

ECHA appeals board rules in BASF's favour in 1,6-dichlorohexane tonnage case

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Agency breached right to 'good administration', BoA says

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ECHA's Board of Appeal has upheld BASF's argument that the agency breached its duties when examining the chemical company's registration dossier for 1,6-dichlorohexane.

The substance is a reactive chemical intermediate with numerous applications from personal care to rubber.



The BoA decision regarding BASF's tonnage downgrade of the substance could have significant implications on the depth of assessments ECHA performs on such adjustments during registration dossier compliance checks.

In case A-001-2023, the appeals board concluded that ECHA had not fully considered BASF's tonnage downgrade from 100-1,000 tonnes to 10-100 tonnes before asking the company to submit information under Annex IX of REACH.

REACH requires different levels of information depending on the tonnage band of a substance when registering.

The company argued that ECHA breached its right to "good administration", as set out in Article 41 of REACH, by failing to properly consider its tonnage downgrade.

The agency initiated a registration compliance check in June 2021. In May 2022, BASF updated its dossier with the downgrade.

ECHA acknowledged this and told BASF it might carry out an assessment to determine whether the step was based on objective industrial or commercial considerations, or primarily triggered by the receipt of the draft dossier evaluation decision.

The latter, it said, could potentially amount to an abuse of procedure, with the company unduly avoiding information requirements necessary to protect human health or the environment.

ECHA said BASF had provided insufficient information to carry out such an assessment and asked for data on the volume of substance that had been imported/manufactured in the calendar year preceding the tonnage downgrade (2021).

The company responded, saying that a significant part of the volume above 100 tonnes was for one single external customer that used this substance as a monomer, which required a full registration in the 100-1,000 tonnage band.

According to BASF, the situation changed following negotiations about future deliveries with the customer, resulting in a reduction in demand. This meant the volume no longer exceeded 100 tonnes a year, triggering its decision to downgrade the tonnage.

ECHA argued that the tonnage band change was not considered for the decision-making process because the data shows that, within the preceding year, the registrant was still operating at the higher band.

However, the company said the objective of a compliance check under Article 41 is not to identify retroactively whether a registrant might have breached its obligations.

The BoA supported the argument, saying that the agency did not:

- examine any other factors than the volume of the substance produced in the calendar year preceding the tonnage downgrade;

- inform member state competent authorities of BASF's reasons justifying it; or

- determine whether the company's downgrade amounted to an abuse of procedure.

It added that ECHA must identify potential data gaps in a registration dossier under evaluation with "reference to the registration dossier as it exists at the time of the adoption of the compliance check decision, not at the time of the notification of the draft compliance check decision".

"In this regard, whilst it falls within the agency's discretion to set an administrative cut-off point in a decision-making process, the agency is required to take into account all relevant factors and circumstances of a particular case until the final decision is adopted," it said.

Cut-off mechanism

The case shows that ECHA must have mechanisms in place to take into account substantial new information coming to light after that administrative cut-off point, the board said.

It also said that because the agency failed to carry out an individual assessment of the tonnage downgrade, and therefore breached the company's right to good administration, its argument must be upheld and the contested decision "annulled insofar as it requires the appellant to provide information under Annex IX".

ECHA told Chemical Watch News & Insight it is analysing the impacts of the decision and discussing internally how to react to it.

BASF was unable to respond to a request for comment by the time of publishing.

Eléonore Mullier, a partner at Brussels-based law firm Steptoe, said the case was a welcome result for industry, adding that the BoA's decision is practical and sensible. There are often many legitimate reasons a company downgrades its tonnage band, she said.

"In addition, this cannot be determined by conducting a one-fact checking exercise, it needs a full assessment," she added.

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