

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

28 February 2023

*(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 that is contradicted)*

Case number	A-014-2021
Language of the case	German
Appellant	GruberChem GmbH, Germany
Representative	Andreas Krellmann Bach Rechtsanwälte Fachanwälte, Germany
Contested Decision	Decision SUB-D-211-4565304-51-01/F of 7 September 2021 on a registration for the substance disodium metasilicate, adopted by the European Chemicals Agency under Article 20(2) of the REACH Regulation and Article 13(3) and (4) of the Fee Regulation

THE BOARD OF APPEAL

composed of Antoine Buchet (Chairman), Nikolaos Georgiadis (Technically Qualified Member), and Marijke Schurmans (Legally Qualified Member and Rapporteur)

Registrar: Alen Močilnikar

gives the following

Decision

1. Background to the dispute

1. This appeal concerns the Appellant's registration for the substance disodium metasilicate (the **Substance**).¹
2. On 18 July 2014, the Appellant submitted a registration for the Substance. In submitting that registration, the Appellant declared that it is a small enterprise within the meaning of Article 2(3) of the Fee Regulation² and Commission Recommendation 2003/361/EC.³ It therefore paid a reduced fee for its registration in accordance with Table 2 of Annex I to the Fee Regulation.
3. On 22 July 2014, the Agency adopted a decision on the Appellant's registration under Article 20(3) of the REACH Regulation⁴ (the **completeness check decision of 22 July 2014**). By that decision, the Agency found the Appellant's registration to be complete and assigned it a registration number.
4. On 20 January 2017, the Agency started a procedure to verify the Appellant's company size in accordance with Article 13(3) and (4) of the Fee Regulation (the **SME verification procedure**). To that end, the Agency requested the Appellant to provide evidence to support its claim that it is a small enterprise within the meaning of Commission Recommendation 2003/361/EC. In particular, the Agency requested the Appellant to provide evidence of its turnover and number of employees, as well as those of linked or partner enterprises.
5. On 3 December 2020, considering that the Appellant had failed to provide the requested evidence, the Agency adopted a decision under Article 13 of the Fee Regulation (the **SME verification decision of 3 December 2020**). By that decision, the Agency found that the Appellant had failed to establish that it was entitled to pay a reduced registration fee. As a consequence, the Agency required the Appellant to pay the difference between the reduced registration fee and the full registration fee (the **top-up fee**), as well as an administrative charge. The Appellant did not challenge the SME verification decision of 3 December 2020 before the General Court in accordance with Article 94(1) of the REACH Regulation and Article 263 of the TFEU.⁵
6. On 26 January 2021, the Appellant requested the Agency to withdraw the SME verification decision of 3 December 2020. On 18 March 2021, the Agency rejected the Appellant's request.
7. Between 6 April 2021 and 3 June 2021, the Agency sent repeated reminders to the Appellant concerning the payment of the top-up fee and the administrative charge. The Appellant did not pay the sums required.

¹ EC No 229-912-9.

² 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).

³ Commission Recommendation concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

⁴ 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).

⁵ Treaty on the Functioning of the European Union (OJ C 202, 7.6.2016).

8. On 3 June 2021, the Agency informed the Appellant by email that due to the final failure to pay the top-up fee within the deadline set, the registration is incomplete. In that same email, the Agency informed the Appellant of the start of the procedure to reject the Appellant's registration and revoke the completeness check decision of 22 July 2014.
9. On 7 September 2021, the Agency adopted the Contested Decision.

2. Contested Decision

10. The operative part of the Contested Decision states:

'Based on Article 20(2) of [the REACH Regulation] and Article 13(3) and (4) of [the Fee Regulation], your registration for the substance with EC number 229-912-9 has been rejected.

You are no longer allowed to use registration number 01-2119449811-37-0011. ECHA will not reimburse any fee received for this registration. This decision revokes and replaces ECHA decision SUB-D-2114285013-57-01/F of 22/07/2014 finding the registration complete.

ECHA will inform the authorities in your Member State of this decision.

You must cease manufacture/import (or, if relevant, use) of the substance. Failure to comply may result in enforcement action. You may only start to manufacture/import (or, if relevant, use) the substance again once you have completed a new registration and ECHA has assigned a new registration number.'

3. Procedure before the Board of Appeal

11. On 2 December 2021, the Appellant filed this appeal.
12. On 8 March 2022, the Agency submitted its Defence.
13. On 21 March 2022, the Board of Appeal raised of its own motion a plea of public policy, namely whether the Agency was empowered by law to adopt the Contested Decision. The parties were requested to respond to written questions of the Board of Appeal concerning that plea.
14. On 2 May 2022, the Agency submitted observations on the plea of public policy raised by the Board of Appeal and replied to the questions of the Board of Appeal on this issue. The Appellant did not submit observations or reply to the questions within the deadline set.
15. On 17 May 2022, in accordance with Article 15(1), (2)(d) and 3(d) of the Rules of Procedure⁶ and with a view to a possible amicable agreement under Article 1a of the Rules of Procedure, the Board of Appeal requested the Appellant to provide documentary evidence related to its appeal. The Appellant did not comply with that request within the deadline set.
16. On 9 November 2022, a hearing was held at the Agency's request. The hearing was held by video-conference in accordance with Article 13(7) of the Rules of Procedure. At the hearing, the Appellant and the Agency made oral submissions and responded to questions from the Board of Appeal.

⁶ Commission Regulation (EC) No 771/2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency (OJ L 206, 2.8.2008, p. 5).

4. Form of order sought

17. The Appellant requests the Board of Appeal to annul the Contested Decision.
18. The Agency requests the Board of Appeal to dismiss the appeal as inadmissible or, in any event, as unfounded.

5. Assessment of the case

5.1. Admissibility of the appeal

19. The Agency objects to the admissibility of the appeal. It argues that all the pleas raised in the notice of appeal are directed against the SME verification decision of 3 December 2020. According to the Agency, the Board of Appeal is not competent to decide on an SME verification decision, which can be challenged only before the General Court in accordance with Article 94(1) of the REACH Regulation and Article 263 of the TFEU. Therefore, according to the Agency, all the pleas raised by the Appellant are inadmissible and therefore the appeal is inadmissible.
20. An appeal may be declared inadmissible if the appellant does not set out in a comprehensible manner the grounds of its appeal, that is to say the pleas in law and the arguments of fact or law on which it relies.⁷ Furthermore, the pleas must be contained in the notice of appeal. A plea which is raised later in the proceedings cannot remedy the initial inadmissibility of an appeal.
21. In the present case, the appeal is directed against the Contested Decision, which is based on Article 20(2) of the REACH Regulation. The Board of Appeal is consequently competent to examine the case under Articles 20(5) and 91(1) of that Regulation.
22. In the notice of appeal, the Appellant raises two pleas, alleging that:
 - (a) the Appellant is in fact a small enterprise within the meaning of Commission Recommendation 2003/361/EC and is therefore entitled to pay a reduced registration fee; and
 - (b) the Contested Decision was adopted without an adequate legal basis insofar as:
 - the Appellant is in fact a small enterprise and therefore the conditions for revoking the completeness check decision of 22 July 2014 are not fulfilled;
 - Article 20(2) of the REACH Regulation and Article 13(3) of the Fee Regulation are not a sufficient legal basis for the Contested Decision;
 - the revocation of the Appellant's registration goes against the principle of a fair, transparent and non-discriminatory procedure; and
 - the Agency could not request further information from the Appellant as the Appellant had already provided all the information required to establish that it is a small enterprise.

⁷ Decisions of the Board of Appeal of 7 October 2011, *Kronochem*, A-004-2011, paragraphs 38 and 47; of 7 September 2021, *Sustainability Support Service (Europe)*, A-008-2020, paragraphs 23 to 28; and of 14 December 2021, *Global Product Compliance (Europe)*, A-007-2021, paragraph 23.

23. Therefore, the notice of appeal contains pleas and arguments which are set out in a comprehensible manner. The admissibility and substantive merit of those pleas and arguments are a question concerning the substance of the appeal, not its admissibility.
24. It follows that the Agency's objection to the admissibility of the appeal must be rejected.

5.2. Substance of the appeal

5.2.1. The plea of public policy raised by the Board of Appeal of its own motion

Reasons for raising the plea of public policy

25. When deciding on an appeal, the Board of Appeal examines the pleas put forward by an appellant, as well as those pleas which must be raised of the Board of Appeal's own motion.⁸
26. According to settled case-law, in an action for annulment the European Union Courts may – or even must – raise pleas of their own motion if they concern a matter of public policy.⁹ Rules concerning the competence of the author of an act are such a matter of public policy.¹⁰
27. That case-law applies by analogy to proceedings before the Board of Appeal.¹¹
28. The Contested Decision rejects the Appellant's registration, declares that the Appellant is no longer allowed to use its registration number for the Substance, and 'revokes and replaces' the completeness check decision of 22 July 2014.
29. The Contested Decision states as its legal basis Article 20(2) of the REACH Regulation and Article 13(3) and (4) of the Fee Regulation. Those provisions do not expressly empower the Agency to re-evaluate the completeness of a registration or revoke a completeness check decision following a failure to pay a top-up fee.
30. Furthermore, neither the Contested Decision nor the Agency's written submissions explain whether the Agency considered that it was empowered to adopt the Contested Decision on the basis of general principles of European Union law.
31. It is therefore necessary to examine, as a plea of public policy, raised by the Board of Appeal of its own motion on 21 March 2022, whether the Agency was empowered by law to adopt the Contested Decision.¹²

⁸ Judgment of 20 September 2019, *BASF Grenzach v ECHA*, T-125/17, EU:T:2019:638 paragraph 65.

⁹ Judgments of 8 July 2004, *Mannesmannröhren-Werke v Commission*, T-44/00, EU:T:2004:218, paragraph 210, and of 14 April 2015, *Ayadi v Commission*, T-527/09 RENV, EU:T:2015:205, paragraph 44; see also, to that effect, judgments of 20 February 1997, *Commission v Daffix*, C-166/95 P, EU:C:1997:73, paragraphs 23 to 25, and of 3 May 2018, *Malta v Commission*, T-653/16, EU:T:2018:241, paragraphs 47 and 48.

¹⁰ Judgments of 19 December 2019, *XG v Commission*, T-504/18, EU:T:2019:883, paragraph 95; and of 17 November 2017, *Teeäär v ECB*, T-555/16, EU:T:2017:817, paragraph 36.

¹¹ Decision of the Board of Appeal of 15 March 2016, *REACheck Solutions*, A-022-2013, paragraph 48.

¹² See paragraph 13 above.

Arguments of the parties

32. The parties presented their views on the plea of public policy by replying to written questions from the Board of Appeal and at the hearing.
33. The Appellant argued at the hearing that the Agency is not empowered by law to adopt the Contested Decision. The Fee Regulation provides for a specific procedure for the verification of company size following a registration. Under that procedure, the Agency is entitled to require registrants to pay a top-up fee and an administrative charge. Under that procedure, however, the Agency is not empowered to reject a registration and revoke a completeness check decision.
34. The Agency argues that it is empowered by law to adopt the Contested Decision. The outcome of the procedure under the second subparagraph of Article 13(4) of the Fee Regulation triggers the competence for the Agency to revisit its initial completeness check decision by applying, *ex post* and by analogy, the procedure under Article 20(2) of the REACH Regulation regarding the registration fee payment.

Findings of the Board of Appeal

35. Article 20(2) of the REACH Regulation, on which the Contested Decision is based, does not expressly empower the Agency to re-evaluate or revoke the completeness of a registration following a failure to pay a top-up fee.
36. Article 20(2) of the REACH Regulation applies in principle to the initial completeness check. In the present case, the non-payment of the required fee was discovered after the adoption of the completeness check decision of 22 July 2014 and the assignment of a registration number.
37. On the basis of the submissions the Agency made at the hearing, it appears that the Agency, besides Article 20(2) of the REACH Regulation, relied on a general principle of European Union law to adopt the Contested Decision.
38. It is a general principle of European Union law that 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.¹³
39. In the present case, it is necessary to examine (i) whether the Agency had the power to abrogate the completeness check decision of 22 July 2014 following the Appellant's final failure to pay the top-up fee within the deadline set, and, if so, (ii) whether the Agency complied with the conditions for the exercise of that power.

(a) The power to abrogate the completeness check decision of 22 July 2014 following the Appellant's final failure to pay the top-up fee within the deadline set

40. In order to determine whether the Agency had the power to abrogate the completeness check decision of 22 July 2014 following a final failure to pay the top-up fee within the deadline set, it is necessary to determine whether the Agency has the power to examine and decide upon the completeness of payment of the required registration fee under Article 20(2) of the REACH Regulation.

¹³ See judgments of 20 November 2002, *Lagardère and Canal+ v Commission*, T-251/00, paragraph 130; of 15 December 2016, *Spain v Commission*, T-808/14, EU:T:2016:734, paragraph 40; of 10 March 2021, *ViaSat v Commission*, T-245/17, EU:T:2021:128, paragraph 117.

41. The first sentence of the first subparagraph of Article 20(2) of the REACH Regulation provides (emphasis added):
'The Agency shall undertake a completeness check of each registration in order to ascertain that all the elements required under Articles 10 and 12 or under Articles 17 or 18, as well as the registration fee referred to in Article 6(4), [...] have been provided'.
42. Article 6(4) of the REACH Regulation provides that *'[a] submission for registration shall be accompanied by the fee required in accordance with Title IX'*.
43. Title IX of the REACH Regulation provides that the fees for registration are specified in a Commission regulation adopted in accordance with the procedure referred to in Article 133(3) of the REACH Regulation. That Commission regulation is the Fee Regulation.
44. Article 3 and Annex I of the Fee Regulation set fees which are calculated on the basis of the company size of the registrant in question, the tonnage of the registration, the type of registration, and whether information is submitted jointly or individually.
45. Therefore, when examining the completeness of a registration under Article 20(2) of the REACH Regulation, the Agency has the power to examine whether a registrant has paid, before the expiry of the given deadlines, the required registration fee in accordance with the Fee Regulation. That fee depends, amongst other things, on company size.
46. It follows that the Agency also has the power to abrogate a completeness check decision if a registrant has not paid, before the expiry of the deadlines set, the required registration fee in accordance with the Fee Regulation.
47. The conclusions set out in paragraphs 45 and 46 above are not called into question by the following considerations.
48. First, the last sentence of the first subparagraph of Article 20(2) of the REACH Regulation states that *'[t]he completeness check shall not include an assessment of the quality or the adequacy of any data or justifications submitted.'*
49. This provision does not preclude the Agency from verifying, in a completeness check, whether the registration fee has been actually paid and paid in accordance with the Fee Regulation. Such a completeness check does not relate to the quality or the adequacy of any data or justifications submitted to satisfy the relevant information requirement.¹⁴ The payment of the required fee based on a declaration of company size can therefore be examined in a completeness check. The power to verify the payment of the required fee covers all registration fees equally, and not only the reduced fees.
50. Second, the second subparagraph of Article 20(2) of the REACH Regulation provides that the Agency must undertake the completeness check within three weeks of the submission of the registration, or within three months of the relevant deadline in Article 23 of the REACH Regulation.
51. Those time-limits apply only to the initial completeness check decision adopted under Article 20(2) of the REACH Regulation, and not to a decision abrogating that initial decision.
52. The power to abrogate arises only after the adoption of the initial completeness check decision and once an act contradicting that initial completeness check decision has occurred.

¹⁴ See, to this effect, decision of the Board of Appeal of 15 March 2016, *REACHCheck Solutions*, A-022-2013, paragraphs 101 to 107.

53. Furthermore, if the time-limits set out in the second subparagraph of Article 20(2) of the REACH Regulation were also to apply to the abrogation of the initial completeness check decision, registrants that do not pay the required fee within the deadline set would benefit from the short time-limit. However, under Article 6(4) of the REACH Regulation the obligation to pay the required fee applies to all registrants equally as from the submission of a registration.
54. The power to abrogate the initial completeness check decision is however subject to specific conditions that will be reviewed below.
55. Third, Article 13(3) and (4) of the Fee Regulation, which is also referred to in the Contested Decision, does not alter the power of the Agency under Article 20(2) of the REACH Regulation. Article 20(2) of the REACH Regulation serves a different purpose than Article 13(3) and (4) of the Fee Regulation¹⁵ and provides for a distinct power of the Agency.
56. Article 20(2) of the REACH Regulation empowers the Agency to ensure that registration dossiers submitted by registrants are complete, including the payment of the required fee.
57. Article 13(3) of the Fee Regulation expressly states that the Agency may request, at any time, evidence that the conditions for a reduction of fees or charges or for a fee waiver apply. Moreover, Article 13(4) of the Fee Regulation provides that the Agency is to levy the full fee or charge as well as an administrative charge '*where a natural or legal person that claims to be entitled to a reduction or a fee waiver cannot demonstrate that it is entitled to such a reduction or waiver*'. It follows from that provision that the Agency has the necessary power to verify that the conditions enabling a registrant to receive a reduction in fees or charges or a fee waiver within the meaning of Commission Recommendation 2003/361/EC are met.¹⁶
58. In the present case, the Agency has already exercised its power under Article 13(3) and (4) of the Fee Regulation by adopting the SME verification decision of 3 December 2020. At the same time, the Agency required the Appellant to pay a top-up fee and an administrative charge for which the Agency followed *mutatis mutandis* the procedure set out in Article 11(3) of the Fee Regulation. That decision has not been contested by the Appellant before the General Court and has become final.¹⁷
59. The existence of that *ex post* SME verification procedure does not exclude the possibility for the Agency to abrogate the initial completeness check decision due to the Appellant's final failure to pay the top-up fee within the deadline set. The final failure to pay the top-up fee could not be rectified by the Appellant by providing the missing information.
60. Furthermore, the Contested Decision does not seek to recover the top-up fee and administrative charge, which could be recovered by either voluntary payment or enforced procedure. The Contested Decision is based on a final failure to pay the top-up fee by the Appellant within the deadline set. The final failure to pay the top-up fee within the deadline set constitutes the act contradicting the initial completeness check decision that confirmed the completeness of the payment of the fee.
61. As the Agency confirmed at the hearing, the abrogation of the completeness check decision means that the Appellant is no longer required to pay the top-up fee. The Appellant remains bound to pay the administrative charge only.

¹⁵ Judgment of 15 September 2016, *La Ferla v Commission and ECHA*, T-392/13, paragraph 75.

¹⁶ Judgment of 15 September 2016, *La Ferla v Commission and ECHA*, T-392/13, paragraph 74.

¹⁷ See paragraph 5 above.

62. Article 13(3) and (4) of the Fee Regulation therefore does not prevent the Agency from abrogating a completeness check decision following the Appellant's final failure to pay the top-up fee within the deadline set.
63. It follows from the reasons set out in paragraphs 35 to 62 above that the Agency had the power to abrogate the completeness check decision of 22 July 2014 following the Appellant's final failure to pay the top-up fee within the deadline set.

(b) Conditions for the exercise of the power to abrogate an earlier completeness check decision

64. The exercise of the power to abrogate a decision is subject to several conditions.
65. First, there must be a new fact which the Agency has the power to verify, and which justifies the abrogation of the initial decision that is contradicted by this new fact. A re-assessment of information already submitted during the initial completeness check is not sufficient.
66. In the present case, the Agency did not examine the correctness of the Appellant's declaration of company size at the time of the initial completeness check (*ex ante* verification). The Agency carried out this examination after having adopted the completeness decision of 22 July 2014, by means of the procedure set out in Article 13(3) of the Fee Regulation (*ex post* verification).
67. By the SME verification decision of 3 December 2020, which was not challenged by the Appellant before the General Court and which is now final, the Agency found that the Appellant had failed to show that it was entitled to pay a reduced fee. As a consequence, the Agency required the Appellant to pay the top-up fee, as well as an administrative charge. Article 13(4) and, *mutatis mutandis*, Article 11(3) of the Fee Regulation lay down the payment procedure.
68. The Appellant did not pay the top-up fee and therefore did not pay the required registration fee in accordance with Article 6(4) of the REACH Regulation. The Appellant's final failure to pay the required registration fee means that its registration is incomplete.
69. Therefore, the Appellant's final failure to pay the top-up fee within the deadline set constitutes a new element of fact which the Agency has the power to verify, and which justifies the abrogation of the completeness check decision of 22 July 2014.
70. Second, the power to abrogate the initial decision that is contradicted must not be reserved to another body.¹⁸ In particular, the Agency's decision must not constitute a sanction or penalty, as the power to impose sanctions or penalties is reserved to the Member States under Article 126 of the REACH Regulation.
71. Under Article 20 of the REACH Regulation, the Agency is the only body competent to adopt completeness check decisions. The Agency is therefore also the only body with the power to abrogate those decisions.
72. Moreover, the Contested Decision rejects the Appellant's registration, declares that the Appellant is no longer allowed to use its registration number for the Substance, and 'revokes and replaces' the completeness check decision of 22 July 2014. Those acts are not a sanction or penalty reserved to Member States' authorities under Article 126 of the REACH Regulation. In the present case, the Contested Decision was adopted on the basis of the Appellant's final failure to pay

¹⁸ Judgments of 20 November 2002, *Lagardère and Canal+ v Commission*, T-251/00, EU:T:2002:278, paragraph 130; of 15 December 2016, *Spain v Commission*, T-808/14, EU:T:2016:734, paragraph 40; of 10 March 2021, *ViaSat v Commission*, T-245/17, EU:T:2021:128, paragraph 117.

- the required registration fee within the deadline set, which rendered its registration incomplete in accordance with Articles 20(2), 6(4) and 74 of the REACH Regulation and Article 3 of the Fee Regulation.
73. At the hearing, the Appellant argued that it is being sanctioned twice. This is because it is required to pay the top-up fee and to re-register. The Appellant is no longer required to pay the top-up fee.¹⁹
 74. Furthermore, the Appellant retains the possibility of re-registering the Substance as a small enterprise in accordance with Article 6(4) of the REACH Regulation at any moment. Therefore, the Appellant has a further opportunity to make a substantiated declaration of its company size.
 75. The Contested Decision therefore does not impose a sanction or penalty within the meaning of Article 126 of the REACH Regulation. The power to abrogate the decision in question consequently lies with the Agency and is not reserved to another body.
 76. Third, when abrogating or amending an earlier decision, the Agency must apply *mutatis mutandis* the procedure which is foreseen for the adoption of that decision (parallelism of form).²⁰
 77. In the first place, under the second subparagraph of Article 20(2) of the REACH Regulation, the Agency shall undertake the completeness check within short, specified timelines. Those time-limits do not apply to a decision abrogating the initial completeness check decision.²¹
 78. Even if it is accepted that, as the Appellant in essence submitted at the hearing, the Agency had to undertake *mutatis mutandis* the abrogation procedure within the time-limit set out in Article 20(2) of the REACH Regulation, the Agency informed the Appellant of its final failure to pay the top-up fee within the deadline set by email of 3 June 2021. In that same email, the Agency informed the Appellant that it would initiate the '*revocation of registration*', which is in essence the abrogation procedure.
 79. This conclusion is not called into question by the wording '*shall undertake*' in Article 20(2) of the REACH Regulation. The time-limits set out in Article 20(2) of the REACH Regulation start from the submission date for non-phase-in substances or from the relevant dates specified in Article 23 of the REACH Regulation for phase-in substances. These short time-limits aim to ensure that a registrant can begin or continue to manufacture or import its substance on the basis of its submission number in accordance with Article 21 of the REACH Regulation if there is no indication to the contrary from the Agency within these time-limits.
 80. In this respect, the wording '*shall undertake*' must be understood as meaning that the Agency starts the completeness check within the specified time-limit but does not need to decide ultimately to reject or accept the registration together with the assignment of a registration number within the same specified time-limit.
 81. If the wording '*shall undertake*' must be understood as meaning that the Agency also has to decide on the completeness of the registration within the short timelines, the third subparagraph of Article 20(2) of the REACH Regulation, which allows an extension with a reasonable deadline in case the registration is incomplete, would be redundant.

¹⁹ See paragraph 61 above.

²⁰ Judgment of 14 December 2006, *Gagliardi v OHIM [MANŪ MANU MANU]*, T-392/04, EU:T:2006:400, paragraph 53.

²¹ See paragraphs 50 to 52 above.

82. In the second place, under the third and fourth subparagraphs of Article 20(2) of the REACH Regulation, if a registration is incomplete, the Agency must inform the registrant of the further information required for the registration to be complete, while setting a reasonable deadline to provide that information. The Agency must reject the registration if the registrant fails to complete it within the deadline set.
83. In the present case, the Agency required the Appellant, as it had already paid a reduced fee, to pay the top-up fee following the SME verification decision of 3 December 2020. To that end, the Agency set an adequate deadline of two weeks in accordance with Article 3(5) of the Fee Regulation. Moreover, the Agency extended the deadline several times and sent repeated reminders to the Appellant. The Appellant did not pay the top-up fee by the deadline, and therefore did not pay the required registration fee in accordance with Article 6(4) of the REACH Regulation.
84. Following the Appellant's final failure to pay the top-up fee within the deadline set, the Agency rejected the registration in accordance with the third subparagraph of Article 20(2) of the REACH Regulation. As a consequence of the rejection of the registration, the registration number can no longer be used, and the previous completeness check decision is abrogated and replaced by the Contested Decision.
85. The Agency therefore applied *mutatis mutandis* the procedure which is foreseen for the adoption of the earlier completeness check decision.
86. Fourth, in abrogating an initial decision that is contradicted the Agency must comply with the general principles of European Union law.
87. The Contested Decision refers to 'revocation', while at the hearing the Agency clarified that it applied the general principle of European law on abrogating the initial decision that is contradicted.
88. It is correct that, unlike the SME verification decision of 3 December 2020, the Contested Decision is not adopted on the basis of false or incomplete information on the Appellant's SME status, or of a change of circumstance concerning the Appellant's status as an SME. Nor does the Contested Decision concern an erroneous or fraudulent SME declaration.
89. The Contested Decision abrogates the completeness check decision of 22 July 2014 due to a new fact, namely the Appellant's final failure to pay the top-up fee within the deadline set. This new fact justifies the abrogation of the completeness check decision of 22 July 2014.²² The decision to abrogate has been adopted in accordance with the general principles of European Union law for the following reasons.
90. In the first place, the completeness check decision of 22 July 2014 was lawful at the time of its adoption and conferred on the Appellant the right to continue manufacturing and marketing the Substance in accordance with Article 5 of the REACH Regulation. As a consequence, the Agency could not abrogate the completeness check decision of 22 July 2014 with effects for the past, but only with effects for the future.
91. During the appeal proceedings, the Agency clarified that the Contested Decision does not have retroactive effect. The Appellant's registration number, which replaced the submission number under Articles 20(1) and 21 of the REACH Regulation and which depended on the completeness check decision of 22 July 2014, remains therefore valid for the past but can no longer be used for the future.

²² See paragraphs 65 to 69 above.

92. In the second place, the Agency acted in a fairly reasonable time by providing the Appellant sufficient opportunities to regularise the registration fee between 2017 and 2021. The initial completeness check decision was adopted on 22 July 2014. The SME verification procedure was opened on 20 January 2017. During that procedure, which lasted until 3 December 2020, the Agency repeatedly requested the Appellant to demonstrate that it was entitled to a reduced registration fee and gave the Appellant the opportunity to regularise its position by paying the top-up fee.
93. After the adoption of the SME verification decision of 3 December 2020, the Agency sent several payment reminders to the Appellant. The Agency also informed the Appellant in almost all communications that a failure to pay the top-up fee might lead to a rejection of its registration and the abrogation of the completeness check decision of 22 July 2014. On 3 June 2021, the Agency confirmed to the Appellant its final failure to pay the top-up fee within the deadline set and initiated the abrogation procedure. The abrogation of the initial completeness check decision, together with the rejection of the registration and the declaration that the Appellant may no longer use its registration number, was adopted on 7 September 2021.
94. In the third place, the Appellant could not have legitimate expectations that the completeness check decision of 22 July 2014 would remain valid after its final failure to pay the top-up fee within the deadline set.
95. The Appellant has not put forward any arguments to show that it had a legitimate expectation that the completeness check decision of 22 July 2014 would remain valid after its failure to pay the top-up fee. At the hearing, the Appellant did not contest that it did not pay the top-up fee.
96. In the circumstances stated in paragraphs 90 to 93 above, the Agency did not infringe any legitimate expectations which the Appellant might have entertained as to the continued validity of the completeness check decision of 22 July 2014. The Agency repeatedly informed the Appellant of the potential consequences if it failed to pay the required fee within the deadline set.
97. Therefore, in adopting the Contested Decision the Agency complied with the specified general principles of European Union law.
98. It follows from the reasons set out in paragraphs 64 to 97 above that the Agency complied with the conditions for the exercise of its power.

(c) Conclusion on the plea of public policy

99. The examination of the plea of public policy, which was raised by the Board of Appeal of its own motion, demonstrates that the Agency was empowered by law to adopt the Contested Decision under the general principle of EU law referred to in paragraph 38 above and Article 20(2) of the REACH Regulation, and that the Agency complied with the specific conditions for the exercise of that power.

5.2.2. The Appellant's pleas

Arguments of the Parties

100. The Appellant raises, in essence, two pleas in support of its appeal.
101. By the first plea, the Appellant argues that it is in fact a small enterprise within the meaning of Commission Recommendation 2003/361/EC, and that it is therefore entitled to pay a reduced fee for its registration of the Substance.

102. By the second plea, the Appellant argues that the Contested Decision was adopted without an adequate legal basis. First, according to the Appellant, it is in fact a small enterprise and therefore the conditions for revoking the registration number are not fulfilled. Second, according to the Appellant, Article 20(2) of the REACH Regulation and Article 13(3) of the Fee Regulation are not a sufficient legal basis for the Contested Decision. Third, the revocation of the Appellant's registration goes against the principle of a fair, transparent and non-discriminatory procedure. Fourth, the Agency could not request further information from the Appellant as the Appellant had already provided all the information required to establish that it is a small enterprise.
103. The Agency disputes the Appellant's pleas. According to the Agency, those pleas are directed against the SME verification decision of 3 December 2020, not against the Contested Decision. Therefore, the Appellant's pleas are inadmissible.

Findings of the Board of Appeal

104. The Appellant's pleas are based, in essence, on the argument that the Appellant is a small enterprise within the meaning of Commission Recommendation 2003/361/EC. This argument was addressed and rejected in the SME verification decision of 3 December 2020.
105. However, the considerations that are addressed in the SME verification decision of 3 December 2020 are also part of the Contested Decision, which is based on the Appellant's failure to pay the top-up fee imposed with the SME verification decision of 3 December 2020. The SME verification decision of 3 December 2020 informs the Contested Decision.
106. As the Board of Appeal is competent to decide on the Contested Decision, and the Contested Decision is based *inter alia* on the Appellant's company size, the Board of Appeal is also competent to decide on the Appellant's pleas. Those pleas are therefore admissible.
107. Nevertheless, the Board of Appeal is bound by the findings of the SME verification decision of 3 December 2020, which has not been challenged before the General Court and is therefore final. The Board of Appeal cannot depart from the findings of the SME verification decision of 3 December 2020. Therefore, the Appellant's pleas cannot bring about the annulment of the Contested Decision.
108. The Appellant's pleas must therefore be rejected as inoperative.

5.3. Result

109. The appeal is admissible, but unfounded. It must consequently be dismissed.

6. Effects of the Contested Decision

110. The Contested Decision rejects the Appellant's registration, declares that the Appellant is no longer allowed to use its registration number for the Substance, and abrogates ('*revokes and replaces*') the completeness check decision of 22 July 2014 with effects for the future. The Appellant was required to cease manufacture, import or use of the Substance as of the date of receipt of the Contested Decision, unless it submitted a new registration.
111. Under Article 91(2) of the REACH Regulation, an appeal has suspensive effect. As a consequence, the effects of the Contested Decision, which is confirmed in these appeal proceedings, apply as of the notification of the present decision.

7. Refund of the appeal fee

112. Under Article 10(4) of the Fee Regulation, the appeal fee must be refunded if the appeal is decided in favour of an appellant. As the appeal is dismissed, the appeal fee is not refunded.

On those grounds,

THE BOARD OF APPEAL

hereby:

- 1. Dismisses the appeal.**
- 2. Decides that the appeal fee is not refunded.**

Antoine BUCHET
Chairman of the Board of Appeal

Alen MOČILNIKAR
Registrar of the Board of Appeal