

The competence of ECHA's Board of Appeal – some procedural consequences

Seminar on 10 years of REACH
Litigation
Helsinki, 24 May 2017

Sari Haukka

*Legally Qualified Member of the Board
of Appeal*



Outline

1. The role of Boards of Appeal (BoA)
2. Admissibility of evidence
3. Grounds of appeal
4. Conclusions

The role of Boards of Appeal (1)

- Purpose of appeal proceedings (EUIPO, CPVO, EASA)
 - i. to enable the BoA to hear an application that has been refused by other units of the agency, and
 - ii. where the BoA upholds that refusal, to clarify the factual and legal grounds so that the judicature is in a position to review the legality of the refusal decision.
- '*Continuity in terms of functions*' between agencies and Boards of Appeal
- Decisions by Boards of Appeal replace the decisions initially adopted by the agency

The role of Boards of Appeal (2)

- Four-tier system:

Initial decision-maker	Initial examination, decision	Administrative review
BoA	Review – <i>de novo</i> , legality,...?	
General Court	Review of legality	Judicial review
Court of Justice	Appeal on points of law	

- What role for ECHA's Board of Appeal - review of legality, *de novo* review or something else?
- Possible procedural consequences
 - Admissibility of evidence
 - Admissibility of pleas

Admissibility of evidence (1)

Other Boards of Appeal

- The underlying facts of a dispute may, in principle, multiply at various stages of the proceedings.
- The outcome of the appeal depends on whether or not a new decision with the same operative part as the decision under appeal may be lawfully adopted at the time of the appeal ruling.

ECHA Board of Appeal

- Art. 12(1) Rules of Procedure:

'No further evidence may be introduced after the first exchange of written pleadings unless the Board of Appeal decides that the delay in offering the evidence is duly justified.'

Admissibility of evidence (2)

Past practice

- Registration, data-sharing:
 - In an early case the BoA acquired evidence of its own motion.
- Evaluation:
 - Evidence submitted with the notice of appeal has been considered admissible even if not previously submitted to ECHA.
 - Justification for delay e.g. experimental studies were not previously available.

Admissibility of evidence (3)

Open issues

- What evidence should be taken into account in BoA decisions?
 - If *de novo* review, new information may change the assessment.
 - If more limited review, what to do with new information?
- Difference depending on the type of contested decision?
 - Data-sharing, registration – time of initial decision?
 - Evaluation cases – time of BoA decision?

Grounds of appeal (1)

Other Boards of Appeal

- Even if the appellant has not raised a specific ground of appeal, the BoA is bound to examine the appeal in the light of all the relevant matters of fact and of law.

ECHA Board of Appeal

Art. 12(2) Rules of Procedure:

'No new plea in law may be introduced after the first exchange of written pleadings unless the Board of Appeal decides that it is based on new matters of law or of fact that come to light in the course of the proceedings.'

Past practice

- In principle, no new pleas in law or forms of order.
- New pleas in law amplifying or developing a plea made previously have been considered admissible.

Grounds of appeal (2)

Open issues

- Why is there a rule on the admissibility of pleas for appeal proceedings?
 - How does it fit the system?
 - Can the BoA raise substantive pleas of its own motion?
- Can procedural defects of the initial decision be remedied by a BoA decision?

Conclusions

- Aspects to take into account:
 - What is the role of the BoA in the REACH system?
 - Should the role of the MSC and the institutional balance it reflects play a role in assessing the BoA's scope of review?
 - What should be the added-value of the BoA in the judicial system?
 - How far does the analogy to other BoAs go?
- Do these questions need to be looked at by reference to the specific type of decision subject to appeal?
- How to make the system work taking into account the specificities of scientific review?

Thank you

