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Resolution of Chemical Industry Disputes under the EU's "REACH" Regime

European Union (EU) companies manufacturing or importing one ton or more of certain chemical substances must register these activities with the newly established European Chemicals Agency (ECHA). The new system, which is set out in Regulation (EC) No 1907/2006, known as REACH (Registration, Evaluation, Authorization, and Restriction of Chemicals), requires the industry to collect and share the data on substances in order to register them with ECHA. The ECHA is to evaluate this data and is authorized to impose stringent regulation of dangerous substances or ban them altogether. Under REACH, the term "chemical substances" is broadly defined to include not only a wide range of substances, but also products such as paints and cosmetics that contain them.

Unlike other EU regulatory legislation, REACH foresees a variety of mechanisms for resolving disputes arising out of this framework. REACH provides for the right to challenge certain decisions of ECHA and the European Commission before the EU General Court, a lower, independent court attached to the EU Court of Justice (ECJ). REACH also provides for the appeal of other ECHA decisions to the Board of Appeal—a dispute resolution body which is part of ECHA. REACH also recognizes a contractual right to arbitrate certain disputes and acknowledges that certain rights conferred by REACH may be pursued before national courts.

Increasingly, ECHA's and the commission's decisions with regard to REACH obligations are being challenged, either in court or before the Board of Appeal. To date, very few of these challenges have been successful; however, and companies considering such a challenge need to carefully consider how, where, and when it is most appropriate to do so.

ECHA's Board of Appeal

The ECHA Board of Appeal is set up within the agency to guarantee the processing of appeals for persons affected by certain decisions taken by ECHA. The Board of Appeal—whose members are required by REACH to be independent—is responsible for deciding on appeals relating to, among other matters, rejections of registrations, decisions on sharing data in the case of substances, examinations of testing proposals, and evaluations of registration dossiers. To have standing to pursue an appeal, the decision at issue must be addressed to, or be of direct and individual concern to, the appellant. Appeals will be decided (by majority



vote) by three members of the Board of Appeal; this procedure is similar to that for appeals to the EU General Court or ECJ.

To date, eight appeals have been lodged with the Board of Appeal, and of these, seven have led to a published decision. Of those seven appeals, two were withdrawn and one has been satisfied. REACH provides that ECHA's Executive Director may rectify the contested decision within 30 days of the appeal being filed. On that basis, three appeals were discontinued after ECHA rectified the decision in question.

Actions before the General Court

Under REACH, decisions of the Board of Appeal may be brought before the General Court. The General Court may also hear challenges to decisions of the ECHA as to which there is no right of appeal to the board, and with regard to European Commission decisions on REACH obligations. In cases where ECHA has an obligation to take a decision but fails to do so, the party concerned may bring proceedings for failure to act before the General Court.

A number of challenges against ECHA and commission decisions concerning the early stages of the authorization process have already been brought before the General Court. Several of these have recently been held to be inadmissible on the grounds that (i) the decision was not of "direct concern" to the applicant; (ii) the decision challenged did not produce legal effects and thus was not a challengeable act;

or (iii) the challenge was out of time. Moreover, the European Court of Justice has already given its first two judgments on questions of interpretation of REACH that had been referred by the UK High Court. In addition, a number of appeals have been logged against General Court decisions.

The Role of National Courts

National courts also have a role under REACH. Specifically, in the event of data sharing between companies—either for existing data or for new data being developed via testing—REACH provides that one party is entitled to have a claim on the other party for an equal share of the cost incurred, or to prohibit the other party from manufacturing, importing, or selling the substance, provided that certain conditions are satisfied. In both cases, REACH provides that the entitled party may bring a claim before the national courts. More generally, where a question on the interpretation of REACH arises in proceedings before a national court, that court may—and in certain circumstances must—refer the question to the ECJ for judgment.

Arbitration under REACH

Last, but not least, REACH recognizes circumstances whereby parties in disagreement may choose to arbitrate. Specifically, when companies or individuals cannot agree on sharing certain information where this is mandatory under REACH, or cannot agree on cost sharing for tests to develop data, they can submit the matter to an arbitration tribunal whose decision the parties agree to accept.

The Future

To date, the REACH dispute resolution regime remains barely tested for most parties subject to REACH. However, given the scope of REACH and its applicability and potentially significant impact on industry, there is likely to be a significant escalation of REACH-related disputes in the near future. There have been recent reports of concerns in the General Court, in particular over the likely number of technically complex REACH-related appeals that the court will be called upon to deal with in the next few years and beyond. Companies subject to REACH should therefore be vigilant in producing the best argument before ECHA's Board of Appeal or the General Court and ensuring that proceedings are lodged in a timely fashion.

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