

10 years of REACH Litigation

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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



Assumption: (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**

e.g. Identification of a substance as Substance of Very High concern

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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Why do companies need an ECHA BoA? (2007)



- 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 appellant(s): 17
 - favourable to ECHA: 18
 - withdrawal of the case: 36
- average length 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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