

Cefic & REACH legal remedies



Within the Cefic legal working group (with focus on the BoA):

- analysis of appeals & decisions
- exchange of experience from appellants/plaintiffs
- follow-up of decisions

+ awareness raising on the role, rules and relevance of existing remedies

Agenda



General Court

- expectations in 2007
- reality today

- ECHA Board of Appeal
 - expectations in 2007
 - reality today

Expectations - in 2007



<u>Assumption</u>: (i) product authorisations more fundamental to economic activity than e.g. a trademark and (ii) not easy to change a whole production process

- + new system, that will be tested
- + complex legislation
- + highly technical
- expected waive of (i) interpretation questions to the Court of Justice(ii) annulment applications to the General Court
- + reform EU Courts: suggestion of specialisation, via ad hoc courts

Objectives of REACH



- 1. human health and the environment
- 2. non-animal testing
- 3. free circulation of substances on the internal market
- 4. competitiveness
- 5. innovation

observation: court cases mostly related to human health and environment

Challenges for chemical companies



Procedure:

- -parties feel respected "good administration"
- -Judges: well educated

- -Action for interim relief: the condition of urgency (risk of serious and irreversible harm) is a very difficult requirement to satisfy
- -legal standing: "direct concern" and the demonstration that "the measure directly affects the applicant's legal situation": very high bar

Challenges for chemical companies



Limited scope of judicial review:

-Procedural arguments: highest chance of success

-Merits: acknowledgement of broad discretion for the Commission "manifest error of assessment" (no detailed review of underlying scientific opinion)

-Proportionality test: only if manifestly inappropriate

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- ECHA = new regulatory authority, with *sui generis* competences
- ECHA decisions : potentially high adverse effects on industry
- ambivalent/unclear provisions in the text of REACH
- judicial channels in Europe are traditionally slow and costly
- **safety net**: need for legal certainty
 - internal administrative review

Benefits of BoA on paper (2007)



- independent from ECHA & impartial
- large power: authority to review/replace ECHA decision
- broad scope of review: scientific assessment + legality
- fast procedure
- low cost
- suspensive effects
- (+ no need for qualified lawyer as representative)

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Key facts



- number of appeals: 90 (2009: 1, 2012: 8, 2015: 26, 2016: 14)
- from all types of companies and all over Europe
- more and more joint appeals
- out of 71 decisions:
 - favourable to the appelant(s): 17
 - favourable to ECHA: 18
 - withdrawal of the case: 36
- average lenght of the procedure: [1-2] years
- moving from Registration to (Substance) Evaluation

Procedure - in reality



- tight deadlines (e.g. 3 months appeal, 3 weeks intervention)
- user-friendly, flexible
- parties feel respected "good administration"
- hearings: good level of discussions
- lawyers are (de facto) needed
- no "frivolous" appeal issue

overall: positive evaluation

Substance/merit - in reality



- truly impartial and independent
- sometimes overly formal
- final decisions of high quality
- BoA members: well educated and equipped
- real impact on ECHA generic processes
- added value of intervention (companies/ NGOs/ associations)

overall: positive evaluation



Substance/merit - in reality

Some (apparent) limits in the review of ECHA decisions:

 decision on science: assessment of ECHA decisions - when BoA in a position to reopen the scientific case, need to demonstrate a legal flaw (legality/proportionality)

- decision on law: review of ECHA decisions pursuant to EU legal principles but new/own legal interpretation by BoA of the REACH text?

In the future



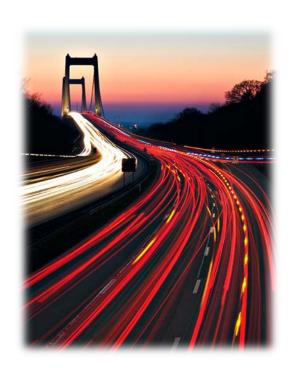
- -decisions on Confidential Business Information: out of the scope
- -grey area art. 91.1: strict exhaustive list?
- -more collective appeals
- -appeals by non-addressee of ECHA decision
- -BoA: sui generis body

+ increasing public awareness on the impartiality of the BoA









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