Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 21 March 2013 [1]

Cases C-625/11 P and C-626/11 P

Polyelectrolyte Producers Group GEIE (PPG),
SNF SAS
v

European Chemicals Agency (ECHA)

(Appeal — Actions for annulment — Admissibility — Premature action — Action out of time — Article 47 of the Charter of Fundamental Rights of the European Union — Right to effective judicial protection — European Chemicals Agency (ECHA) — Regulation (EC) No 1907/2006 — Articles 57 and 59 — Substances subject to authorisation — Identification of acrylamide as a substance of very high concern — Inclusion on the candidate list of substances — Publication of the list on the ECHA website — Time-limit for instituting proceedings — Dies a quo — Article 102(1) of the Rules of Procedure of the General Court — Claim barred by lapse of time)

1. Through the appeals brought in these two cases, which this Opinion will address together, the Court is called upon to consider a quite unusual situation. Two actions for annulment brought by the same applicants against one and the same 'decision' of the European Chemicals Agency (ECHA), identifying a substance, in this case acrylamide, as a substance of very high concern, led to the adoption by the General Court of the European Union of two orders of inadmissibility, namely the orders of 21 September 2011 in Case T-1/10 *PPG and SNF* v *ECHA* ('the order under appeal in Case T-1/10') and Case T-268/10 *PPG and SNF* v *ECHA* ('the order under appeal in Case T-268/10') (together called 'the orders under appeal') the former dismissing one of the actions as premature and the latter dismissing the other action as out of time.

2. By two separate appeals, the applicants in the two proceedings before the General Court are requesting the Court of Justice, claiming inter alia infringement of their right to effective judicial protection, to set aside those orders, since they consider that both the finding that the first action was premature and the finding that the second action was out of time are vitiated by errors of law.

3. The relevant legislation in these two cases, namely Article 59(10) of Regulation (EC) No 1907/2006, [2] provides, in the circumstances of the present case, that the ECHA decision at issue is to be published on the ECHA website.

1 — Original language: French.

2 — Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1, 'Regulation No 1907/2006').

4. The Court will therefore require to examine, first of all and for the first time, one of the decision-making processes established by the provisions of Regulation No 1907/2006, in order to determine whether the acts adopted in the course of that process constitute acts which may be challenged, for the purposes of Article 263 TFEU, by the economic operators concerned. It will then have to consider whether Article 263 TFEU precludes, as the General Court held in Case T-1/10, an applicant bringing an action for the annulment of an act adopted at the end of that decision-making process and published on the Internet, as soon as he is aware of that act and therefore even before it has been published in accordance with the measures laid down by Regulation No 1907/2006.

5. In addition, the Court will be requested to rule, also for the first time, on the methods of computing time-limits for bringing proceedings against acts published exclusively on the Internet or, more accurately, which it is envisaged will not be actually published but publicised only on the Internet. It must, more specifically, reply to the question whether Article 102(1) of the Rules of Procedure of the General Court, which provides that the period of time allowed for commencing proceedings against acts published in the *Official Journal of the European Union* does not begin to run until the 14th day after that publication, applies to the publication of acts on the Internet.

I – The proceedings before the General Court and the orders under appeal

A – *Background to the two actions before the General Court*

6. The two actions for annulment which are the subject of the appeals both have their origin in a decision by which ECHA, pursuant to Article 59 of Regulation No 1907/2006, placed acrylamide, a substance considered to be of very high concern, on the list of substances for future inclusion in Annex XIV of Regulation No 1907/2006. [3]

7. It is apparent from the two orders under appeal that Polyelectrolyte Producers Group GEIE is a grouping which represents the interests of companies that are producers and/or importers of polyelectrolytes, polyacrylamide and/or other polymers containing acrylamide; one of its members is SNF SAS. [4]

8. On 25 August 2009, the Kingdom of the Netherlands submitted to ECHA a dossier concerning the identification of acrylamide as a carcinogenic and mutagenic substance, fulfilling the criteria set out in Article 57(a) and (b), of Regulation No 1907/2006, to be placed on the candidate list of substances for inclusion in Annex XIV of that regulation, listing the substances subject to authorisation.

9. On 27 November 2009, the Member State Committee to which the dossier was referred pursuant to Article 59(7) of Regulation No 1907/2006, issued a unanimous agreement on the identification of acrylamide as a substance of very high concern, since it fulfilled the criteria set out in Article 57(a) and (b) of that regulation.

10. On 7 December 2009, ECHA published a press release announcing the unanimous agreement of the Member State Committee and the updating, in January 2010, of the candidate list of substances.

11. On 22 December 2009, the Executive Director of ECHA adopted Decision ED/68/2009 providing for the publication, on 13 January 2010, of the updated candidate list of substances, which included acrylamide.

3 — ‘The candidate list of substances’.

4 — ‘SNF’.

B – *The two cases brought before the General Court*

12. It was in these circumstances that the appellants brought the two actions in Cases T-1/10 and T-268/10.

13. By a first application, lodged on 4 January 2010 in Case T-1/10, the subject of the appeal in Case C-625/11 P, the applicants sought the 'annulment of the decision of ECHA identifying acrylamide as a substance fulfilling the criteria set out in Article 57 of Regulation No 1907/2006, pursuant to Article 59 of that regulation'.[5] On 5 January 2010, SNF also lodged, by separate document, an application for suspension of operation of that decision, registered under number T-1/10 R.

14. By order of 11 January 2010, the President of the General Court provisionally granted the application for suspension of operation.

15. On 13 January 2010, ECHA published a further press release announcing the inclusion of 14 substances on the candidate list of substances and reserving the position as regards of acrylamide in compliance with the order for suspension of operation of 11 January 2010.

16. On 18 March 2010, ECHA lodged a plea of inadmissibility against the action in Case T-1/10.

17. By order of 26 March 2010, the President of the General Court dismissed the application for suspension of operation lodged by SNF and reserved costs.

18. On 30 March 2010, ECHA published on its website the candidate list of substances, updated and including acrylamide.

19. By a second application, lodged on 10 June 2010, in Case T-268/10, which is the subject of the appeal in Case C-625/11 P, the applicants sought the 'annulment of the decision of ECHA, published on 30 March 2010, identifying acrylamide as a substance fulfilling the criteria set out in Article 57 of Regulation No 1907/2006 and including acrylamide in the candidate list of substances'.[6]

20. On 5 November 2010, ECHA lodged a plea of inadmissibility against the action in Case T-268/10. On 18 January 2011, ECHA also lodged an additional pleading on the plea of inadmissibility.

C – *The order under appeal in Case T-1/10 (action declared premature)*

21. By the order under appeal in Case T-1/10, the General Court upheld the plea of inadmissibility lodged by ECHA and, consequently, dismissed the applicants' action as inadmissible. It also ordered the applicants to pay their own costs and those incurred by ECHA, and ordered the Kingdom of the Netherlands and the European Commission to pay their own costs. Finally, it ordered SNF to pay the costs relating to the proceedings for interim measures.

22. In that case, the General Court considered, in essence, that, at the date on which the application was lodged, that is to say, 4 January 2010, acrylamide was not yet included in the candidate list of substances. It is true that, by that date, the Member State Committee had unanimously agreed on the identification of acrylamide as a substance of very high concern and the Executive Director of ECHA had adopted his decision to include it in the candidate list of substances. However, that decision was not due to enter into force until 13 January 2010.[7] Consequently, the decision contested by the

5 — Paragraph 8 of the order under appeal in Case T-1/10.

6 — Paragraph 11 of the order under appeal in Case T-268/10.

7 — Paragraph 45 of the order under appeal in Case T-1/10.

applicants when they brought their action was not intended to produce legal effects vis-à-vis third parties.[8] As the candidate list of substances exists only on the ECHA website, it is only upon inclusion in that list published on the ECHA website that the act identifying a substance as being of very high concern is intended to produce legal effects.[9]

D – *The order under appeal in Case T-268/10 (application declared out of time)*

23. By the order under appeal in Case T-268/10, the General Court upheld the principal ground of inadmissibility raised by ECHA in its plea of inadmissibility, alleging failure to observe the time-limit for bringing an action, and consequently dismissed the application brought by the applicants as inadmissible. It also ordered the applicants to bear their own costs and those incurred by ECHA and ordered the Kingdom of the Netherlands and the Commission to bear their own costs.

24. In that case, the General Court found that the contested decision, that is, the decision identifying acrylamide as a substance fulfilling the criteria set out in Article 57 of Regulation No 1907/2006 and including acrylamide in the candidate list of substances,[10] had been published by ECHA on its website on 30 March 2010, in accordance with its obligation under Article 59(10) of Regulation No 1907/2006,[11] and that the period for bringing an action against it expired on 9 June 2010.[12] Since the action was brought on 10 June 2010, it was out of time[13] and, since the applicants had not argued the existence of unforeseeable circumstances or of force majeure,[14] the action had to be dismissed as inadmissible.[15]

25. The Court also took care to add, once it had been established that the action was out of time, that the applicants could not rely on any excusable error.[16]

II – Procedure before the Court of Justice and forms of order sought by the parties

26. The applicants in the two proceedings before the General Court brought an appeal against the orders under appeal, the first, lodged on 6 December 2011, under number C-625/11 P, against the order under appeal in Case T-268/10 declaring the action out of time, the second, lodged under number C-626/11 P, against the order under appeal in Case T-1/10 declaring the action premature.

27. By letters lodged on 23 December 2011, the Kingdom of the Netherlands, which had intervened in support of ECHA in the two cases before the General Court, stated that it continued its support in the two appeals but did not, however, wish to add further written argument.

28. The appellants and the respondent in the appeals and the Commission presented oral argument at the hearing, common to both cases, on 14 December 2012, during which they were invited to state their views on the relevance of paragraph 8 of the judgment in *Hoogovens Groep* v *Commission*,[17] for the purposes of the appeal in Case C-626/11 P.

8 — Ibid., paragraphs 41 and 46.
9 — Ibid., paragraph 50.
10 — Paragraph 11 of the order under appeal in Case T-268/10.
11 — Ibid., paragraph 31.
12 — Ibid., paragraph 39.
13 — Ibid., paragraph 40.
14 — Ibid., paragraph 42.
15 — Ibid., paragraph 43.
16 — Ibid., paragraph 41.
17 — Joined Cases 172/83 and 226/03 *Hoogovens Groep* v *Commission* [1985] ECR 2831.

29. In their appeal in Case C-625/11 P, the appellants claim that the Court of Justice should:

— set aside the order under appeal in Case T-268/10;

— annul the contested decision; or

— in the alternative, refer the case back to the General Court for judgment on their application for annulment, and

— order the respondent to pay the costs incurred in the proceedings before the Court of Justice and in the proceedings before the General Court.

30. ECHA contends that the Court should:

— declare the appeal unfounded and

— order the appellants to pay the costs.

31. The Commission contends that the Court should:

— dismiss the appeal and

— order the appellants to pay the costs.

32. In their appeal in Case C-626/11 P, the appellants claim that the Court of Justice should:

— set aside the order under appeal in Case T-1/10;

— annul the contested decision; or

— in the alternative, refer the case back to the General Court for judgment on their application for annulment, and

— order the defendant to pay the costs incurred in the proceedings before the Court of Justice and in the proceedings before the General Court.

33. ECHA contends that the Court should:

— declare the appeal unfounded and

— order the appellants to pay the costs.

34. The Commission contends that the Court should:

— dismiss the appeal and

— order the appellants to pay the costs.

III – The appeals

A – *Preliminary observations on the function of the publication of acts of the EU institutions, bodies, offices and agencies and in particular on the use of the Internet for that purpose*

35. It should be pointed out at the outset that the validity of Article 59(10) of Regulation No 1907/2006, inasmuch as it provides that the ECHA 'shall publish' and 'update' the candidate list of substances on the ECHA website 'without delay after a decision on inclusion of a substance [on that list] has been taken', was not called in question in the proceedings before the General Court, so that that matter is excluded from consideration in this appeal.

36. None the less, that provision, which, as we shall see, lies of necessity at the heart of the questions posed by the two appeals, inasmuch as it defines the event on the basis of which the General Court declared the two actions inadmissible, raises a number of questions which, in my view and at least to a certain extent, cannot be overlooked.

37. It should be pointed out, in that regard, that the function of the publication of an act of the institutions, bodies, offices and agencies of the European Union, which stems from the requirement for legal certainty, is, first and foremost, to inform the parties concerned, precisely and accurately, of the extent of the obligations it imposes upon them,[18] where appropriate, and also the moment from which those obligations will in the normal course begin,[19] to produce legal effects, precisely in order to enable them to take steps accordingly[20] and to exercise, if necessary and with full knowledge of the facts, their right to bring an action against that act.

38. Similarly, publication, which satisfies the procedural requirements compliance with which is itself subject to review by the Court of Justice,[21] also makes it possible to establish with certainty the date from which the parties concerned are presumed to have been acquainted with the content of acts which may affect them and therefore, with the occasional exception,[22] the date from which it is possible to calculate accurately and therefore necessary to calculate the periods in which actions against them are, in the interests of legal certainty, barred, even where publication is not a condition of their applicability.

39. The right to effective judicial protection guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union also requires, in my view, that the conditions of admissibility of actions should be construed so as, in cases of doubt or difficulty, to give preference to their examination on the merits and therefore access to the court in the full sense, subject always to the rights and interests of the other parties to the proceedings. That approach should therefore lead the court hearing an action to refrain from interpreting the provisions relating to the time-limits for bringing actions unduly strictly and, in any event, to rule out an interpretation hostile to its admissibility.[23]

18 — Case C-108/01 *Consorzio del Prosciutto di Parma and Salumificio S. Rita* [2003] ECR I-5121, paragraph 95, and Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, paragraph 38.

19 — Regarding the exceptions to the principle of non-retroactivity, see, *inter alia*, Case 98/78 *Racke* [1979] ECR 69, paragraphs 19 and 20, and Case C-337/88 *SAFA* [1990] ECR I-1, paragraph 13.

20 — Case C-345/06 *Heinrich* [2009] ECR I-1659, paragraphs 42 to 44.

21 — See, inter alia, in that regard, concerning publications in the *Official Journal of the European Union*, *Racke*, paragraph 15, and *SAFA*, paragraph 12; for publication on the Internet, see Case C-221/*01 Commission* v *Belgium* [2002] ECR I-7835, paragraphs 44 and 45.

22 — Case C-335/09 P *Poland* v *Commission* [2012] ECR, and Case C-336/09 P *Poland* v *Commission* [2012] ECR.

23 — See, regarding this approach, which is well-known, particularly in Spain, as the *pro actione* principle, Sáez Lara, C., 'Tutela judicial efectiva y proceso de trabajo', in Casas Baamonde, M. E. and Rodríguez-Piñero y Bravo-Ferrer, M., *Comentarios a la Constitución española*, Wolters Kluwer 2008, p.603.

40. Moreover, that is the reason why, according to settled case-law, it is usually the actual date of publication of an act which marks the starting point of the period laid down for instituting proceedings against it, even where the applicant was acquainted with its content before publication, since the day on which a measure came to the knowledge of an applicant, as the starting point of the period laid down for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure. [24]

41. That being so, it is now necessary to examine the specific procedural requirement to 'publish' 'decisions' on inclusion of substances on the candidate list of substances, by means of updating that list on the ECHA website, as provided by Article 59(10) of Regulation No 1907/2006, which must inevitably be checked against the content of the 'legal notice' inserted by ECHA on that website. Under what that legal notice describes as a 'disclaimer', ECHA declares, inter alia, that it 'accepts no responsibility or liability whatsoever with regard to the information [on its website]', and states that it 'cannot be guaranteed that a document available online exactly reproduces an officially adopted text'. [25] It is, to say the least, difficult not to take account of that disclaimer when assessing the scope and effects of that specific procedural requirement of publication.

42. It would be possible to interpret Article 59(10) of Regulation No 1907/2006 providing for a certain 'publicising' of the content of a 'decision', which is, moreover, not identified with sufficient precision. By contrast, in the absence of any rules governing such publicising on the Internet [26] and making it possible, in particular, to ensure with certainty the dates the information is put on line [27] and also the authenticity, integrity and unalterability of that information, [28] that provision cannot be equated with a genuine 'publication', with all the legal consequences which that gives rise to. [29]

43. For a website to be regarded as properly fulfilling an obligation to publish, in the strict sense, it must be technically capable of ensuring that a 'disclaimer' such as the one covering the ECHA website is, at least for part of the content of that site, plainly unnecessary. [30]

44. Moreover, it should be pointed out that the fact that Article 59(10) of Regulation No 1907/2006 requires that publicity of that kind be given to decisions on the inclusion of a substance on the candidate list of substances does not necessarily mean that it precludes any measure to publish those decisions, including on the Internet. ECHA's Management Board, without infringing that provision, could perfectly well lay down in ECHA's internal rules and procedures, under the powers conferred upon it by Article 78 of Regulation No 1907/2006, an obligation to 'publish' – in the strict sense – those decisions.

24 — See Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraphs 35 to 39, and order of 25 November 2008 in Case C-500/07 P *TEA* v *Commission*, paragraphs 21 to 23.

25 — This legal notice, consulted on the date of the hearing, is available at all times through a link at the foot of each page of the website (http://echa.europa.eu/en/web/guest/legal-notice).

26 — See, in that regard, *Skoma-Lux*, paragraph 48.

27 — Unlike, inter alia, what is provided in Article 58(4) of Regulation No 1907/2006.

28 — By way of comparison, it is the Publications Office of the European Union which ensures the authenticity of the *Official Journal of the European Union*. See Article 3(1)(a) of Decision 2009/496/EC, Euratom of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions of 26 June 2009 on the organisation and operation of the Publications Office of the European Union (OJ 2009 L 168, p. 41).

29 — These fundamental requirements form the basis of Council Regulation (EC) No 216/2013 of 7 March 2013, relating to the electronic publication of the *Official Journal of the European Union* (OJ L 69, p. 1); see, in particular, recitals 8 and 10 in the preamble and Articles 2(1) and 4(1). See also the Proposal for a Council Regulation on electronic publication of the *Official Journal of the European Union*, presented by the Commission on 4 April 2011, COM(2011) 162 final. See points 1.1 and 1.3 of the Explanatory Memorandum, recital 8 and Articles 1(2) and 2(1) and (2) of the proposal.

30 — Article 2(1) of Regulation No 216/2013 relating to the electronic publication of the *Official Journal of the European Union* provides, from that point of view, that the legal effects of that electronic publication are to be based on an electronic signature based on a certificate created by a secure signature device, in accordance with Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (OJ 2000 L 13, p. 12).

45. I must point out, to conclude these preliminary observations, that, since the validity of a method of publication such as that provided for in Article 59(10) of Regulation No 1907/2006 is not in dispute in this case, it is not on the basis of considerations of that nature that the appellants' appeals must be assessed. However, in view of the significance of that publication and of the date on which it occurred in the two cases, I consider that those considerations must have a place in the overall assessment of the two appeals.

B – *The appeal in Case C-626/11 P (order under appeal in Case T-1/10, declaring the action premature)*

1. Summary of the arguments of the parties

46. The applicants raise, in essence, a single ground of appeal alleging misinterpretation of Regulation No 1907/2006, which led to an infringement of their right to effective judicial protection.

47. More specifically, they criticise the General Court for having held that it was the actual 'inclusion' of acrylamide on the candidate list of substances as published on the ECHA website, which constituted the only act intended to produce legal effects in respect of third parties in the context of the procedure laid down in Article 59 of Regulation No 1907/2006 and not its identification as a substance fulfilling the criteria laid down in Article 57 of Regulation No 1907/2006, formulated and brought to their attention by the press release published by ECHA on 7 December 2009.

48. ECHA, supported by the Kingdom of the Netherlands and the Commission, maintains, by contrast, that the General Court was right to hold that the decision of the Member States Committee identifying acrylamide as a substance of very high concern was only a preparatory decision which was not intended to produce legal effects vis-à-vis third parties, since only the publication of the updated candidate list of substances on the ECHA website could produce such effects.

2. Analysis

49. It should be noted at the outset that, under the order under appeal in Case T-1/10, the applicants' application was dismissed as inadmissible solely on the ground that, at the time when it was lodged, the contested decision was not intended to produce legal effects vis-à-vis third parties.[31] The General Court considered, as is apparent in particular from paragraph 45 of that order, that that decision could not produce effects before the entry into force, on 13 January 2010, of the decision of the Executive Director of ECHA, giving effect to the unanimous agreement of the Member State Committee, to include acrylamide in the candidate list of substances published on the ECHA website.

50. The grounds of the order under appeal in Case T-1/10 are marred by several errors of law.

51. In that regard, it must be pointed out first of all that the Court of Justice has held that the provisions of Article 33(3) CS,[32] which prescribed information and publication as the formalities from which the time-limit for bringing an action to have a decision declared void was to run, did not prevent an applicant from lodging an application against an act as soon as it had been adopted, without waiting for it to be notified or published.

52. Nothing in the provisions of the sixth paragraph of Article 263(6) TFEU precludes the application of that case-law in the present case.

31 — See, in particular, paragraphs 41 and 46 of the order under appeal in Case T-1/10.

32 — *Hoogovens Groe*p v *Commission*, paragraph 8.

53. It is apparent, on the contrary, from all the case-law of the Court of Justice, that the right to effective judicial protection requires that every individual should have the right to bring an action for annulment of an act, provided that that act is designed to have legal effects vis-à-vis third parties and may therefore affect him and that the party concerned fulfils the other conditions for admissibility of the action, from the time he knows of the author, content and grounds of that act, without facing the objection that he has brought the action prematurely, even if the act is still to be published or notified and therefore even before those procedures, assuming them to be necessary, have been carried out.

54. As is apparent from settled case-law, an action for annulment must be available against any act of the EU institutions, bodies, offices and agencies which are intended to have legal effects vis-à-vis third parties, [33] that is to say, binding legal effects capable of affecting their interests by bringing about a distinct change in their legal position, [34] and those effects must be assessed according to objective criteria relating to the substance of the act, [35] taking account, if appropriate, of the context in which it was adopted. [36]

55. Therefore, if, having regard to its content and to the circumstances in which it was adopted, an act is intended, definitively and unequivocally, [37] to produce legal effects vis-à-vis third parties, it constitutes a challengeable act for the purposes of Article 263 TFEU, irrespective of whether it has been published or notified.

56. The publication of an act, as is also apparent from the settled case-law of the Court of Justice, is a condition of its enforceability, [38] which therefore initiates the period for bringing proceedings against the act. While the publication of an act commences the period for bringing proceedings on expiry of which that act becomes final, it does not, by contrast, constitute a condition which initiates the period for bringing proceedings against that act.

57. In the present case, the General Court held that the act identifying a substance as of very high concern, adopted in accordance with the procedure laid down in Article 59 of Regulation No 1907/2006, implied legal obligations, including the obligations to inform laid down in Article 7(2), Article 31(1)(c) and (3)(b), and Article 33(1) and (2) of Regulation No 1907/2006. [39] It also recognised that the ECHA body responsible for including a substance in the candidate list of substances did not have any discretion in relation to that inclusion, since the Member States Committee had given its unanimous agreement. [40]

58. The General Court nevertheless held that the act identifying a substance as being of very high concern was not intended to produce legal effects vis-à-vis third parties before the inclusion of that substance in the candidate list of substances published on the ECHA website [41] and, more specifically, before the entry into force of the decision of the Executive Director of ECHA ordering the publication of the candidate list of substances. [42] It concluded, in formal terms, that the period for 'bringing an action against the act identifying a substance as being of very high concern ... cannot begin to run until the publication of the candidate list of substances containing that substance'.

33 — Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraphs 39 and 42, and Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 24.

34 — Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9.

35 — See, inter alia, Case C-314/11 P *Commission* v *Planet* [2012] ECR paragraphs 94 and 95.

36 — See, to that effect, Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669, paragraph 58.

37 — Case 44/81 *Germany and Bundesanstalt für Arbeit* v *Commission* [1982] ECR 1855, paragraphs 8 to 12.

38 — See, inter alia, Case 185/73 *König* [1974] ECR 607, paragraph 6; *Racke*, paragraph 15; *Skoma-Lux*, paragraph 37; *Heinrich*, paragraph 43; and Case C-146/11 *Pimix* [2012] ECR, paragraph 33.

39 — See paragraph 42 of the order under appeal in Case T-1/10.

40 — See paragraph 46 of the order under appeal in Case T-1/10.

41 — Ibid., paragraphs 45 and 50.

42 — See paragraphs 7 and 45 of the order under appeal in Case T-1/10.

59. It was therefore the actual date of publication of the candidate list of substances on the ECHA website, and more specifically the date on which that list was updated, which is the same as the date on which that decision came into force, which was regarded by the General Court as constituting the mandatory starting point of the periods for bringing actions in the present case [43] and on the basis of which it concluded that the applicants' application was premature.

60. By so doing, the General Court was mistaken as regards both the scope and the effects of the publication of the acts of EU law and the interpretation of the concept of 'challengeable act' for the purposes of Article 263 TFEU.

61. Consequently, by concluding that the applicants' action for the annulment of the decision of ECHA to include acrylamide on the candidate list of substances was premature since it had been brought before the publication of that list on the ECHA website, the General Court misinterpreted the provisions of Article 263(6) TFEU.

62. It must be added that, as both the Kingdom of the Netherlands and the Commission had, moreover, pointed out in the proceedings before the General Court, it is the decision of the Executive Director of ECHA to include a substance on the candidate list of substances which must be considered as the final act bringing to an end the procedure laid down in Article 59 of Regulation No 1907/2006.

63. The publication of the updated candidate list on the ECHA website is only the physical operation bringing the final decision of the ECHA to the knowledge of the parties concerned, [44] even if, in the event, it is that operation which determines whether that decision is enforceable against them and which sets the date from which the periods within which actions may be brought against the decision will start to run.

64. Finally, in the absence of any other form of official information on the inclusion of a substance in the candidate list of substances, such as the publication of the decision of the Executive Director of ECHA or its notification to the parties concerned who have submitted the comments referred to in Article 59(4) of Regulation No 1907/2006, the admissibility of an action brought by those parties as soon as they are aware of such inclusion is all the more justified.

65. The order under appeal in Case T-1/10 must therefore be set aside and the case referred back to the General Court for it to rule on the other pleas in law and arguments raised by the parties and particularly on the other grounds of inadmissibility raised by ECHA in its plea of inadmissibility. It should be pointed out, in that regard, that, if the General Court were to conclude that the applicants' action is admissible, that conclusion would automatically lead to the inadmissibility, on the grounds of *lis alibi pendens*, of their action in Case T-268/10, which is the subject of the appeal in Case C-625/11 P and which I am now going to examine, in order to determine whether that appeal should be upheld and the case be referred back to the General Court.

43 — See, in particular, paragraph 50 of the order under appeal in Case T-1/10.

44 — See, to the same effect, the order in Case C-93/11 P *Verein Deutsche Sprache* v *Council* [2011] ECR, paragraph 26.

C – The appeal in Case C-625/11 P (order under appeal in Case T-268/10, declaring the application out of time)

1. Summary of the arguments of the parties

66. The applicants raise, in essence, a single ground of appeal alleging that the General Court erred in its interpretation of Article 102(1) of its Rules of Procedure and the case-law concerning time-limits for bringing actions, resulting in an infringement of their right to effective judicial protection. They claim that the period of 14 days laid down in that provision must be applied to any published act, whatever the means of publication, not only to acts published in the *Official Journal of the European Union*.

67. ECHA, supported in every respect by the Kingdom of the Netherlands, considers, by contrast, that the 14-day period laid down in Article 102(1) of the Rules of Procedure of the General Court cannot be applied in the case of publication of an act on the Internet. Since the EU rules on time-limits for bringing actions are of strict application, the scope of that provision cannot be extended without an amendment to those Rules of Procedure, if the principle of legal certainty is not to be infringed. ECHA also emphasises, in that regard, the difference between publication on the Internet and publication in the *Official Journal of the European Union*.

68. The Commission, for its part, points out that the appellants, in their appeal, merely complain of the discriminatory and arbitrary treatment to which they were subjected. As the General Court held in paragraph 38 of the order under appeal in Case T-268/10, the time-limit for bringing proceedings applied to the appellants in the present case, which does not take into account the 14-day period laid down in Article 102(1) of the Rules of Procedure of the General Court, applies without distinction to any party in the same position as the appellants.

2. Analysis

69. It should be pointed out, first of all, that, in the order under appeal in Case T-268/10, the General Court dismissed the applicants' action as inadmissible as out of time, on the ground that the 14-day period laid down in Article 102(1) of its Rules of Procedure could not be applied, beyond the confines of its wording, to acts which, like the act contested in the present case, are published not in the *Official Journal of the European Union*, but exclusively on the Internet.[45] The General Court stated that no excusable error could be accepted in this case.[46]

70. The grounds of the order under appeal in Case T-268/10 are also vitiated by errors of law.

71. It should be noted that the Rules of Procedure of the General Court do not contain, any more, moreover, than the Rules of Procedure of the Court of Justice,[47] any provisions equivalent to those of Article 102(1) thereof as regards specifically the publication of acts of the EU institutions, bodies, offices and agencies on the internet.

45 — See, in particular, paragraph 34 of the order under appeal in Case T-268/10.

46 — See, in particular, paragraph 41 of the order under appeal in Case T-268/10.

47 — See, in that regard, Article 50 of the new Rules of Procedure of the Court of Justice, as approved by the Council of the European Union on 24 September 2012, drafted in substantially the same terms as Article 102(1) of the Rules of Procedure of the General Court. See also the identical provisions contained in Article 81(1) of the Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991 (OJ 1991 L 176, p. 7).

72. More generally, it must be stated that the EU legislation relating to time-limits for bringing actions contains no provisions governing the publication on the Internet of the acts of EU institutions, bodies, offices and agencies, so that it is for the Court of Justice to fill that gap by guaranteeing the right to effective judicial protection, [48] in compliance with general legal principles and, now, with Article 47 of the Charter of Fundamental Rights of the Union, [49] as interpreted in the light of Articles 6(1) and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

73. In that regard, it is admittedly clear from the case-law of the European Court of Human Rights, [50] as the Court of Justice has had occasion to note, [51] that the right to a court, of which the right of access to a court is one aspect, is not absolute and is subject to limitations, particular as regards the conditions of admissibility of an action, which include the setting of time-limits for bringing proceedings. [52]

74. However, it is also important to point out that, although litigants must expect the rules on admissibility to be applied, those rules must pursue a legitimate aim and be proportionate and cannot therefore restrict a person's access to a court in such a way or to such an extent that the very essence of the right is impaired. [53] The application of those rules should not prevent litigants from making use of an available remedy. [54]

75. It is in the light of these principles that it is necessary to examine whether the General Court was entitled to refuse to take into account the 14-day period laid down in Article 102(1) of its Rules of Procedure and consequently declare the applicant's action out of time, without granting them the benefit of excusable error.

a) The question whether the 14-day period applies to acts published on the Internet

76. In that regard, it should be noted, first of all, that the very wording of Article 102(1) of the Rules of Procedure of the General Court is not unambiguous, since that provision begins by referring to the publication of acts in general and then refers, *in fine*, only to publication in the *Official Journal of the European Union*.

77. It may therefore be considered, contrary to what the General court held, that that provision does not specifically regulate the calculation of time-limits for bringing proceedings against 'acts published in the *Official Journal of the European Union*', but regulates, in general, the calculation of time-limits for bringing proceedings against acts which are published, as opposed to acts which are, inter alia, notified. The point relating to publication in the *Official Journal of the European Union* is, so to speak, contingent; it harks back to a time when the Internet did not exist and when publication of an act could only be envisaged in an edition of the *Official Journal of the European Union* which would of necessity be in printed form.

48 — See Case C-334/12 RX-II *Arango Jaramillo and Others* v *EIB* [2013] ECR, paragraphs 40 to 46.

49 — See, inter alia, Case C-389/10 P *KME Germany and Others* v *Commission* [2011] ECR I-13125, paragraph 119.

50 — See, inter alia, the European Court of Human Rights, *Pérez de Rada Cavanilles v*. Spain, 28 October 1998, § 44, *Reports of Judgments and Decisions* 1998-VIII, and *Anastasakis v. Greece*, no. 41959/08, § 24, 6 December 2011.

51 — Order in Case C-73/10 P *Internationale Fruchtimport Gesellschaft Weichert* v *Commission* [2010] ECR I-11535, paragraph 53; judgment in Réxamen *Arango Jaramillo and Others* v *EIB*, paragraph 43.

52 — Orders in Case C-406/01 *Germany* v *Parliament and Council* [2002] ECR I-4561, paragraph 20, and *Internationale Fruchtimport Gesellschaft Weichert* v *Commission*, paragraphs 48 to 50.

53 — See, inter alia, ECHR, *Brualla Gómez de la Torre v. Spain*, 19 December 1997, § 33, *Reports of Judgments and Decisions* 1997-VIII, and *Pérez de Rada Cavanilles*, cited above, § 44.

54 — See, inter alia, ECHR, *Société Anonyme Sotiris and Nikos Koutras Attee* v *Greece*, no. 39442/98, § 20, *ECHR* 2000-XII, and *Anastasakis*, cited above, § 24.

78. However, an intrinsic textual analysis of that provision of the Rules of Procedure of the General Court cannot, on its own, be considered an adequate response to the fundamental question raised by this case and it is necessary, in accordance with the settled case-law of the Court of Justice, to interpret it taking account of its context and the aims it pursues. [55]

79. In this case, the 14-day period laid down in Article 102(1) of the Rules of Procedure of the General Court stems from the need to ensure that all persons in the European Union have the same time-limit for bringing proceedings against acts of EU institutions, bodies, offices and agencies published in the *Official Journal of the European Union*, calculated not from the official publication date of the *Official Journal of the European Union*, as usually indicated on each issue, but from the date on which it may reasonably be presumed that that *Official Journal of the European Union* is actually available, because it has usually arrived, in all the Member States of the European Union. The Court of Justice, moreover, has had occasion to hold that the publication of an electronic version of the *Official Journal of the European Union* could not be considered as a sufficient form of making Community legislation available for it to be enforceable. [56]

80. That 14-day period was therefore required to ensure, in view of the very function of publication referred to above, equal treatment for all persons in the European Union. It therefore constitutes, as it were, a single period of latency, ensuring observance of the general principle of equality of EU law in the sphere of actions for annulment.

81. Consequently, the mere fact that provision is made for publication of an act on the internet still does not make it permissible to 'disregard' the 14-day period laid down in Article 102(1) of the Rules of Procedure of the General Court. On the contrary, and in the absence of express provisions governing the publication of the acts of EU institutions, bodies, offices and agencies on the internet, that provision must be interpreted as meaning that the time-limit in question must, in compliance with the general principle of equality and in the absence of any imperative reasons to the contrary, [57] be considered applicable to the calculation of the time-limits for bringing proceedings against any published acts of EU institutions, bodies, offices and agencies, whatever method of publication is considered.

b) Excusable error

82. In any event, and beyond that interpretation *pro actione* of the provisions of Article 102(1) of the Rules of Procedure of the General Court, it was for that Court to assess any excusable error on the part of the applicants taking into account all the circumstances of the case.

83. Although it is true that the concept of 'excusable error' concerns only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party concerned acting in good faith and exercising all the diligence required of a normally experienced operator, [58] the Court has, however, also taken care to point out [59] that it cannot be limited to that situation alone and might be the result of all kinds of exceptional circumstances. [60]

55 — See, inter alia, Case C-217/94 *Eismann* [1996] ECR I-5287, paragraph 16; Case C-315/00 *Maierhofer* [2003] ECR I-563, paragraph 27; and Case C-321/02 *Harbs* [2004] ECR I-7101, paragraph 28.

56 — Judgment in *Skoma-Lux*, paragraphs 47 to 50.

57 — Case 117/78 *Orlandi* v *Commission* [1979] ECR 1613, paragraphs 10 and 11.

58 — Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraph 26; Case C-163/07 P *Diy-Mar Insaat Sanayi ve Ticaret and Akar* v *Commission* [2007] ECR I-10125, paragraph 36; Case C-112/09 P *SGAE* v *Commission* [2010] ECR I-351, paragraph 20; and *Internationale Fruchtimport Gesellschaft Weichert* v *Commission*, paragraph 42.

59 — See *Bayer* v *Commission*, paragraph 26.

60 — Order in *SGAE* v *Commission*, paragraph 29.

84. In the present case, the General Court held that the error of the applicants was 'based on a misinterpretation either of Article 102(2) of the Rules of Procedure or Article 101(1) [of the Rules of Procedure of the General Court]', provisions which do not pose any particular difficulty of interpretation.

85. However, although it is true that the Court of Justice, in the order cited by the General Court,[61] held that the rules governing the time-limits applicable in the present case did not pose any particular difficulty of interpretation, the Court was referring only to the rules for calculating those time-limits. It could not be inferred from that order alone that the computation of time-limits for bringing proceedings against acts of the EU institutions, bodies, offices and agencies published exclusively on the internet was perfectly clear and left no room for any reasonable doubt.

86. The absence of any express provision and of any specific case-law on the rules for calculating time-limits for bringing proceedings against acts of the EU institutions, bodies, offices and agencies published exclusively on the internet should, on the contrary, have led the General Court to take into consideration all the circumstances of the case for the purpose of assessing, in the light of the right to effective judicial protection, the conditions for establishing an excusable error.

87. The ambiguity of the wording of Article 102(1) of its Rules of Procedure, together with the fact that the diligence with which the applicants had believed that they should exercise their right of action was penalised by an order made on the same day declaring their action inadmissible because it was premature, should have led the General Court to accept that there had been an excusable error in this case.

88. Consequently, the General Court erred in law in its interpretation of the sixth paragraph of Article 263(6) TFEU and Article 102(1) of its Rules of Procedure by concluding that the applicant's action for the annulment of the ECHA decision to include acrylamide on the candidate list of substances was out of time and that that belatedness was not the consequence of an excusable error.

89. The order under appeal in Case T-268/10 must therefore be set aside and the case referred back to that Court for it to rule on the other pleas in law and arguments raised by the parties; I would recall, however, that that action will have to be dismissed as inadmissible on the grounds of *lis alibi pendens* if the action in Case T-1/10 referred back to the General Court is declared admissible.

IV – Conclusion

90. I therefore propose that the Court should:

In Case C-625/11 P:

(1) Set aside the Order of the General Court of the European Union of 21 September 2011 in *PPG and SNF* v *European Chemicals Agency (ECHA)* (T-268/10);

(2) Refer the case back to the General Court of the European Union;

(3) Reserve the costs.

In Case C-626/11 P:

(1) Set aside the Order of the General Court of the European Union of 21 September 2011 in *PPG and SNF* v *European Chemicals Agency Agence (ECHA)* (T-1/10);

61 — Order in *Germany* v *Parliament and Council*, paragraph 21.

(2) Refer the case back to the General Court of the European Union;

(3) Reserve the costs.