Decision in case 962/2018/JN on the delay by the European Commission in processing an application to authorise the use of the chemical substance chromium trioxide

Chromium trioxide is a chemical substance used in various sectors including aerospace, automotive, defence, engineering and construction. It has carcinogenic and mutagenic properties.

This inquiry followed a complaint to the Ombudsman by an industry group, and concerned the delay by the European Commission in processing an application to authorise different uses of chromium trioxide.

As the Commission has taken the necessary steps toward completing its handling of the application for authorisation, the Ombudsman decided to close the inquiry.

Background to the complaint

1. Companies seeking to use potentially hazardous chemical substances in the European Union must apply to have the use of the substance authorised, in accordance with the EU Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (the REACH Regulation) [1]. [2]

2. In May 2015, a group of companies ('the complainants') applied to the European Chemicals Agency (ECHA) to have six further uses of the chemical substance chromium trioxide authorised. Chromium trioxide [3] is a chemical substance with carcinogenic and mutagenic properties, which is already on the market.

3. In accordance with the REACH Regulation, applications to authorise the use of chemicals are first examined by ECHA’s Committees for Risk Assessment and Socio-economic Analysis. ECHA sends the opinions of these two committees to the European Commission, EU Member State governments and the applicant. The Commission then has three months to prepare a ‘draft authorisation decision’. The draft authorisation decision is examined by a committee of experts representing EU governments (the REACH Committee) [4]. After the committee votes
to adopt its opinion, the Commission takes a decision on whether to grant or refuse authorisation [5]. Even if the Commission has not completed reviewing applications to authorise uses of a substance, the substance can continue to be used after the ‘sunset’ date set out in the regulation (which was 21 September 2017).

4. On 16 September 2016, ECHA’s committees adopted their opinions, which they sent to the Commission on 30 September 2016.

5. On 23 May 2018, the industry complainants turned to the Ombudsman claiming that the Commission had breached the applicable three month time limit for adopting a draft authorisation decision.

The inquiry

6. The Ombudsman looked into the Commission’s failure to adopt a draft authorisation decision within three months.

7. In the course of the inquiry, the Ombudsman received the reply of the Commission on the complaint and, subsequently, the comments of the complainants in response to the Commission’s reply.

Arguments presented to the Ombudsman

8. The Commission acknowledged that it had not complied with the applicable time limit in assessing the application. However, it considered that the delay was justified by the specific circumstances of the case, which it described as exceptionally complex and the “brodest and most complex application of this kind” that it had dealt with. The application was also controversial among Member State authorities and other stakeholders. Moreover, there were important uncertainties, which the Commission needed to address. These stemmed from:
   - shortcomings with the application, prepared at a time when there was no specific guidance on complex applications submitted by actors up the supply chain;
   - the high level of uncertainty with the substances, as identified by the ECHA committees;
   - the divergent positions of the relevant Commission departments, as well as of interested stakeholders;
   - ongoing court cases against the Commission for having granted authorisations in cases with similarities to this case; and
   - the fact that the approach followed by the Commission in this case could constitute a precedent for similar applications for authorisation that were pending with the Commission.

9. The Commission, however, committed to “process a draft implementing decision on the application” as quickly as possible. It described a number of measures it had taken at the administrative level to avoid similar delays occurring in future cases.
10. The complainants challenged the Commission's arguments. They emphasised that the REACH Regulation sets out a three-month time limit, which must be observed irrespective of the complexity of an application. The complainants contended that they had diligently prepared their application in line with available guidance. In their view, the potential complexity of the assessment should not adversely affect their application.

11. In February 2019, the Ombudsman notes that the REACH Committee voted by large majority (24 member states in favour, with only 4 against) on the Commission's draft decision [6]. The Commission must now adopt a final decision on the application.

The Ombudsman's assessment

12. The REACH Regulation [7] sets out a specific time limit of three months for the Commission to prepare a draft authorising decision, from the date it receives ECHA's opinions. It does not provide for any exceptions.

13. The Commission acknowledges that it did not meet this deadline.

14. Complying with all applicable rules and relevant legislation is good administration. However, in this specific case the Ombudsman appreciates the exceptional circumstances of this large and complex application. The Commission had to deal with divergent views, ongoing relevant court cases, and the need to consider information received from different stakeholders, all of which may have contributed to the delay.

15. Moreover, the Commission's reply suggests that it had concerns about the safety of chromium trioxide and how it is used, and that it needed to consider possible alternatives. At the same time, the applicants are allowed to use the substance pending the final decision on the application (see paragraph 3). It was possible however that, at the end of the assessment, the Commission could have decided not to draft an authorisation for all or some of the uses covered by the application.

16. The Ombudsman notes the points emphasised in a recent resolution adopted by the European Parliament on 27 March 2019 [8] calling on the Commission to withdraw the draft decision. Parliament noted that the Commission's delay meant that the use of chromium trioxide was tolerated for one and a half years after the 'sunset' date [9] - under conditions that were possibly inadequate. The Parliament resolution also notes that the ECHA Committee for Risk Assessment “has estimated that the granting of such an authorisation would lead to 50 statistical fatal cancer cases every year”.

17. However, the Ombudsman notes that the Commission has a challenging task in meeting its obligations under the REACH regulation for this specific authorisation. On the one hand, an overwhelming majority of EU governments want this chemical to continue to be used on the EU market. The Commission recently told Parliament that 27 of the 28 Member States indicated in a preliminary discussion of the REACH committee that they would favour authorisation [10]. The Commission also stated that a rejection would mean an immediate
end to the authorisation of the use of the chemical leading to, according to some estimates, thousands of job losses in the EU. Yet serious questions have also been repeatedly raised about the potential negative health impacts of the use of this chemical, including on those workers in those industrial sectors, and this obviously cannot be overlooked either.

18. Assessing the balance of risks on this issue is not the role of the Ombudsman. The role of the Ombudsman is to assess whether not meeting the three month deadline for drafting an authorisation decision amounted to maladministration, given the specific and complex circumstances of the case. Normally, not to follow the requirements of specific timelines in legislation binding upon an administration would be a clear case of maladministration. However, given the specific and complex circumstances of this case the Ombudsman does not find maladministration by the Commission.

19. Regarding the impact of the delay on the complainants, the Ombudsman notes that the complainants applied in the context of a specific administrative procedure and have a right to receive a decision on their application within the legal timeframe set out in the REACH Regulation. Moreover, as the Commission itself admits, the delay may have led to uncertainty for other businesses using (or planning to use) chromium trioxide.

20. The Commission maintains that, at least in part, the delays stemmed from shortcomings in the application. The complainants deny that there were any such shortcomings. The Ombudsman’s view is that, if the application contained shortcomings, for example if it was not complete, it was arguably ECHA’s responsibility to send it back to the complainants to deal with those shortcomings [11].

21. The correspondence between the Commission and the complainants, which has been provided to the Ombudsman, indicates that the delays by the Commission were, at least in part, also due to Commission staffing issues, the consultation of stakeholders and internal deliberations within the Commission. Given the importance of this issue for health and the environment, and implications for certain industrial uses, the Commission should arguably have done more to address the staffing issues.

22. The Ombudsman recognises and indeed expects that the Commission diligently consults external stakeholders and conducts internal deliberations. However, given the importance of decisions on the authorisation of chemical substances, the Commission should be able to process such authorisations in good time. This could be done by planning consultations and setting strict deadlines for receiving and analysing replies and any other measures deemed useful. Any potentially rushed and deadline driven procedure is often not in the public interest while neither is a delay that could allow a potentially hazardous use of a chemical, under certain conditions, remain on the market. It is important that these tensions are appropriately resolved.

23. The Ombudsman trusts that the administrative measures the Commission has taken will improve the functioning of the authorisation system and speed up the procedure for the future.
Since the Commission has taken steps to complete its handling of the application, the Ombudsman thus closes the inquiry.

**Conclusion**

The Ombudsman closes the case with the conclusion that no further inquiries justified. The Commission and the complainants will be informed of this decision.

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Strasbourg, 16/04/2019


[2] ‘Substances of very high concern’ are set out in Annexes to the REACH Regulation. The uses of these substances must be authorised before they can be carried out in the EU: https://echa.europa.eu/substances-of-very-high-concern-identification-explained.

[3] Chromium trioxide is used in various sectors including aerospace, automotive, defence, sanitary, steel, food packaging, engineering and construction. Chromium trioxide is included in Annex XIV of the REACH Regulation as a substance with carcinogenic and mutagenic properties. As such, any use of the substance must be authorised by the Commission.


[5] For further detail see, in particular, Article 64 of the REACH Regulation.

[7] Article 64(8) of the REACH Regulation.


[9] Recital F.


[11] In its resolution of 27 March 2019, the European Parliament considered that ECHA’s Committees should “no longer accept applications that do not include the information to be provided” in accordance with the REACH Regulation (paragraph 6).