, as to what further information is required in order for the registration to be complete, while setting a reasonable deadline for this. The registrant shall complete his registration and submit it to the Agency within the deadline set. [...]

The Agency shall reject the registration if the registrant fails to complete his registration within the deadline set. The registration fee shall not be reimbursed in such cases.'

5. Article 74(1) of the REACH Regulation provides:

'The fees that are required according to Article 6(4), [...] shall be specified in a Commission Regulation adopted in accordance with the procedure referred to in Article 133(3) by 1 June 2008.'

6. Article 93(3) of the REACH Regulation provides:

'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.'

The Fee Regulation

7. Article 3(1) and (5) to (7) of Commission Regulation (EC) No 340/2008 of 16 April 2008 on the fees and charges payable to the European Chemicals Agency pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (OJ L 107, 17.4.2008, p. 6; hereinafter the 'Fee Regulation') provides:

'1. The Agency shall levy a fee, as provided for in paragraphs 2, 3 and 4 of this Article, for any registration of a substance under Article 6, 7 or 11 of [the REACH Regulation].

[...]

5. Fees due under paragraphs 1 to 4 shall be paid within 14 calendar days from the date on which the invoice is notified to the registrant by the Agency. However, invoices linked to a registration of a pre-registered substance that is submitted to the Agency during the two months that precede the relevant registration deadline of Article 23 of [the REACH Regulation] shall be paid within 30 days from the date on which the invoice is notified to the registrant by the Agency.

6. Where the payment is not made before expiry of the deadline provided for in paragraph 5, the Agency shall set a second deadline for the payment. Where the payment is not made before expiry of the second deadline, the registration shall be rejected.

7. Where the registration has been rejected due to the failure of the registrant to submit missing information or due to his failure to pay the fee before expiry of the deadlines, the fees paid in relation to that registration shall not be refunded or otherwise credited to the registrant.'

SUMMARY OF THE FACTS

Background

8. On 7 July 2010, the Appellant submitted a substance registration dossier using REACH-IT (the on-line-tool for the submission of registration dossiers to the Agency which also serves as the primary means of communication between the registrants and the Agency). On 8 July 2010, an invoice for the payment of the registration fee, with an initial due date of 22 July 2010 (hereinafter the 'First Invoice') was sent to the Appellant via REACH-IT.
9. On 12 July 2010, the Agency sent a technical completeness check letter (hereinafter the 'TCC Letter') to the Appellant. By the *TCC Letter*, the Agency informed the Appellant that the registration was considered incomplete as certain elements required by the REACH Regulation were not available. The *TCC Letter* also requested the Appellant to pay the registration fee by 21 August 2010.
10. According to the Agency's records, the registration fee had not been paid by the initial due date of 22 July 2010. As a consequence, a reminder message was sent to the Appellant on 23 July 2010 as an automatic IT action via

REACH-IT. At the same time, a new due date of 21 August 2010 (hereinafter the 'second deadline') was set via REACH-IT for the payment of the Appellant's registration fee. The second deadline was inserted into the first invoice and made available to the Appellant via REACH-IT.

11. The Appellant paid the registration fee on 30 August 2010.
12. On 24 September 2010, the Agency adopted the contested decision by which it rejected the registration due to late payment of the registration fee. By the contested decision, the Agency also informed the Appellant that it would not reimburse any fee received for the registration.
13. On 21 December 2010, the Appellant lodged the present appeal at the Registry of the Board of Appeal challenging the contested decision to the extent that the Agency decided not to reimburse the registration fee received for the Appellant's registration. The Agency received the appeal fee on 8 December 2010.

Procedure

14. On 25 January 2011, the Chairman of the Board of Appeal designated an alternate member to act in the present case as the position of the regular technically qualified member of the Board of Appeal was vacant at the time.
15. On 16 February 2011, the Agency submitted its defence. The defence also contained an application for confidential treatment. More specifically, the Agency requested the names of certain staff members, contained in documents submitted as evidence, to be treated as confidential with regard to third parties. By decision of 24 February 2011, the Chairman granted the Agency's application.
16. By letter dated 24 February 2011, the Board of Appeal invited the Appellant to submit its observations on the Agency's defence. On 17 March 2011, the Appellant duly lodged its observations.
17. On 14 April 2011, the Board of Appeal invited the Agency to respond to certain questions. The Agency submitted its reply on 29 April 2011.
18. On 16 May 2011, the Board of Appeal addressed additional questions to the Agency, to which the Agency responded on 30 May 2011.
19. On 14 June 2011, the Appellant and the Agency were invited to submit observations on certain aspects of versions 1.0, 2.0, 2.1 and 2.2 of the REACH-IT Frequently Asked Questions on REACH INVOICES AND PAYMENTS (hereinafter together with the versions of 2.3 and 3.0 the 'FAQs'), as published by the Agency on its website and obtained by the Board of Appeal on its own motion. The Appellant was also invited to submit its observations on the Agency's reply of 30 May 2011. The Appellant and the Agency submitted their observations on 27 June 2011 and 28 June 2011 respectively.
20. By letters dated 1 July 2011, the Appellant and the Agency were given the opportunity to submit observations on the latest observations of the other party. The Appellant and the Agency submitted their observations on 21 July 2011 and 22 July 2011 respectively.
21. On 2 September 2011, the Board of Appeal closed the written procedure. On 13 September 2011 and 19 September 2011 respectively, the Appellant and the Agency informed the Board of Appeal that they did not request a hearing in

the present case. On 22 September 2011, the Board of Appeal decided that it was not necessary to hold a hearing in the present case.

ARGUMENTS OF THE PARTIES

Appellant's arguments

The Appellant's claims and arguments can be summarised as follows:

22. In the notice of appeal, the Appellant requests the Board of Appeal to order the Agency to reimburse its registration fee, which it argues, was paid unduly.
23. The Appellant claims that the Agency's decision not to reimburse its registration fee is unfair for the following reasons:
 - (a) The Appellant argues that due to the *'unclearness'* of the Agency's website and the information provided to it by the Agency it did not pay the registration fee by the second deadline. As a result of the unclear information, the Appellant was under the impression that the original due date was extended by 60 days. The Appellant also claims that *'ECHA was not complying with the information on the website'*;
 - (b) The Appellant states that it did not receive the *'message of the reminding invoice'* in its REACH-IT message box to which it logged-on on a weekly basis. Furthermore, the Appellant argues that the fact of not receiving any message of the reminder invoice being delivered was *'in contradiction to the first invoice'* for which the Appellant received a separate message of delivery;
 - (c) The Appellant also argues that it is completely reasonable that it waited with its payment and states that when making the payment on 30 August 2010 it was under impression that the original deadline was extended by 60 days and that therefore its payment was made in due time. In addition, the Appellant states that an expert third party that technically assisted the Appellant in the registration process also thought that a 60-day extended period applied. The Appellant claims that it was unreasonable for the Agency to have rejected its registration without having taken this into consideration;
 - (d) In its subsequent observations, the Appellant argues further that according to versions 1.0, 2.1, 2.2 and version 3.0 of the FAQs, the Agency has always given registrants a minimum of 60 days to pay the fee after the expiry of the initial due date. The Appellant concludes that where the payment term is shortened, the Agency should inform registrants more explicitly of the time-limit so that they can pay the registration fee on time;
 - (e) As a consequence of the rejection of its registration dossier, the Appellant states that it had to re-submit its registration dossier and to pay the related registration fee for a second time. According to the Appellant, the payment made for its registration, which the Agency rejected by the contested decision, was made unduly. According to the Appellant, the reimbursement of its registration fee is supported by considerations of good faith and the undue nature of the payment.

24. In support of its arguments, the Appellant submitted as evidence a screenshot of its message box in REACH-IT, dated 27 September 2010. The Appellant also submitted a presentation '*Registratie, Evaluatie, Authorisatie van Chemische stoffen*' dated 20 May 2010. This presentation had been given by the third party expert that technically assisted the Appellant in the registration process.

Agency's defence

The Agency's counterclaims and arguments are summarised below:

25. In its defence, the Agency asks the Board of Appeal to dismiss the Appellant's request to refund the registration fee. The Agency argues that the contested decision is legally sound and that the Appellant's arguments are unfounded for the following reasons:
- (a) On 9 July 2010, the Appellant received and opened the *First Invoice*, which indicated 22 July 2010 as the initial due date to pay the registration fee;
 - (b) The Appellant does not contest having received on 13 July 2010 the *TCC Letter*, which indicated 21 August 2010 as the second deadline to pay the registration fee. The *TCC Letter* also stated that failure to pay the registration fee within the set deadline would result in the rejection of the registration and that the registration fee would not be refunded to the Appellant;
 - (c) Version 2.3 of the FAQs, which was published on the Agency's website at the time the Appellant was to pay its registration fee, indicated that the payment deadline is extended '*usually up to 30 calendar days from the initial payment due date*';
 - (d) According to the Agency, on 27 July 2010, the Appellant logged-on to REACH-IT and opened the reminder message. This message stated that the invoice had not been settled by the initial due date and that the registration fee should be paid by the second deadline;
 - (e) In addition, the Agency states that it took all reasonable measures to put the Appellant in a position to pay the fee on time. The Agency adds that Appellant disregarded the Agency's communications and the information provided on the Agency's website and that the Appellant did not contact the Agency's Helpdesk for assistance.
26. In support of its claims and arguments, the Agency submitted the following evidence in the submissions:
- FAQ version 2.3, dated 12 July 2010;
 - Invoice no. 10003013 of 8 July 2010, sent to the Appellant as the reminder invoice on 22 July 2010 (hereinafter the '*Reminder Invoice*');
 - FAQ version 3.0, dated 1 October 2010;
 - Form for recording Regulation Rules Update;

- Invoice no. 10003013 of 8 July 2010, as uploaded to REACH-IT on 8 July 2010, and to which the Agency refers as the original invoice of 8 July 2010 (*'First Invoice'*);
 - The *TCC Letter*, dated 12 July 2010;
 - Extract of data from REACH-IT, which contains a log of the Appellant's registration submission;
 - REACH-IT Industry User Manual, Part 08 – Invoicing, Version 1.1, Release date: December 2009;
 - The reminder message sent by the Agency to the Appellant on 23 July 2010 via REACH-IT (hereinafter the *'Reminder Message'*);
 - The invoice reminder of 22 July 2010, sent by the Agency via REACH-IT (hereinafter *'Invoice Reminder'*); and
 - A TCC letter and invoice reminder sent to an unrelated and unidentified registrant that the Agency submitted as evidence to illustrate its practice on extending payment deadlines in the period after 25 March 2010.
27. In its observations of 28 June 2011 regarding versions 1.0, 2.0, 2.1 and 2.2 of the FAQs, the Agency claimed that the Appellant had not referred to these documents, and therefore contested their admissibility as evidence. In addition, the Agency claimed that the implementation of its duties pursuant to the REACH Regulation and the Fee Regulation prevails over any FAQs.
28. In its observations of 22 July 2011, the Agency clarified its claim made in the defence that *'all registration dossiers submitted before 1 October 2010, in case the payment was not received within that initial due date, were given an extension of 30 days to pay the fee'*. More specifically, the Agency explained that while its initial practice was to give an extension of (a minimum) 60 days, this practice was changed (first to 30 days, and subsequently back to 60 days maximum). However, due to complex issues with REACH-IT, the change from 60 to 30 days was applied only as of 25 March 2010. The Agency admitted that it took some time before the corresponding FAQ was updated.

REASONS

1. Admissibility

1.1 Admissibility of the notice of appeal

29. The appeal complies with Articles 91(1) and 92(1) and (2) of the REACH Regulation as well as Articles 6, 9, 10 and 14 of Commission Regulation (EC) No 771/2008 of 1 August 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; hereinafter the *'Rules of Procedure'*). The appeal is therefore admissible.

1.2 Admissibility of certain pleas and evidence

(a) The scope of the Board of Appeal's power to examine the case and the admissibility of evidence acquired on its own initiative

30. The Agency has contested the use of versions 1.0, 2.0, 2.1 and 2.2. of the FAQs as evidence. As the Board of Appeal obtained these FAQs on its own initiative, the Agency argued that they should not be admitted as evidence. It also claimed that it would be inappropriate for the Board of Appeal to raise new grounds for a possible annulment of the contested decision which have not been invoked by the Appellant.
31. In its submissions dated 28 June 2011 and 22 July 2011, the Agency based its claim of inadmissibility on the view that the documents in question had not been referred to in the notice of appeal, and thus amounted to new evidence, within the meaning of Article 12(2) of the Rules of the Procedure, substantiating the Appellant's arguments.
32. Given these claims, the Board of Appeal shall examine the scope of its power to examine a case that it has been called upon to decide.
33. The power of the Board of Appeal to examine a case is defined in the Article 93(3) of the REACH Regulation. According to this provision, the Board of Appeal may exercise any power that lies within the competence of the Agency or it may remit the case to the competent body of the Agency for further action. In judgments relating to the board of appeal of the Office for Harmonization in the Internal Market (hereinafter 'OHIM'), the General Court has ruled that administrative continuity exists between the agency and its board of appeal, which can exercise any power that lies within the competence of the agency (see Case T-163/98, *Procter & Gamble v OHIM (BABY-DRY)* [1999] ECR II-2383, paragraph 38, not overturned on this point by the European Court of Justice in Case C-383/99 P, *Procter & Gamble v OHIM (BABY-DRY)* [2001] ECR I-6251).
34. The General Court has explained the meaning of '*administrative continuity*' in the context of the board of appeal of OHIM in the following terms: '*[...] the examination which the Board [of OHIM] must conduct is not, in principle, determined by the grounds relied on by the party who has brought the appeal. Accordingly, even if the party who has brought the appeal has not raised a specific ground of appeal, the Board of Appeal [of OHIM] is none the less bound to examine whether or not, in the light of all relevant matters of fact and of law, a new decision with the same operative part as the decision under appeal may be lawfully adopted at the time of the appeal ruling*' (see Case T-308/01, *Henkel KGaA v OHIM* [2003] ECR II-03253, paragraph 29).
35. The Board of Appeal considers that since the wording used in the REACH Regulation to define its competence is identical to the wording used for the OHIM's board of appeal in Article 62(1) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ L 11, 14.1.1994, p.1, now Article 64(1) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78, 24.3.2009, p. 1), the same concept of administrative continuity applies also between the Agency and the Board of Appeal. Consequently, the case-law of the Court of Justice of the European Union regarding the scope of the power of the OHIM's board of appeal to

examine appeal cases applies, by analogy, to the Board of Appeal of the European Chemicals Agency.

36. It follows that the Board of Appeal has the power to re-examine a case and when deciding on a case, it may exercise any power that lies within the Agency's competence. Thus, the Board of Appeal can carry out a new, full examination as to the merits of the appeal, in terms of both law and fact (see, by analogy, to that effect, Case C-29/05 P, *OHIM v Kaul* [2007] ECR I-02213, paragraphs 56 and 57).
37. Consequently, when called upon to decide on an appeal related to a registration pursuant to the REACH Regulation, the Board of Appeal is conducting an *ex parte* procedure and it may, contrary to the Agency's claims, consider all circumstances and facts applicable during the administrative procedure that led to the adoption of the contested decision. As such, and by reason of the concept of administrative continuity, the examination of the appeal by the Board of Appeal is not limited to the arguments of facts and law raised by the parties.
38. For the reasons explained above, the Board of Appeal rejects the Agency's claim that the earlier versions of the FAQs, acquired by the Board of Appeal on its own motion, should not be taken into account as evidence.
39. The Board of Appeal further observes that while the Appellant did not specifically refer to the earlier versions of the FAQs in its notice of appeal, the Appellant did refer to a FAQ that was published on the Agency's website. The Appellant made this reference by providing a hyperlink to a FAQ posted on the Agency's website at the time when the notice of appeal was lodged. According to the Appellant, the hyperlinked document provided a minimum extension of 60 days to the initial payment deadline. The Appellant's reference to a FAQ highlighted the importance of examining the earlier FAQs. This was the case also given the Agency's initial claim that '*all registration dossiers submitted before 1 October 2010 were given an extension of 30 days to pay the fee in case of the payment was not received within the initial due date*'.
40. In addition, the Board of Appeal considers that earlier FAQs may be of relevance as they may create legitimate expectations for a registrant.

(b) Other issues of admissibility to be examined

41. The Board of Appeal must also examine the Agency's objection of inadmissibility as regards certain claims it alleges the Appellant has made. This objection, together with the issue of admissibility of certain evidence submitted by the Agency after lodging the defence, is examined at paragraphs 83 to 87 and 126 to 140 below in relation to the relevant evidence and facts.

2. Content of the law relevant to the substance matter of the appeal

42. The registration procedure under the REACH Regulation is an administrative procedure. As such, it must fulfil the criteria for good administration as laid down in EU law, including in particular Article 41(1) of the Charter of Fundamental Rights of the European Union. Accordingly, the Board of Appeal must not only apply the relevant provisions of the REACH Regulation and the

Fee Regulation but also apply these provisions in light of the principle of good administration.

43. The Fee Regulation stipulates that where a registration fee has not been paid by the expiry of the initial due date, as set by the Agency, the Agency shall set a second deadline for the payment.
44. In accordance with the Fee Regulation, an extension of the initial due date does not require a request or any other action from registrants. On the contrary, the Agency must grant a second deadline on its own initiative in every case where payment has not been received by the expiry of the initial due date. The Agency has no discretion in this respect.
45. Consequently, the Fee Regulation gives registrants a clear possibility to wait with payment until the second deadline. Insofar as the Agency is concerned, a failure to pay by the initial due date is not a valid reason to reject a registration.
46. While the Fee Regulation is clear as regards the possibility of a second deadline, it does not define the length of the extension to the initial due date. This has been left to the Agency's discretion although, as defined in recital 16 to the Fee Regulation, any second deadline must be reasonable. Accordingly, for a registrant to know the extent of its obligations in law as regards the payment of a registration fee, a registrant needs not only to know the content of the relevant provisions of the Fee Regulation but also the Agency's administrative practice in applying those provisions.

3. Claims under examination

47. As stated in paragraph 23 above, the Appellant claims that its failure to pay the fee by the second deadline was due to the unclear and confusing nature of information given by the Agency. In addition, the Appellant claims that it did not receive any message in its REACH-IT message box that the *Reminder Invoice*, containing the second deadline, had been issued. The Appellant states further that not having received any message was particularly confusing, as it had received an explicit message about the availability of the *First Invoice* in REACH-IT. This had caused an expectation that the second deadline would also be notified to the Appellant in the same manner. Moreover, the Appellant claims that as a consequence of the unclear and confusing information, it was under the impression that the initial due date was always extended by a minimum of 60 days and consequently its payment on 30 August 2010 was made in good faith and that should be protected.
48. As mentioned in paragraph 25 above, the Agency claims that it took all reasonable measures to put the Appellant into a position to pay the fee on time but the Appellant disregarded the Agency's communications. The Agency states further that, if unsure about the second deadline, the Appellant should have contacted the Agency for clarification.
49. As a result of these claims, the Board of Appeal shall in principle, examine the following issues:
 - I. Whether the Appellant's failure to observe the second deadline set by the Agency for the payment of the registration fee resulted from unclear information provided by the Agency as regards the second deadline or

was due to any other potential shortcomings in notifying the second deadline;

- II. Whether the late payment of the registration fee was caused by the Appellant's inactivity in monitoring its payment obligations in a reasonably diligent and prudent manner;
- III. Whether the Appellant acted in good faith and that should be protected;
- IV. Whether the Agency was unjustified in retaining the Appellant's registration fee.

3.1 Claim as regards lack of clarity in the information provided by the Agency

50. The Appellant claims that the Agency's acts during the administrative registration procedure gave rise to its erroneous understanding of the obligations relating to the payment of the registration fee.
51. The Appellant has not, however, identified which acts on the Agency's part led to the incorrect understanding as regards the length of the second deadline. In the notice of appeal, the Appellant provided a hyperlink to a FAQ available on the Agency's website at the time the appeal was lodged. However, the Agency observed that the content of its website differed at the relevant time period and the time when the appeal was lodged.
52. Consequently, the Board of Appeal needs to examine, on the one hand, all communications provided to the Appellant individually in the course of the administrative registration procedure and, on the other hand, the communications provided to the general public, as regards the payment of the registration fee and the second deadline and its notification, in particular. However, before examining the evidence related to the notification, the Board of Appeal must address certain preliminary factual and legal questions, which includes carrying out an examination of the FAQs.

3.1.1 Preliminary factual and legal questions for examining the evidence related to the notification of the second deadline

53. The Board of Appeal shall examine the following factual and legal questions before examining the evidence related to the notification of the second deadline:
 - (a) The Agency's discretion in setting the second deadline and the use of that discretion in the FAQs;
 - (b) The relevance and legal nature of the FAQs as a source of information on administrative practice;
 - (c) The relevant time period and the contents of the relevant FAQs as evidence;
 - (d) The Agency's practice on extending the payment deadline;
 - (e) The Agency's practice in updating the FAQs;
 - (f) The admissibility of the claims related to the relevance of guidance in general;

- (g) The requirements for an administrative procedure and the principles of legal certainty and legitimate expectations; and
- (h) The means of communication chosen by the Agency.

(a) The Agency's discretion in setting the second deadline and the use of that discretion in the FAQs

- 54. As observed above, the Fee Regulation does not define the length of the second deadline. Rather, the determination of the minimum length, the maximum length and the exact length of the extension to the payment of the registration fee has been left for the Agency to decide in its administrative practice.
- 55. The Agency has used this discretion by defining its administrative practice in the FAQs. These are published on the Agency's website, and are regularly updated. The FAQs include precise instructions on the payment of the registration fee and the applicable deadlines. In fact, the Agency refers to the FAQs as a source of further instructions on payment terms and condition in invoices that are issued to registrants. By way of example, in the present case, the *First Invoice* contained a hyperlink with the following mention: '*Please, consult [payment instructions here: www.echa.europa.eu/reachit/reachit_faq_en.asp](http://www.echa.europa.eu/reachit/reachit_faq_en.asp)*.'
- 56. The legal nature of the FAQs needs to be distinguished from the REACH Guidance, which are drafted and issued in close co-operation with the stakeholders. Compared to the REACH Guidance, the legal nature of the FAQs is different and less complex as the Agency alone decides on the contents of the FAQs and their purpose is to directly inform registrants of the Agency's administrative practice.

(b) The relevance and legal nature of the FAQs as a source of information on administrative practice

- 57. An administrative body entrusted with discretion to define obligations vis-à-vis natural and legal persons may adopt, and publish in advance, detailed rules on how it uses that discretion in individual cases. However, according to the case-law of the Court of Justice of the European Union, the administrative body imposes, at the same time, a limit on the exercise of that discretion and it cannot depart from those rules in individual cases.
- 58. The European Court of Justice has held that '*[...] [i]n adopting rules of conduct and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of its aforementioned discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations [...]*' (see Case C-464/09 P, judgement of 2 December 2010, *Holland Malt BV v Commission*, paragraph 46, not yet reported).

59. In light of the case-law of the Court of Justice of the European Union, it is clear that while administrative guidance does not constitute a source of law, which would be comparable to legislation, such administrative guidance, if published, can nevertheless bind the administrative body in question.
60. For the reasons explained above, the Board of Appeal finds that where the Agency has decided to publish guidance which defines in advance the length of any extension of the payment deadline, the Agency's conduct can be confined by such guidance. Accordingly, when analysing the Agency's acts in this case as regards the notification of the second deadline to the Appellant, account must be taken of the potential limitations to the Agency's discretion that flow from its own actions.

(c) The relevant time period and the content of the relevant FAQs as evidence

61. In order to examine the factual claims and evidence in the present case, the Board of Appeal must examine what is the relevant time period. In particular, given the differences between the instructions in FAQ versions 3.0 and 2.3, the Board of Appeal must determine which FAQs were available on the Agency's website and what were the applicable instructions as regards the length of the second deadline.
62. In the notice of appeal, the Appellant referred, by proving a hyperlink, to an FAQ available on the Agency's website at the time the appeal was lodged. The FAQ that was available under that link was version 3.0. According to FAQ version 3.0, the extension to the payment deadline was 60 days.
63. In the defence, the Agency stated that FAQ version 3.0 was issued on 1 October 2010, and therefore that version had not been available to the Appellant at '*the relevant time*'. According to the Agency, the relevant time was when the *TCC Letter* was uploaded on REACH-IT on 12 July 2010 notifying the Appellant of the second deadline. Therefore, the Agency submitted as evidence FAQ version 2.3, dated 12 July 2010, and claimed that this version had been available to the Appellant at the relevant time. FAQ version 2.3 gave the following instruction to the public as regards the payment of the registration fee:

'It is important to note that in case the payment has not been made within the prescribed period (by the initial payment due date), ECHA will set a second deadline for payment. This second deadline (extended payment due date) is usually up to 30 calendar days from the initial payment due date.'
64. It needs to be noted that at the time the *First Invoice* was sent to the Appellant on 8 July 2010, FAQ version 2.3 had not yet been published. That version is dated 12 July 2010 and it could not therefore be available on the Agency's website on 8 July 2010. Similarly, on the day following the sending of the *First Invoice*, namely on 9 July 2010, when the Appellant opened the *First Invoice*, FAQ version 2.3 was not available. Rather, on the day when the *First Invoice* was issued, and when the Appellant opened that invoice, the previous FAQ version, namely version 2.2, was available on the Agency's website.
65. According to evidence submitted (Annex V to the defence), the first invoice contained the following mention: '*Please consult payment instructions here:*

www.echa.europa.eu/reach/reachit_faq_en.asp (hyperlink). This was a direct reference to the FAQ available on the Agency's website.

66. In light of the above, the Board of Appeal finds no support for the Agency's claim that FAQ version 2.3, dated 12 July 2010, should only be considered relevant in this case. On the contrary, the Board of Appeal considers that a diligent and prudent registrant would not start to plan its payment activities as late as at the time of receiving the *TCC Letter* but rather already at the time of receiving the first invoice. In fact, the Board of Appeal considers that, in practice, a diligent and prudent registrant may start to examine and plan its obligations relating to the payment of the registration fee even earlier, for instance, already at the time when the registration dossier is submitted, or even earlier than that. It remains, of course, the registrant's duty to verify the payment terms at the time of receiving the first invoice in order to plan and effect any payment in a prudent and timely manner.
67. However, it would be unreasonable to require a registrant, after having received the First Invoice with a mention '*please consult payment instructions here*', to anticipate that the Agency could subsequently change its administrative practice with a legal effect also vis-à-vis registrants to whom an invoice with such a mention has already been issued. Consequently, the Board of Appeal finds that there are no grounds for the Agency's view that the relevant time period should not extend to time before 12 July 2010, when the *TCC Letter* was uploaded to REACH-IT and when the new FAQ version, namely 2.3, was issued.
68. Thus, the Board of Appeal finds that the relevant time period starts earlier than on 12 July 2010, and in fact starts at the time when the registration dossier was submitted. The Board of Appeal is of the opinion that the relevant time period starts at the latest when the first invoice was issued on 8 July 2010 as after that time, a diligent and prudent registrant could not be expected to consult the applicable FAQ again for a potential change in the Agency's practice regarding the payment terms, unless specifically invited to do so.
69. As a result of these findings, the contents of FAQ version 2.2 are particularly relevant in this case as that version was available to the public at the relevant time. The Agency's instructions in FAQ version 2.2 as regards the second deadline differ significantly from FAQ version 2.3, as version 2.2 provides that:

'It is important to note that the Agency will establish a second deadline before the submission is rejected. The extended deadline depends on the submission type but it is a minimum of 60 days after the first dead line.'
70. In conclusion, the Board of Appeal finds that in this case, the relevant time for the Appellant to plan and organise the payment of its registration fee is the period between the end of June 2010 and the first weeks of July 2010. This is the period during which the Appellant submitted its registration dossier and downloaded the *First Invoice*.

(d) The Agency's practice on extending the payment deadline

71. In the defence, the Agency claimed that '*all registration dossiers submitted before 1 October 2010 were given an extension of 30 days to pay the fee in*

case of the payment was not received within the initial due date'. However, the Agency subsequently clarified its earlier statement and confirmed to the Board of Appeal that the Agency's initial practice was to grant an extension of minimum 60 days for the payment of the registration. According to the Agency, the '30 days rule', which was referred to in its defence, was applied only to registrations submitted in the period between 25 March 2010 and 1 October 2010.

72. The Agency's statement signifies that at the start of the REACH registration process, the Agency's administrative practice was to issue a minimum of 60 days extension for the payment of every registration fee not received by the first deadline. According to the Agency, it started to follow the new practice only as of 25 March 2010 when it applied the significantly shorter '30 days rule'.
73. It follows from the foregoing that not all registration dossiers submitted before 1 October 2010 were given the shorter 30 days extension to the payment deadline. Rather, the Agency applied the shorter '30 days rule' only during a relatively short period of six months and one week. Outside this time frame, the Agency's practice was to follow the longer 60 days extension rule.

(e) The Agency's practice in updating the FAQs

74. In light of the above findings regarding the dates on which the Agency changed its administrative practice and published the updated versions of the FAQs, it is evident that the Agency's practice did not at all times correspond to the contents of the applicable FAQs.
75. According to the Agency's statements and evidence submitted, the Agency chose to follow a new practice for several months without communicating it to the public in the FAQs. This was notwithstanding the fact that the Agency identified the FAQs as a source of payment instructions in invoices issued to registrants.
76. More specifically, according to the Agency's statements, it followed the rule of a minimum 60 days extension only until 25 March 2010, while according to the FAQs, the rule of a minimum of 60 days applied until 12 July 2010. In fact, according to the FAQs, the '30 days rule' applied only during a period of two and half month since FAQs version 2.3 is dated 12 July 2010 and the subsequent FAQs version, 3.0, was issued on 1 October 2010.
77. In the defence, the Agency stated that its policy has been to update the FAQs *'prior to every update of the REACH-IT system itself, taking into consideration the new functionalities'*. Subsequently, the Agency specified that *'while ECHA continuously tracks changes to existing practices, updates to the FAQ and ECHA website in general can only been done every other month, changing several pieces of information at the same time. For this reasons it may take several weeks until a policy change is reflected in an FAQ.'*
78. However, according to evidence submitted in this case, a longer time period elapsed between the change in the Agency's practice and the update of the FAQs than the Agency states. The Agency changed its administrative practice on the length of the extension already on 25 March 2010 but it updated the FAQ document only several months later, namely on 12 July 2010 when FAQ version 2.3 was published. Consequently, the Agency started to follow a much

stricter rule for the second deadline already several months before it updated its FAQs.

79. In this context, it is also relevant to note that according to the Agency, it started to review its existing policies on the payment deadline already in October 2009 but '*due to complex technical issues with REACH-IT*', the policy was changed only on 25 March 2010.
80. The Board of Appeal finds that, despite the long planning process, the Agency had not acted responsibly in allowing over three months to elapse before the FAQ was updated on the Agency's website. This is particularly the case given the significance of the change in the Agency's administrative practice for registrants, and the fact that the change could lead to the loss of rights and have serious financial implications for registrants.
81. Moreover, it must also be taken into account that the Agency has not identified any specific measures that were taken to inform registrants affected by the new rule while the FAQ had not yet been updated. According to evidence submitted, none of the Agency's communications to the Appellant uploaded into REACH-IT contained any reference to the recent change in the Agency's practice on the payment deadline or to the fact that in this particular case, the rule for calculating the second deadline significantly differed from both the rule stated in the publicly available FAQ and the practice the Agency had followed from the start of the REACH registration period. This evidence is discussed in detail in Section 3.1.2 below.
82. The Board of Appeal further observes that the principle of good administration requires an administrative body to keep any published guidance up-to-date. This requirement does not necessarily prevent an administrative body from changing its practice before updating the guidance available for the public provided that it communicates any changes to those affected by them. Thus, to safeguard the rights of persons affected by the change before the publication of the update, the administrative body must ensure that the necessary preventive measures are taken so that any changes in its practice are communicated in a clear and accurate manner to those affected by it.

(f) Admissibility of the claims related to the relevance of guidance in general

83. In its submission dated 22 July 2011, the Agency claims that the Appellant's statement in the submission dated 27 June 2011 constitutes a new plea of law within the meaning of Article 12 of the Rules of the Procedure and, as such, it should not be taken into account by the Board of Appeal.
84. The Appellant's statement to which the Agency refers relates to the earlier versions of the FAQs. According to the Appellant, these earlier versions of the FAQs provide that the Agency '*has to give the registrant minimal second deadline of 60 days after the initial payment date*'. According to the Agency, the Appellant claims by this statement that the '*FAQ should take precedence over ECHA direct communications with the registrant*'. According to the Agency, this claim constitutes a new plea of law, and as such, should be inadmissible.
85. The Board of Appeal considers that the Appellant's statement to which the Agency refers is purely related to the contents of an earlier FAQ, which the Board of Appeal notified to the parties. As such, it merely describes the rules

set out in the FAQ and is thus a mere statement of fact expressed in support of the Appellant's claim which was raised already in the notice of appeal. Consequently, the Appellant's statement does not constitute a plea of law.

86. The Board of Appeal further considers that even if the Appellant had claimed that the FAQs should take precedence over the Agency's direct communications, such a statement would not constitute a new plea of law. It would amount to a legal argument supporting the Appellant's claim, raised already in its notice of appeal, that late payment was due to the unclear and confusing nature of the information given by the Agency, in particular as regards '*which extended deadline was applicable to the registration*'.
87. It follows that the Board of Appeal finds no support for the Agency's objection of inadmissibility. The Board of Appeal further underlines that in any *ex parte* proceedings, the parties' arguments do not in any way restrict the Board of Appeal from reaching a certain conclusion on the contents of the law (see paragraphs 37 above).

(g) The requirements for an administrative procedure and the principles of legal certainty and legitimate expectations

88. It is the duty of every person to know the obligations imposed by law. However, at the same time, the Court of Justice of the European Union has repeatedly held that EU legislation must be certain and its application foreseeable by those subject to it (see Case C-17/01 *Finanzamt Sulingen v Walter Sudholz* [2004] ECR I-4243, paragraph 34). The opinion of the European Court of Justice reflects in this respect the principle of legal certainty.
89. According to the European Court of Justice, the requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations imposed on them (see Case C-17/01 *Finanzamt Sulingen v Walter Sudholz*, cited at paragraph 88 above, paragraph 34).
90. In the present case, for the Appellant to have known precisely the scope of its legal obligations, it was not sufficient for it to know only the content of the REACH Regulation and the Fee Regulation but also the Agency's practice in implementing them. Consequently, the issue to be analysed is whether the Agency's conduct was responsible for the Appellant's understanding that the second deadline was calculated by using the rule of 'minimum 60 days' and whether this undertaking should be protected by the principle of legitimate expectations.
91. It must also be taken into account that the registration procedure under the REACH Regulation constitutes an administrative procedure. It follows that the Agency's actions on the issuing of the second deadline and any communications related to that must observe the principles of good administration and legitimate expectations, including the requirement of clarity. This means that information on the second deadline must be given in a way that enables a diligent and prudent registrant, exercising a reasonable level of due care, not only to understand precisely the scope of its obligations in advance but also the consequences of a potential failure to meet those

obligations. This is a prerequisite for the careful and proactive planning of business activities, including the payment of the registration fee.

92. For the second deadline to have legal effects vis-à-vis the Appellant it must have been notified in a manner that fulfils the requirements of good administration and was capable of creating legal effects in the specific circumstances of the case.
93. When examining whether the notification of the second deadline in this case fulfils these requirements, it is necessary also to take into account the potential consequences of a failure to pay the registration fee on time. In this case, such consequences would include the rejection of the Appellant's registration, which in turn could have prevented the Appellant from manufacturing or placing the substance on the market in the EU. Therefore, the serious nature of the potential consequences of not paying the registration fee on time increases the importance of clear and accurate notification of the second deadline.
94. Consequently, the Board of Appeal must examine whether, in light of evidence submitted on the Agency's individual communications with the Appellant, the Agency has fulfilled its duty to notify the second deadline to the Appellant in a clear, precise and accurate manner. This examination must take account of any potential limitations flowing from the principle of legitimate expectations, as created by the FAQs, as discussed at paragraphs 57 to 60 above.

(h) Means of communication chosen by the Agency

95. When analysing the individual communications sent by the Agency to the Appellant and the obligations of the registrants and the Agency in the registration procedure, certain fundamental elements of the registration system under the REACH Regulation need to be taken into account. These include, in particular, the following:
 - (a) The registration process under the REACH Regulation is premised on REACH-IT, a tailored IT program, which is the primary means of communication between registrants and the Agency. The Agency has decided both on the functions of REACH-IT and the contents of individual communications that are notified to registrants via REACH-IT;
 - (b) The Agency has full discretion as regards the content of the general communications and instructions, including the FAQs, given to registrants on the Agency's website;
 - (c) The use of REACH-IT as a means of communication is obligatory for all registrants. In practice, the possibilities for personal advice from the Agency's officials are somewhat limited as, according to evidence submitted, the Agency's communications do not indicate any contact person. Rather, registrants are requested to contact the Agency by using an electronic web form on the Agency's website and to raise any questions through the Agency's Helpdesk.
96. Thus, the possibilities for registrants to communicate with the Agency are defined by the latter, and in practice, such possibilities are somewhat limited. This must be taken into account when analysing the communications that took place between the Agency and the Appellant in this case.

3.1.2 Examination of evidence related to the notification of the second deadline

97. The Agency has submitted as evidence the following copies of communications sent to the Appellant by the Agency in relation to the payment and notification of the second deadline:
- a. The *First Invoice* (Annex V to the defence: copy of the INVOICE no. 10003013 of 8 July 2010, addressed to the Appellant, to which the Agency refers as the original invoice of 8 July 2010);
 - b. The *TCC Letter* (Annex VI to the defence: letter of 12 July 2010);
 - c. The *Reminder Invoice* (Annex II to the defence: copy of the INVOICE no. 10003013 of 8 July 2010, addressed to the Appellant, to which the Agency refers as the reminder invoice of 22 July 2010);
 - d. The *Reminder Message*: a copy of the REACH-IT automatic message (submitted as part of Annex VII to the defence and also separately as Annex QII to the Agency's reply dated 29 April 2010);
 - e. The *Invoice Reminder* (Annex RI to the Agency's reply dated 30 May 2011: copy of the INVOICE REMINDER dated 22 July 2010).
98. This evidence will be discussed below.

(a) *The First Invoice*

99. The *First Invoice* was issued by the Agency on 8 July 2010 when it made the invoice available to the Appellant in REACH-IT. The Appellant downloaded the *First Invoice* on the following day. The invoice included an instruction with the following text '*Please consult payment instructions here: www.echa.europa.eu/reachit_faq_en.asp*'. In addition to this text, the invoice contained a hyperlink to a FAQ published on the Agency's website.
100. At the time the Appellant downloaded the *First Invoice* on 9 July 2010, FAQ version 2.2 was available on the Agency's website according to the date of publication (see paragraph 64 above). As discussed above, FAQ version 2.2 provided that the initial due date was to be extended by a minimum of 60 days. However, as also discussed above, by 9 July 2010 the Agency had already changed its practice as regards the length of the second deadline to the '*30 days rule*' although the applicable FAQs had not been updated and the invoice did not otherwise inform the Appellant that the second deadline would be calculated using the '*30 days rule*'.
101. As discussed in detail above (see paragraphs 57 to 60 above), an administrative guidance, such as the FAQs, can constitute a precise assurance by the administrative body as to the course of conduct that it follows, and as such, it can create legitimate expectations. This applies also in the case of registrants that have submitted registration dossiers pursuant to the REACH Regulation, particularly where the registrant has carefully reviewed the payment terms at the time of receiving the first invoice.

(b) *The TCC Letter*

102. According to the Agency, its regular practice was to notify the second deadline to registrants in a TCC letter. This course of action was followed also in the present case. The *TCC Letter* addressed to the Appellant is dated 12 July 2010, which is also the date when the Agency uploaded the letter to REACH-IT. The Appellant does not dispute having downloaded the *TCC Letter* on 13 July 2010.
103. Taking into account the significance that the Agency ascribes to the *TCC Letter*, it is important to examine carefully whether the *TCC Letter* sent to the Appellant notified the second deadline in a clear, precise and accurate manner, having regard to all circumstances of the case, including the information in the FAQ published on the Agency's website.
104. The relevant parts of the *TCC Letter* sent to the Appellant read as follows:
- [...]*
- In addition, the required fee is not confirmed as having been received. If you have already paid the fee by the due date, it could be that the transaction is still in the process of being treated. In that case there is no need for further action. Please note that in case the required fee is not confirmed as having been received by the due date, ECHA's invoicing system automatically sends a separate invoice reminder indicating a new extended due date.*
- You are requested to pay the fee by 21/08/2010 and submit all the information required to ECHA as an update of your first submission by the technical completeness deadline 25/11/2010.*
- [...]*
105. When analysing the content of the *TCC Letter* in this case, the Board of Appeal finds that several details in that letter are confusing and unclear. First, the *TCC Letter* does not refer to either of the two dates as being the second deadline after which no extension would be given. The *TCC Letter* merely identifies 21 August 2010 as the payment deadline, stating that '*you are requested to pay the fee by 21 August 2010 [...]*'. However, the letter fails to indicate whether this is the initial due date or the second deadline.
106. This is an important consideration as the *TCC Letter* was made available to the Appellant only five days after the submission of the registration dossier and thus well before the expiry of the initial due date specified in the *First Invoice*. Taking into account the early timing of the *TCC Letter*, it could therefore be unclear as to which deadline was referred in the letter. Therefore, the contents of the *TCC Letter* do not support the Agency's claim that the second deadline was notified in a clear manner to the Appellant in the *TCC Letter*.
107. At the same time, the *TCC Letter* announced in a clear and precise manner that if no payment were made by the initial due date, the Agency would send a 'separate invoice reminder' with the second deadline. More specifically, the *TCC Letter* stated that '*[...] in case the required fee is not confirmed as having been received by the due date, ECHA's invoicing system automatically sends a separate invoice reminder indicating a new extended due date.*' However, and

as noted above, the *TCC Letter* did not indicate that the second deadline was being notified by that very letter and not separately later.

108. Secondly, the Agency did not inform the Appellant in the *TCC Letter* that the second deadline was calculated according to the new administrative practice, the '30 days rule'. As discussed above, this new practice differed significantly from the rule provided in the FAQ on the Agency's website at the time of the *First Invoice*, which rule had been used since the start of the REACH registration period until 25 March 2010.
109. Rather, it is clear that the *TCC Letter* contains no reference to the change in the administrative practice. Similarly, the *TCC Letter* did not inform the Appellant that the FAQ available on the Agency's website, to which the *First Invoice* referred, was not up-to-date. Thus, the Agency did not communicate in any manner that the rule on the length of the extension to the payment deadline was in this case new and differed from the instructions available in the FAQ.
110. In light of the above considerations, the Board of Appeal finds that in the present case the contents of the *TCC Letter* failed to meet the clarity, accuracy and precision required from a communication notifying the second deadline, having regard to the specific circumstances of the case and the matter in question.

(c) *The Reminder Invoice*

111. As discussed above at paragraph 104, the *TCC Letter* stated that '[...] ECHA's invoicing system automatically sends a separate invoice reminder indicating a new extended due date'. In its submission dated 30 May 2011, and in reply to a specific question raised by the Board of Appeal, the Agency clarified that the document referred to as the *invoice reminder* in the *TCC Letter* is the same document as the *Reminder Invoice* that was attached as Annex II to the defence. Thus, in accordance with the Agency's clarifications, the terms *Reminder Invoice* and *Invoice Reminder* are taken to refer to the document submitted as Annex II to the defence.
112. In reply to questions raised by the Board of Appeal, the Agency explained that no 'separate reminder invoice' was actually issued to the Appellant. Rather, the 'separate invoice reminder' referred to in the *TCC Letter*, and submitted as Annex II to the defence, was in fact a course of IT actions that automatically and dynamically changed the contents of the *First Invoice* (Annex V to the defence), which had been sent via REACH-IT already on 8 July 2010. In other words, the Agency did not issue any new document, but following a set of automatic IT actions, the contents of the *First Invoice* were updated and thus turned into the *Reminder Invoice*. Thus, the *Reminder Invoice* was in fact an amended version of the *First Invoice*, which had been downloaded by the Appellant already on 9 July 2010.
113. In light of the above explanations, the Board of Appeal finds that the *Reminder Invoice* and the *First Invoice* (Annexes II and V to the defence) cannot be considered as two different documents but rather as two different versions of one and the same document. Both Annexes II and V to the defence bear the date of 8 July 2010, although only the *First Invoice* was issued on that date,

and the *Reminder Invoice* was created much later and contained additional information inserted as an automatic IT function by REACH-IT.

114. Thus, it seems that the Agency's practice was, rather than issuing a separate, new invoice reminder, to add the second deadline to the first invoice by including the following standard text:

'Original due date has been missed and you have the extended due date to pay. However if the payment has already been made, it could be that it is in the process of being dealt with.'
115. When making these alterations to the earlier document, the Agency did not, however, change any of the identification elements of that document. Thus, after the automatic set of IT actions, all information in the top-right corner of the document remained the same, including in particular the title, the date and the invoice number. The Board of Appeal finds that there is nothing in these identification elements that would have indicated that this was the '*separate reminder invoice*' referred to in the *TCC Letter* rather than the *First Invoice*, and that this document contained the second deadline after which no extension could be given.
116. The Agency's practice to change the content of the document that has been already notified, while retaining the earlier document date, seems rather exceptional and not something that could reasonably be expected in an administrative practice. In practice, this amounts to the back dating of documents.
117. The Board of Appeal find that every administrative act should clearly indicate the date when it has been adopted, and when, following proper notification, it creates legal effects. For this reason, the Board of Appeal considers that any practice of not correctly indicating the date of an administrative act is questionable. The Board of Appeal further observes that the principles of legal certainty and good administration require an administrative body to always clearly indicate the date of administrative actions that may have legal effect vis-à-vis natural and legal persons.
118. In this context, it is necessary to note that according to the parties, the Appellant received a separate message in its REACH-IT message box for the *First Invoice*. However, according to the Appellant, it did not receive a similar message for the *Reminder Invoice*.
119. When analysing the evidence submitted by the Agency, in particular the log of the Appellant's registration submission, there is no indication of a *Reminder Message* having been uploaded into or downloaded from REACH-IT. Moreover, the evidence contains no indication of the automatic and dynamic IT-action having changed the contents of the *First Invoice*. In contrast, the uploading of the *First Invoice* is clearly indicated as having taken place on 8 July 2010.
120. Furthermore, the Agency chose a rather exceptional practice for notifying the *Reminder Invoice* to the Appellant. This document was notified via REACH-IT by sending, not the *Reminder Invoice* itself, but an automatic *Reminder Message* (the Agency's evidence Annex Q II) to the Appellant. By the *Reminder Message*, the Agency requested the Appellant to check whether the Agency had issued a new due date for the payment of the registration fee. The contents of the *Reminder Message* are discussed in detail below.

(d) *The Reminder Message*

121. According to the Agency, in addition to the *First Invoice* and the *Reminder Invoice*, an automatic *Reminder Message* was sent to the Appellant via REACH-IT. This document is dated 23 July 2010. However, the Appellant contests the receipt of the *Reminder Message*. In fact, in the notice of appeal, the Appellant claims that '*[...] this reminder was read by EPZ only in the end of September, because EPZ did not receive a message of the reminding invoice in the message box*'.
122. Without examining whether or not the message was actually notified to the Appellant via REACH-IT with legal effects, the Board of Appeal observes that the *Reminder Message* contains neither the date of the second deadline nor any mention that the second deadline was already set in the *TCC Letter* of 12 July 2010. Rather, the *Reminder Message* reads at relevant parts as follows:

'Our records show that the invoice mentioned below has not been paid by the original due date and therefore you now have until the extended due date to pay. If you have already paid [...] In either case we request you that you check the on line invoice to see the progress of the payment or any updated due date that may have been issued. If you have any further questions, please contact the Agency immediately.'
123. Thus, by the *Reminder Message*, rather than notifying the second deadline, the Agency used standard text to request the Appellant to check whether the Agency had issued a new online invoice.
124. Consequently, the Board of Appeal must decide whether, by requesting the Appellant to check REACH-IT for a new updated invoice, the Agency could discharge its own duty to notify in a clear, precise and accurate manner the second deadline to the Appellant.
125. In light of the above considerations, the Board of Appeal finds that by simply requesting in the *Reminder Message* the Appellant to check for a new updated invoice, the Agency has not fulfilled the requirements of clear, accurate and precise notification of the second deadline. In reaching this conclusion, the Board of Appeal has considered in particular the serious consequences, both financial and commercial that flow from the failure to observe the deadline, and the importance of such consequences to operators subject to the REACH registration obligation. The Board of Appeal has also had regard to the fact that, in this particular case, the Agency had changed its administrative practice as regards the length of the second deadline without, however, having updated the FAQ or otherwise having informed the Appellant of the change in its practice.

(e) *The Invoice Reminder and its admissibility as evidence*

126. In addition to the communications discussed above, the Agency also submitted as evidence a further communication addressed to the Appellant, namely the *Invoice Reminder*. According to the Agency, this message was uploaded into REACH-IT on 6 August 2010.
127. The Agency submitted a part of the *Invoice Reminder* on 29 April 2011 and upon request of the Board of Appeal, the entire document on 30 May 2011. Given that the *Invoice Reminder* was not submitted as part of the Agency's defence, the Board of Appeal must examine whether the delay in submitting this document is duly justified within the meaning of Article 12(1) of the Rules of Procedure, and is thus admissible as evidence in the present proceedings.
128. At the time of the defence, the Agency submitted as evidence the following documents, which relate to the notification of the payment deadlines in this case: the *First Invoice* (Annex V to the defence), the *TCC Letter* (Annex VI to the defence), the *Reminder Message* (Annex VII to the defence) and the *Reminder Invoice* (Annex II to the defence).
129. In its reply of 29 April 2011 to questions raised by the Board of Appeal, the Agency had inserted a part of a document within the text of its reply. The Board of Appeal was able to infer from this that the contents did not correspond to documents the Agency had lodged earlier in these proceedings, and thus the Board of Appeal concluded that the part of the document inserted within the text had not been submitted to the Board of Appeal earlier.
130. Moreover, the inserted part of the document did not relate to the text of the Agency's reply, as the text referred and discussed documents that had been submitted to the Board of Appeal already earlier, namely Annexes II and V to the defence.
131. In addition, the Board of Appeal observed that the document included elements that were missing or differed from Annexes II and V to the defence, which were discussed in the Agency's reply. Importantly, the essential document identification elements of the partial document differed from Annexes II and V to the defence, including the name ('*REMINDER INVOICE*' as opposed to '*INVOICE*' used in Annexes II and V) and the date (22 July 2010 as opposed to 8 July 2010).
132. As a result of these observations on the nature of the document and the differences described above, the Board of Appeal requested the Agency to provide explanations on the document itself and reasons for its inclusion in the Agency's reply given that the reply itself did not address the document. The Board of Appeal also requested the Agency to submit the document in its entirety, as this had not been done earlier, and to provide justifications for its late submission.
133. In its reply of 30 May 2011, the Agency clarified that the document was a new piece of evidence and different from the documents discussed in the Agency's reply of 29 April 2011. In addition, the Agency informed the Board of Appeal that the document related to a change in the Agency's practice that took place on 6 August 2010. According to the Agency, it introduced on that date a new practice of making available a separate new document in REACH-IT.

134. In its reply, the Agency claimed that while the format of the *Invoice Reminder* may have differed from the *Reminder Invoice* (Annex II to the defence) submitted earlier, the contents of these two communications are the same. The Agency further explained that the late submission of the *Invoice Reminder* was due to the similarity of the documents. Notwithstanding this, the Agency nevertheless found it '*more correct*' to submit both versions to the Board of Appeal.
135. When examining the justification for the late submission of the new evidence (*Invoice Reminder*), the Board of Appeal must take into account that the specific document was neither submitted as evidence at the time of the defence, nor provided to the Board of Appeal following its request to clarify how the Agency had informed the Appellant of the second deadline. Notwithstanding this explicit request, the Agency submitted this document only subsequently and clarified in its reply of 30 May 2011 that this document (*Invoice Reminder*) had been uploaded and made available to the Appellant via REACH-IT on 6 August 2010.
136. As a further and related remark, the Board of Appeal notes that the *Invoice Reminder* has also been back dated. According to the Agency's explanations, this document was created and uploaded into REACH-IT on 6 August 2010 but the document itself bears the date of 22 July 2010.
137. When comparing the documents in question, the Board of Appeal cannot find support for the Agency's claim that the contents of these documents would have been the same. As explained above, for instance the title and the date of these two documents, which are both essential elements, are clearly different.
138. In light of the above considerations, the Board of Appeal finds that none of the reasons provided by the Agency for the late submission of the *Invoice Reminder* are justified. In fact, the Agency has not provided an explanation for the fact that the *Invoice Reminder* was not provided to the Board of Appeal earlier, namely at the time of the defence or even in reply to Board of Appeal's explicit request to clarify the manner in which the second deadline was notified to the Appellant. Similarly, the Agency provided no proper explanation as to the reasons for the *Invoice Reminder* having been partially inserted into the Agency's reply of 29 April 2011, while the text of that reply addressed different documents (Annex II and VII to the defence), which had moreover already been submitted earlier as evidence to the Board of Appeal.
139. Further, it must also be noted that following the submission of the Agency's defence on 14 April 2011, the Board of Appeal invited the Agency to provide all the relevant correspondence with the Appellant. The Agency did not include the *Invoice Reminder* as part of its communications with the Appellant that it submitted as evidence to the Board of Appeal. Neither did the Agency explain to the Board of Appeal that by including the *Invoice Reminder* message in the set of communications with registrants, the Agency's invoicing system had been significantly improved on 6 August 2010.
140. For the reasons described above, the Board of Appeal concludes that there is no justification within the meaning of Article 12(1) the Rules of Procedure for the late submission of the *Invoice Reminder*. Consequently, the *Invoice Reminder* is deemed to be inadmissible and shall not be taken into account by the Board of Appeal.

3.1.3 Findings of the Board of Appeal on the facts and evidence related to the notification of the second deadline

141. When analysing the contents of the individual communications addressed to the Appellant, the Board of Appeal comes to the conclusion that these individual communications do not fulfil the requirements of clear, accurate and precise notification of the second deadline as required by the principle of good administration. In reaching this conclusion, the Board of Appeal took into account in particular the importance of the second deadline and the special circumstances of this case. The reasons for the Board of Appeal's finding are the following.
142. It is the Agency's duty to notify the second deadline in a clear, precise and accurate manner. In examining the acts related to the notification, the Board of Appeal took into account the Agency's communications that had been provided individually to the Appellant as well as those available to the public in general, in particular the FAQs.
143. The Agency had rightly decided that the second deadline needs to be notified not only once but several times to registrants. However, in light of the evidence in this case, none of the Agency's individual communications notifying the second deadline (*TCC Letter*, *Invoice Reminder*, and *Reminder Message*) fulfils as such the requirements of clear, precise and accurate notification.
144. The contents of the *TCC Letter* were confusing. It was sent to the Appellant only five days after the submission of the registration dossier but well before the first payment deadline. Notwithstanding this, the *TCC Letter* already contained the second deadline but gave no indication that the date indicated was actually the second deadline after which no extension would be given. At the same time, the *TCC Letter* also stated that in case no payment were made by the first due date, a separate invoice reminder with the second deadline would be automatically sent via REACH-IT. This statement can be seen as misleading as at that time no separate invoice was actually sent via REACH-IT. Rather, following a set of automatic and dynamic IT actions, the contents of the *First Invoice* were amended.
145. The Board of Appeal also finds that this confusion was added to by the fact that when the automatic and dynamic IT actions took place amending the contents of the *First Invoice*, the identification elements of the invoice, including the date, remained the same. Consequently, the *Reminder Invoice* (submitted as Annex II to the defence) was not a new separate document but rather an updated version of the *First Invoice* with the same identification elements, including the title and the date.
146. The *Reminder Message*, which was sent following a set of automatic IT actions in REACH-IT, did not contain the date of the second deadline at all. Rather, it merely requested the Appellant to check REACH-IT to see whether the Agency had issued a new invoice. Thus by its request, rather than clearly notifying that the second deadline had been issued and providing the date thereof, the Agency in practice delegated its duty to notify to the Appellant.
147. The Board of Appeal finds that the duty to notify the second deadline rests with the Agency and this duty cannot be delegated to registrants themselves. This is particularly the case given that the on-line invoice referred to in the *Reminder Message* was not a new, separate invoice, but rather the *First Invoice*, with, confusingly, the same title and the date, in which some contents were changed.

148. In addition, according to evidence submitted by the Agency, the *First Invoice*, which is in practice the most important document for the diligent and prudent registrant proactively planning its payments, contained a link to payment instructions available on the Agency's website. These instructions were not up to date and inaccurately provided that the extension of the payment deadline would be a minimum of 60 days.
149. The Board of Appeal is also of the opinion that in any administrative practice, any shortcomings in the quality of communication, which can give rise to errors, cannot be compensated by the number of messages if none of the individual messages can, as such, fulfil the requirements of clear, precise and accurate notification.
150. In the present case, the requirements for clear, precise and accurate notification were even stricter than in normal circumstances given the recent and significant change in the Agency's practice regarding the length of the extension. This is also the case given that during the relevant time period, FAQ version 2.2, which was available on the Agency's website, stated that the length of the second deadline would be a minimum of 60 days.
151. In the light of the above considerations, and in particular taking into account the financial significance of the matter as well as the Agency's delayed actions in updating the FAQ, the Board of Appeal cannot rule out that, as a consequence of incorrect information given by the Agency, even a diligent and reasonably prudent registrant could have mistaken that the rule of minimum 60 days of extension applied also in this individual case. This finding is based in particular on the consideration that the Appellant was one of the registrants affected by the new practice at the time when the FAQ had not yet been updated, and no measures were taken in the individual correspondence with the Appellant to prevent confusion.
152. The Appellant has contested the receipt of the *Reminder Message* and the *Reminder Invoice*. The Board of Appeal is of the opinion however that it would have reached the same conclusion even if the *Reminder Message* and the *Reminder Invoice* had been available to the Appellant. Accordingly, whether or not these messages were actually received by the Appellant is not in any way decisive. The Appellant's claims regarding the receipt and the time of opening of these two messages do not therefore need to be examined.

3.1.4. Findings of the Board of Appeal on the claimed lack of clarity

153. The REACH Regulation lays down specific duties and obligations on manufacturers, importers, and downstream users of substances. The REACH Regulation is based on a principle that industry should manufacture, import or use substances or place them on the market with such responsibility and care as may be required to ensure that under reasonably foreseeable conditions, human health and the environment are not adversely affected. To this effect, manufacturers and importers shall fulfil their duties in relation to registration.
154. In practice, all obligations laid down by the REACH Regulation on manufacturers, importers, and downstream users imply a duty to carefully and regularly monitor any potential changes, not only in their relevant activities related to chemical substances, but also to monitor regularly any potential

changes in legal rules or administrative practices, which may have an impact on their obligations set by the REACH Regulation, in particular in relation to the content of respective registration dossiers. This requires regular monitoring of the general communications published on the Agency's website.

155. In addition, the REACH Regulation also imposes obligations on manufacturers, importers and downstream users to actively communicate within the supply chain. Thus, the obligations set by the REACH Regulation on the manufacturers, importers and downstream users are not minor either in their quantity or importance.
156. As a counterpart to the extent and significance of these obligations, the legitimacy of these obligations requires that all activities of the Agency fulfil the requirements set by the principle of good administration, including in particular the requirement of clarity and accuracy as regards any information provided by the Agency to those subject to these obligations.
157. According to the facts of this case, on 25 March 2010 the Agency changed its administrative practice regarding the length of the extension to the second deadline for the payment of the registration fee. Such a change, which can have potentially significant financial consequences, should always be communicated promptly and in a particularly clear manner. Also, when communicating in any individual case affected by a change in the administrative practice, the Agency must take into account that publicly available general instructions, which contain a different rule, may cause mistakes for registrants. Therefore, all necessary preventive measures should be taken, for instance by drawing particular attention to the change in administrative practice.
158. The Board of Appeal is of the opinion that given the significance of the change in the Agency's practice, the Agency should have updated the FAQ on the payment instructions sooner and not waited over three months for this. This is particularly the case given that the change in the Agency's practice was such that it could give rise to mistakes, and consequently lead to the loss of rights and significant financial consequences.
159. Further, it must be taken into account that, according to evidence submitted in this case, the Agency took no measures to prevent any potential confusion that may have resulted from the FAQs that was no longer up-to-date. On the contrary, according to the evidence in this case, even the Agency's individual communications with the Appellant were not clear, precise and accurate. In addition, the Agency practice included IT actions that led to the back dating of documents, a practice which the Board of Appeal finds as such questionable. As discussed above, the date of every administrative act must be recorded in a precise and accurate manner.
160. The Agency argued that its implementation of duties pursuant to the Fee Regulation, such as the notification of the second deadline in the present case, prevails over any FAQs. However, given the various shortcomings in the notification of the second deadline in the present case, it is clear that the implementation of the Agency's duties cannot prevail over the legitimate expectations created by the precise assurance given in the FAQs, which as discussed above, was referred to as a source for payment instructions in the *First Invoice* sent to the Appellant.

161. The Agency further argued that the Fee Regulation leaves no discretion for it but to reject a registration and not to reimburse the related fee in case of non-payment. However, the Board of Appeal finds that the obligation to reject the registration and not to refund the fee not does apply in a case where the Agency has failed to notify the second deadline in a clear, precise and accurate manner. In this respect, it must also be noted that the Fee Regulation has left it to the Agency's discretion to define the length of the extension to the initial due date. Similarly, the Agency has defined the manner in which payment terms are communicated in individual communications.
162. Furthermore, the Agency claimed that it took all reasonable measures to put the Appellant in a position to pay the fee on time. However, the Board of Appeal finds that that was clearly not the case. As explained above, the shortcomings in communicating in a clear, precise and accurate manner both individually with the Appellant as well as with the public in general, are, taken together, such that even a diligent and reasonably prudent registrant exercising a reasonable level of due care could have been mistaken on the correct time of the payment.
163. Moreover, the Agency claimed that the Appellant's failure to pay the fee in due time was only a result of the Appellant's inactivity. In this respect, the Board of Appeal finds that every registrant has the duty to act in a diligent and prudent manner when fulfilling obligations pursuant to the REACH Regulation. The Board of Appeal also finds that it is the registrant's duty to contact the Agency in the event of any confusion as regards the Agency's practice or the individual registrant's obligations. At the same time, the Board of Appeal stresses that the registrant's duties do not discharge the Agency from its obligation to notify the second deadline in a clear, precise and accurate manner.
164. When analysing the Appellant's obligations in this specific case, it must, however, also be taken into account that if the Agency had applied the rule in FAQ version 2.2, which was available on the Agency's website at the time of the *First Invoice* and importantly was referred to in that message as a source of payment instructions, the earliest date for the second deadline would have been 22 September 2010.
165. In light of the above considerations and findings, the Board of Appeal is of the opinion that any possible inactivity on the Appellant's part to seek further information during the 60-day period provided by FAQ version 2.2. does not change the conclusion reached by the Board of Appeal.
166. As explained above, the Board of Appeal considers that the circumstances of this case have been such that even a diligent and prudent registrant exercising a reasonable level of due care could have been mistaken as to the length of the second deadline and the correct time of payment. In light of these findings, the Board of Appeal need not examine further the Agency's claim that the Appellant's failure to pay the fee in due time was caused by the Appellant's claimed inactivity.

4. Other claims under examination

167. The appeal is successful on grounds of the claimed lack of clarity in the information given by the Agency. Therefore, it is not necessary to examine the

remaining grounds, namely the claimed good faith in paying the fee and the claim of the Agency having unduly retained the payment.

5. Conclusion

168. Considering the shortcomings in the Agency's communications, the Board of Appeal concludes that in the present case the second deadline was not notified to the Appellant in a clear, precise and accurate manner as required by the principle of good administration. In reaching this conclusion, the Board of Appeal has had regard to the special circumstances of the case, particularly the legitimate expectations flowing from FAQ version 2.2 and from the fact that the Agency's practice was, since the start of the REACH registration process, to grant an extension of a minimum of 60 days.
169. Due to these shortcomings in the notification of the second deadline, it cannot be excluded that the Appellant's failure to observe the second deadline issued by the Agency resulted directly from the lack of clarity in information given by the Agency as regards the second deadline. This is particularly the case given that the Agency had chosen to apply a new, stricter rule in the Appellant's case despite the fact that at the time of the *first invoice*, the Agency's payment instructions in the FAQ defined the length of the deadline as a minimum of 60 days.
170. The registration procedure under the REACH Regulation is an administrative procedure, which must satisfy the criteria set for good administration in EU law, including in particular the general principles of law and Article 41 of the Charter of Fundamental Rights of the European Union. The Board of Appeal finds that the Agency's acts in this case do not meet the requirements set for good administration, particularly as regards the requirement of clarity.
171. For the above reasons, the Board of Appeal annuls the contested decision insofar as the Agency decided not to refund the registration fee, as sought by the Appellant.

6. Refund of the appeal fee

172. In accordance with Article 10(4) of the Fee Regulation, the appeal fee shall be refunded if the appeal is decided in favour of an appellant.
173. Since the Board of Appeal decided the appeal in favour of the Appellant in this case, the appeal fee shall be refunded on that basis.

ORDER

On those grounds,

THE BOARD OF APPEAL

hereby:

- 1. Annuls the contested decision in so far as it decides that the Agency will not reimburse any fee received for the Appellant's registration.**
- 2. Orders the Agency to refund the registration fee to the Appellant.**
- 3. Orders the refund of the appeal fee.**

Mercedes ORTUÑO
Chairman of the Board of Appeal

Sari HAUKKA
Registrar of the Board of Appeal