

Decision of the Board of Appeal in case A-017-2013 - 17 December 2014

The Vanadium Consortium notes the Board of Appeal decision in case A-017-2013. The decision is being carefully studied and follow-up actions will be decided upon and implemented accordingly.

The Board of Appeal found in favour of the Agency in a case involving a data sharing dispute between the Vanadium Consortium and a potential registrant of vanadium for a 100-1,000 tpa. In particular, the Board of Appeal found that the Agency had properly decided that the registrant had made every effort while the Consortium could have provided cleared explanations as to its system of a deposit payment and reconciliation.

Since 2010, the Vanadium Consortium has published its terms and conditions for a letter of access for vanadium, which included a deposit payment, the amount of which depended on the information requirements of the potential registrants and of the date of the payment of the deposit. The Board of Appeal upheld the Agency's finding that registrants in a same tonnage category should not be asked to make different deposits according to the date in which they purchase the letter of access to the dossier (para 46 of the decision: *"the Board of Appeal observes that the cost of the letter of access offered by the Appellant would be different depending on when it was purchased by the registrant. Additionally, the deadlines for registering phase-in substances are set out in Article 23 and there is no obligation to register before these deadlines. As a result, any additional charge based solely on the time of registration means that later registrants are required to pay more. In this respect, the Board of Appeal considers that an additional charge which is to be paid only by registrants who purchase the letter of access after 2010 is de facto discriminatory unless there are legitimate and justifiable reasons for charging additional amounts to later registrants"*). The reasons put forward by the Consortium during the data sharing negotiations were not considered sufficient.

The Board of Appeal further noted that the terms and conditions offered by the Vanadium Consortium included a reconciliation system, which would take into account, among other things, the exact number and the level of registrations, to recalculate the costs to be borne by each registrant. The Board of Appeal held (at para 53 of the decision) that such a reconciliation system *"may, in certain circumstances, be considered to be an important point in assessing whether every effort had been made"*. However, it added, *"the Board of Appeal does not consider that it was made clear from the communications during the data sharing negotiations that the [...] cost increase would be included in that reconciliation"*. The decision concludes by saying that the Appellant's explanation of the annual cost increase *"of the reconciliation process may have had a significant impact on whether the [...] annual cost increase was in fact discriminatory"* but the Board of Appeal was *"not in a position to assess whether the [...] annual cost increase is in fact discriminatory"* (para 60 of the decision). The Board of Appeal has not found that the system put in place by the Consortium was discriminatory but only that the explanation of that system during the data sharing negotiations was not sufficiently clear.

The Consortium remains committed to conducting its work for the benefit of all registrants in a fair, transparent and non-discriminatory manner. It will be contacting registrants to inform them of the next steps with regard to reconciliation of the costs of the letter of access.