

## **SUMMARY OF DECISIONS OF 28 FEBRUARY 2023 OF THE BOARD OF APPEAL OF THE EUROPEAN CHEMICALS AGENCY**

### **Case numbers: A-013-2021 and A-014-2021**

*(REACH Regulation – Article 20(2) – Non-payment of a top-up fee within the deadline set – Admissibility – Plea of public policy – Power to abrogate a completeness check decision)*

#### *Factual background*

The Appellant registered two substances in 2013 and in 2014, paying reduced registration fees as a small enterprise. The Agency found those registrations to be complete, adopted two completeness check decisions and granted the Appellant registration numbers for the two substances.

Between 2017 and 2020, the Agency carried out a verification of the Appellant's company size ('the SME verification decision') under Article 13 of the Fee Regulation.<sup>1</sup> It concluded that the Appellant had not established that it was entitled to pay reduced registration fees. It therefore required the Appellant to pay top-up registration fees and an administrative charge. The Appellant did not challenge the SME verification decision before the General Court.

In 2021, following the Appellant's failure to pay the required top-up fees, the Agency adopted two Contested Decisions. By those decisions, the Agency rejected the registrations and revoked the completeness check decisions of 2013 and 2014. Consequently, the Appellant was no longer allowed to use its registration numbers.

The Appellant requested the Board of Appeal to annul the Contested Decisions.

#### *Main findings of the Board of Appeal*

The Board of Appeal raised, of its own motion, a plea of public policy, namely whether the Agency had the legal power to revoke the completeness check decisions which it had previously adopted.

The Board of Appeal found that, in accordance with settled case-law, a body which has the power to adopt a particular legal measure also has, in principle, the power to abrogate or amend an initial decision that is contradicted. As the Agency had the power to adopt the completeness check decisions, it also had the power to abrogate them. The final failure to pay the top-up fees within the deadline set contradicts the completeness check decisions, which confirmed the completeness of the payment of the required fees.

That power of abrogation is, however, subject to several conditions.

First, there must be a new fact which the Agency has the power to examine, and which justifies the abrogation of the previous decision. A re-assessment of information already submitted during the initial completeness check is not sufficient. In this case, the new fact was not the SME verification decision, which was not challenged by the Appellant, but the Appellant's final failure to pay the top-up fee within the deadline set by the Agency.

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<sup>1</sup> Commission Regulation (EC) No 340/2008 on the fees and charges payable to the European Chemicals Agency pursuant to the REACH Regulation (OJ L 107, 17.4.2008, p. 6).

Second, the power to abrogate the previous decision must not be reserved to another body. The Agency is the only body competent to adopt completeness check decisions under Article 20 of the REACH Regulation. The Agency is therefore also the only body with the power to abrogate those decisions. In addition, the abrogation of the previous completeness check decisions was not a sanction or penalty. The power to impose sanctions or penalties is reserved to the Member States.

Third, when abrogating an earlier decision, the Agency must apply *mutatis mutandis* the procedure which is foreseen for the adoption of that decision. In this case, the Agency correctly applied the completeness check procedure.

Fourth, in abrogating its previous decision the Agency must comply with the general principles of European Union law. In particular, the decision cannot have retroactive effect, must be taken within a reasonable time, and any legitimate expectations of the registrant must be respected. In this case, the Agency complied with these requirements.

The examination of the plea of public policy raised by the Board of Appeal of its own motion therefore revealed that the Agency was empowered by law to adopt the Contested Decisions under the general principles of EU law and Article 20(2) of the REACH Regulation, and that the Agency complied with the specific conditions for the exercise of that power. Furthermore, the pleas raised by the Appellant were also held to be unfounded.

The appeal was therefore dismissed.

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**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.

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*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>