

2023 Judicial Colloquium

Judicial protection of human rights and public interests
against environmental pollution from chemicals and wastes

*Session 2 | The Board of Appeal at the European
Chemicals Agency*

Geneva, Palais des Nations, 3 April 2023

Marijke Schurmans, Member of the Board of Appeal and
Alen Močilnikar, Registrar of the Board of Appeal



EU institutions
(European Parliament, Council and Commission)



Management Board

Board of Appeal

Supported by its Registry

Executive Director

ECHA Secretariat

4 Committees composed of members nominated by Member States

Forum on Enforcement

EU Member States



Since 1 June 2008 ECHA manages the EU's chemicals legislation to protect people and the environment

REACH Regulation

- Registration of chemicals ["substances"]
- Evaluation of selected registered substances
- Authorisation and Restriction of (certain) Chemicals

CLP (UN GHS)

- Classification, Labelling & Packaging of substances and mixtures

BPR (Biocidal Products Regulation)

- Authorisation of Biocidal Active Substances and Products at EU level

PIC (UN Rotterdam Convention)

- Import and Export notifications for dangerous chemicals

Later more were added...

POPs (UN Stockholm Convention)

- Bans or severely restricts the production and use of persistent organic pollutants in the European Union

CAD & CMRD (International Labour Standards)

- Chemical Agents Directive & Carcinogens, Mutagens or Reprotoxic substances Directive

Waste Framework Directive (UN Basel Convention)

- Addressing the adverse impacts of the generation and management of waste on the environment and human health
- Improving efficient use of resources

Drinking Water Directive (UN-WHO-EU Protocol for Water & Health)

- Protecting citizens and the environment from the harmful effects of contaminated drinking water and improving access to drinking water

Access to administrative and judicial review in environmental matters is a multi-layered system in the EU

- **(Aarhus) Regulation (EC) No 1367/2006 (as amended by Regulation (EU) 2021/1767)** provides for members of the public to have direct access to internal administrative (self-review) procedure of administrative acts or of omissions contravening environmental law by the Union's institutions or bodies.
 - Members of the public can challenge decisions of individual or general scope under any policy area.
 - The member of the public, which made the request for internal review, may institute subsequently an appeal proceeding against the internal review decision.
- Such internal administrative review **complements** the overall EU system of judicial and administrative review.
 - Judicial review before the Court of Justice of the EU, including preliminary ruling through a national court.
 - The Board of Appeal constitutes a separate **administrative review** of certain administrative decisions of ECHA.
 - EU Ombudsman in cases of maladministration.

How the Board of Appeal contributes to effective access to justice in environmental matters

In focus: Board of Appeal of ECHA

- Introduction to the Board of Appeal
- Access for public to environmental matters:
Legal standing
- Scope of review
- Legal remedies



Who? Team behind the Board of Appeal

Role of the Board of Appeal



- **Impartial and independent administrative review body;**
as of 2019 recognized in Article 58a of the Statute of the CJEU:

Article 58a

An appeal brought against a decision of the General Court **concerning a decision of an independent board of appeal of one of the following offices and agencies of the Union** shall not proceed unless the Court of Justice first decides that it should be allowed to do so:

- (a) the European Union Intellectual Property Office;
 - (b) the Community Plant Variety Office;
 - (c) the European Chemicals Agency;**
 - (d) the European Union Aviation Safety Agency.
- **C-46/21 P, ACER v Aquind, 9 March 2023, para. 59:** '*[...] administrative revision bodies, which are internal to the agencies. They have a certain independence, perform quasi-judicial functions through adversarial procedures and are composed of lawyers and technical experts, which means they are better able to dispose of appeals against decisions which often have a strong technical component.*'

Shared competence between General Court and Board of Appeal on EU REACH*

General Court

Art. 94(1) REACH

Registration

SME
verification

Access
to
docu
ments

SVHC
identification

Dossier
evaluation

Substance
evaluation

Amendments Annex XIV
- Authorization

SVHC
identification

Authorization
Decisions

Amendments Annex
XVII - Restrictions

Dossier
evaluation

Harmonised
Classification &
Labelling

VS.

ECHA decisions



Board of Appeal
decisions



European Commission
decisions



Board of Appeal* *

Art. 91(1) REACH: decisions of
ECHA taken pursuant to Arts. 9,
20, 27(6), 30(2) & (3) and 51

Registration

Data
sharing

Dossier
evaluation

Substance
evaluation

* The slide reflects the types of appeal decisions that have been adopted until 31/03/2023.

** Board of Appeal is also competent to review certain decisions under the EU Biocidal Products Regulation.

- **Burden of proof:** the Appellant needs to prove that ECHA made *an error* of assessment (T-125/17, paras 61-65).
- BoA reviews *the legal and scientific aspects* of ECHA's decisions in detail (T-755/17, par. 55).
- **No 'de novo' assessment:** no repetition of the initial process (T-125/17, par. 59).
- **Adversarial nature** of the review.

DOSSIER EVALUATION:

- Standard information requirements: identification of data gaps is sufficient.
- Error in assessments of need for further information.
- Clarification of a follow-up procedure (non-compliance).
- Registrant's responsibilities in submitting and justifying adaptations.

Horizontal issues:

- **Procedural:** good administration, duty to state reasons, right to be heard, etc.
- **Exercise of Agency's discretion:** obligation to take all relevant information into account.
- **Animal testing as a last resort.**
- **Clarification of testing proposals and methods.**
- **Interaction** with other legislations (e.g. cosmetics).

SUBSTANCE EVALUATION:

Based on the precautionary principle, the BoA established three conditions to be met to justify substance evaluation:

1. A *potential risk*, based on hazard and exposure;
2. The potential risk *needs to be clarified*;
3. The information requested has a realistic possibility of leading to *improved risk management measures*.

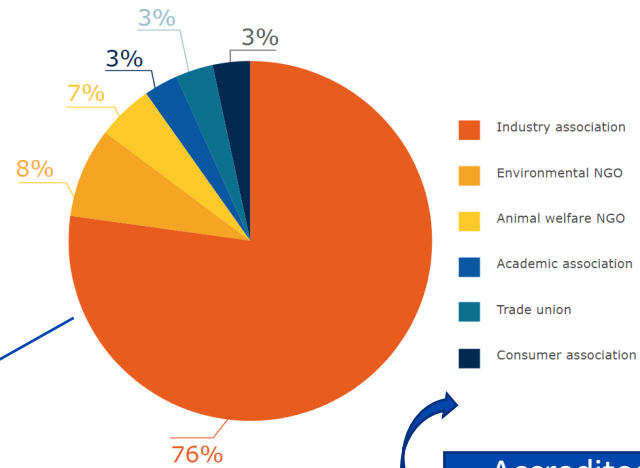
ACCESS OF MEMBERS OF THE PUBLIC TO THE BOARD OF APPEAL PROCESS / LEGAL STANDING

Art. 8(1) Rules of Procedure: *'Any person establishing an interest in the result of the case submitted to the Board of Appeal may intervene in the proceedings before the Board of Appeal.'*

Cumulative criteria (MB/34/2011)

- (i) *legally established within EU/EEA + activities at EU level*
- (ii) *legitimate interest in the areas of work of ECHA*
- (iii) *representative in the field of their competence*
- (iv) *those interests are affected to an appreciable extent*
- (v) *registered in the Register of Interest Representatives maintained by EC (if observers in the Committee and Forum meetings of ECHA)*

echa.europa.eu



Accredited stakeholders

Evaluating MSCAs privileged applicants (SEv)


Other (co-)registrants

Other party to a data sharing dispute

Effective access to Board of Appeal proceedings

C-46/21 P, ACER v Aquind, para. 59: *'(...) they are a quick, accessible, specialised and inexpensive mechanism for protecting the rights of the addressees and persons concerned by those decisions.'*

- Inexpensive: no fee payment required to intervene
- Accessible, transparent and quick:
 - Publication of announcement following receipt of an appeal;
 - No need to be represented by a qualified lawyer;
 - Documents can be lodged by email instead of regular mail;
 - Possibility to use a language other than the one of the case;
 - In majority of cases, a hearing is held. Intervener can participate in a hearing (it can opt to join the hearing remotely). No right to request a hearing;
 - Hearings are public.

 Interveners are fully involved during the process.

BOARD OF APPEAL – LEGAL REMEDIES

- Amicable agreement (Art. 1a Rules of Procedure)
- Rectification by ECHA's Executive Director within 30 days of the notice of appeal
- 'Appeal dismissed': Board of Appeal rejects the appeal
- 'Appeal upheld':
 - Board of Appeal remits the case back to ECHA for further action; or
 - Replaces the ECHA decision with its own decision.



'may exercise any power which lies within the competence of the Agency'

Limits (T-755/17, paras 88-89, and T-125/17, par. 59):

- ✓ Sufficient information on the file
 - ✓ Take into account role of various actors in the decision-making procedure
 - ✓ No 'de novo' assessment: no repetition of the initial process
- Board of Appeal decisions are ECHA decisions; they can be challenged before the General Court



Thank you

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