

Announcement of appeal¹

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| Published on | 17 January 2023 |
| Case | A-011-2022 |
| Appellant | Biofa GmbH, Germany |
| Appeal received on | 16 December 2022 |
| Subject matter | A decision taken by the European Chemicals Agency ('the Agency') pursuant to Article 63(3) of the Biocidal Products Regulation ('the BPR' ²) |
| Keywords | <i>Biocidal products – Data sharing dispute – Every effort – Article 95</i> |
| Contested Decision | DSH-63-3-D-0028-2022 |
| Language of the case | English |

Background and remedy sought by the Appellant

On 16 August 2022, a company (the 'prospective applicant') submitted a dispute to the Agency concerning a failure to reach an agreement on data sharing with the Appellant. Data sharing had been sought for an application to be included in the list foreseen by Article 95 with respect to the product-type 18 of silicium dioxide³.

The Agency assessed the evidence on the negotiations provided by the prospective applicant and the Appellant to establish whether they had made every effort to reach an agreement on sharing data and the related costs in a fair, transparent and non-discriminatory way.

On 28 October 2022, the Agency adopted the Contested Decision concluding that the prospective applicant had made every effort to reach an agreement on the sharing of data, whilst the Appellant had not.

According to the Contested Decision, during the negotiations the Appellant and the prospective applicant agreed on the scope of the data requested by the prospective applicant and on the payment of fair, transparent and non-discriminatory compensation. However, the Agency concluded in the Contested Decision that, following that agreement, the Appellant imposed an additional condition concerning the payment of damages by the prospective applicant relating to a commercial dispute between them.

¹ Announcement published in accordance with Article 6(6) of Commission Regulation (EC) No 771/2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency (OJ L 206, 2.8.2008, p. 5).

² Regulation (EU) No 528/2012 of the European Parliament and of the Council concerning the making available on the market and use of biocidal products (OJ L 167, 27.6.2012, p. 1). **All references to Articles hereafter concern the Biocidal Products Regulation unless stated otherwise.**

³ CAS No 61790-53-2.

The Agency decided that the additional condition concerning the commercial dispute was unrelated to the data sharing dispute and that, by unilaterally imposing such a condition, the Appellant had failed to make every effort to reach an agreement on the sharing of the data requested.

The Agency therefore granted the prospective applicant permission to refer to the requested data subject to the receipt by the Agency of proof that the prospective applicant had paid the Appellant a share of the costs incurred within two months from the notification of the Contested Decision.

The Appellant requests the Board of Appeal to annul the Contested Decision, refund the appeal fee, and to take such other or further measures as justice may require.

Pleas in law and main arguments

The Appellant argues that, by granting the prospective applicant access to its data, the Contested Decision breaches Article 17 of the Charter of Fundamental Rights of the European Union (the 'Charter') without adequate justification. According to the Appellant, mandatory data sharing, without adequate justification, infringes a data owner's property rights as guaranteed by Article 17 of the Charter. The Appellant argues that such a violation cannot be justified by Article 63(3) if the data in question is being made available to a company which, as in the present case, has violated the data owner's property rights and acted in bad faith.

The Appellant argues that the Agency neglected the principle of good faith by concluding in the Contested Decision that the resolution of the commercial dispute could not be included as a condition in the data sharing negotiations. According to the Appellant, the Agency also failed to take into account the fact that the prospective applicant did not act in a good faith during the data sharing negotiations.

The Appellant argues that the Agency did not consider all the relevant facts in a balanced manner and erred in concluding that the prospective applicant and the Appellant had agreed on the data sharing agreement and that, after that agreement, the Appellant unilaterally added a condition that was unrelated to the data sharing dispute.

The Appellant argues that the Agency breached Article 63(3) by disregarding relevant facts in its assessment of the parties' efforts and by limiting that assessment in a manner favourable to the prospective applicant.

The Appellant argues that the Agency infringed the principle of contractual freedom by disregarding the mutual agreement between the Appellant and the prospective applicant that the settlement of the commercial dispute between them was a pre-condition of data sharing.

Further information

The rules for the appeal procedure and other background information are available on the 'Appeals' section of the Agency's website:

<http://echa.europa.eu/web/guest/regulations/appeals>