Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 September 2013*

(Appeal — European Chemicals Agency (ECHA) — Registration, evaluation and authorisation of chemical substances — Regulation (EC) No 1907/2006 (REACH Regulation) — 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 — Action for annulment brought prior to that publication — Admissibility)

In Case C-626/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 30 November 2011,

Polyelectrolyte Producers Group GEIE (PPG), established in Brussels (Belgium),

SNF SAS, established in Andrézieux-Bouthéon (France),

represented by R. Cana and K. Van Maldegem, avocats,

appellants,

the other parties to the proceedings being:

European Chemicals Agency (ECHA), represented by M. Heikkilä and W. Broere, acting as Agents, assisted by J. Stuyck, advocaat,

defendant at first instance,

Kingdom of the Netherlands, represented by C. Wissels and B. Koopman, acting as Agents,

European Commission, represented by P. Oliver and E. Manhaeve, acting as Agents, with an address for service in Luxembourg,

interveners at first instance,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Lõhmus (Rapporteur), M. Safjan and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Hewlett, Principal Administrator,

* Language of the case: English.

having regard to the written procedure and further to the hearing on 14 November 2012,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2013,

gives the following

Judgment

1 By their appeal, Polyelectrolyte Producers Group GEIE (PPG) ('PPG') and SNF SAS ('SNF') seek to have set aside the order of the General Court of the European Union of 21 September 2011 in Case T-1/10 *PPG and SNF* v *ECHA* [2011] ECR II-6573 ('the order under appeal'), by which that Court dismissed as inadmissible their action for annulment of the decision of the European Chemicals Agency ('ECHA'), identifying acrylamide (EC No 201-173-7) as a substance meeting the criteria laid down in Article 57 of 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, and – corrigendum – OJ 2007 L 136, p. 3, 'the REACH Regulation'), in accordance with Article 59 thereof ('the contested decision').

Legal context

The REACH Regulation

2 Article 57 of the REACH Regulation sets out which substances can be included in Annex XIV to that regulation, entitled 'List of substances subject to authorisation'. Points (a) and (b) of Article 57 list the substances which meet the criteria for classification as carcinogenic and mutagenic substances under certain categories.

3 Pursuant to Article 59 of that regulation, entitled 'Identification of substances referred to in Article 57':

'1. The procedure set out in paragraphs 2 to 10 of this Article shall apply for the purpose of identifying substances meeting the criteria referred to in Article 57 and establishing a candidate list for eventual inclusion in Annex XIV ('candidate list of substances'). ...

…

3. Any Member State may prepare a dossier in accordance with Annex XV for substances which in its opinion meet the criteria set out in Article 57 and forward it to [ECHA].… [ECHA] shall make this dossier available within 30 days of receipt to the other Member States.

4. [ECHA] shall publish on its website a notice that an Annex XV dossier has been prepared for a substance. [ECHA] shall invite all interested parties to submit comments within a specified deadline to [ECHA].

5. Within 60 days of circulation, the other Member States or [ECHA] may comment on the identification of the substance in relation to the criteria in Article 57 in the dossier to [ECHA].

6. If [ECHA] does not receive or make any comments, it shall include this substance on the list referred to in paragraph 1. …

7. When comments are made or received, [ECHA] shall refer the dossier to the Member State Committee within 15 days of the end of the 60-day period referred to in paragraph 5.

8. If, within 30 days of the referral, the Member State Committee reaches a unanimous agreement on the identification, [ECHA] shall include the substance in the list referred to in paragraph 1. …

…

10. [ECHA] shall publish and update the list referred to in paragraph 1 on its website without delay after a decision on inclusion of a substance has been taken.'

Background to the dispute and the contested decision

4 PPG is a European economic interest grouping which represents the interests of companies that are producers and/or importers of polyelectrolytes, polyacrylamide and/or other polymers containing acrylamide. SNF is one of its member companies.

5 On 25 August 2009, the Kingdom of the Netherlands submitted to ECHA a dossier which it had drawn up concerning the identification of acrylamide as a substance fulfilling the criteria set out in Article 57(a) and (b) of the REACH Regulation.

6 On 31 August 2009, ECHA published a notice on its website inviting interested parties to submit comments on the acrylamide dossier. It also invited the competent authorities of other Member States to submit comments on this subject.

7 After receiving comments on the dossier in question, in particular from PPG, and the responses to those comments from the Kingdom of the Netherlands, ECHA referred the dossier to its Member State Committee which, on 27 November 2009, unanimously agreed on the identification of acrylamide as a substance of very high concern, because it fulfilled the criteria set out in Article 57(a) and (b) of the REACH Regulation.

8 On 7 December 2009, ECHA published a press release announcing, first, the unanimous agreement of the Member State Committee to identify acrylamide and 14 other substances as substances of very high concern in so far as they fulfilled the criteria set out in Article 57 of the REACH Regulation and, second, that the candidate list of substances would be formally updated in January 2010.

9 On 22 December 2009, the Executive Director of ECHA adopted Decision ED/68/2009, whose entry into force was envisaged for 13 January 2010, to include those 15 substances on that date on the candidate list of substances.

10 On 30 March 2010, the candidate list of substances, including acrylamide, was published on the ECHA website.

The procedure before the General Court and the order under appeal

11 According to the order under appeal, by application lodged at the Registry of the General Court on 4 January 2010, PPG and SNF brought an action for annulment of the contested decision.

12 On 17 March 2010, ECHA lodged at the General Court Registry a document raising a plea of inadmissibility against that action. It raised three grounds of inadmissibility based on the nature of the contested decision, on the fact that it was not of direct concern to the appellants, and on the fact that that decision, which it contends is not a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU, was not of individual concern to those appellants.

13 In regard to the plea of inadmissibility based on the nature of the contested decision, ECHA argued, in essence, that the appellants, by referring to the unanimous agreement of the ECHA Member State Committee of 27 November 2009, were contesting a preparatory measure that was not intended to produce legal effects vis-à-vis third parties within the meaning of the second sentence of the first paragraph of Article 263 TFEU.

14 The Kingdom of the Netherlands, which was granted leave to intervene in support of the form of order sought by ECHA, supported all the pleas of inadmissibility raised by the latter.

15 The European Commission, which was also granted leave to intervene, supported the arguments of ECHA with regard to the nature of the contested decision and the absence of direct effect on the appellants. In addition, it contended that the application did not comply with the requirements of Article 44(1)(c) of the Rules of Procedure of the General Court in that it lacked clarity.

16 The General Court first examined that last plea of inadmissibility. While noting that an intervener does not have standing to raise a plea of inadmissibility not raised by the party which it supports, it stated that the conditions of admissibility of an action and the complaints set out therein are a matter of public policy, and it was thus able to examine them of its own motion.

17 The General Court rejected that plea of inadmissibility and held, in paragraph 34 of the order under appeal, that it was clear, to the requisite legal standard, from the application that the subject-matter of the dispute was the ECHA measure resulting from the procedure laid down in Article 59 of the REACH Regulation, identifying acrylamide as a substance fulfilling the criteria set out in Article 57 of that regulation, the content of which had been determined by unanimous agreement by the Member State Committee on 27 November 2009, implementation of which was to be effected by the inclusion of acrylamide on the list of candidate substances published on ECHA's website. Publication of that list was scheduled for 13 January 2010, but finally took place on 30 March 2010.

18 Second, in regard to the plea of inadmissibility raised by ECHA, based on the nature of the contested decision, the General Court considered, in paragraph 41 of the order under appeal, that it was not necessary to rule on the argument concerning the alleged preparatory nature of that unanimous agreement, as the contested decision was not intended to produce legal effects vis-à-vis third parties at the time when the admissibility of the action had to be assessed, that is to say at the time when the application was lodged.

19 In that regard, the General Court found, in paragraph 45 of the order under appeal, that the application had been lodged after the unanimous agreement of the Member State Committee on the identification of acrylamide as a substance of very high concern and after the decision of the Executive Director of ECHA to include that substance on the candidate list of substances, but before 13 January 2010, namely the scheduled date for the entry into force of that decision and for the inclusion of acrylamide on that list.

20 In paragraph 49 of the order under appeal, the General Court considered, first, that the act of identifying a substance as being of very high concern does not produce legal effects vis-à-vis third parties prior to the inclusion of that substance on the list of candidate substances, and that the legal obligations resulting from that act can be imposed on the persons concerned only after the publication and updating of the list containing that substance on ECHA's website, in accordance with

Article 59(10) of the REACH Regulation. Second, the General Court held that the time-limit for bringing an action against that act, pursuant to the sixth paragraph of Article 263 TFEU, can start running only after that publication.

21 Consequently, the General Court dismissed the action before it as inadmissible, without examining the other pleas of inadmissibility raised by ECHA.

Forms of order sought by the parties

22 The appellants request the Court to set aside the order under appeal and to annul the contested decision or, alternatively, to refer the case back to the General Court to rule on their application, and to order ECHA to pay the costs at first instance and on appeal.

23 ECHA, along with the Kingdom of the Netherlands and the Commission, which supported ECHA at first instance, request the Court of Justice to declare the appeal unfounded and to order the appellants to pay the costs.

The appeal

Arguments of the parties

24 The appellants raise a single ground of appeal, alleging that the General Court erred in law in the interpretation and application of the REACH Regulation by finding that the identification of a substance as a substance of very high concern by the ECHA Member State Committee, in accordance with Article 59(8) of that regulation, does not constitute a decision intended to produce legal effects vis-à-vis third parties before the publication of the candidate list of substances including that substance.

25 The appellants claim that, contrary to what the General Court found in paragraph 47 of the order under appeal, it is clear from the various references to 'identification' and 'inclusion' in the provisions of the REACH Regulation defining the information obligations that the European Union legislature intended to create such obligations arising from the identification of a substance at an earlier stage than its inclusion on the candidate list of substances.

26 ECHA, supported by the Kingdom of the Netherlands, recalls that, in the case of measures adopted by a procedure involving several stages, only measures definitively laying down the position of the institution or body at the completion of the procedure constitute measures which may be contested. In its view, in the present case, the inclusion of acrylamide on the candidate list of substances, as published on 30 March 2010, is the measure creating potential legal effects, whereas the agreement of the Member State Committee is a preparatory measure which does not produce any legal obligation in itself.

27 According to the Commission, the fact that the unanimous agreement of the Member State Committee allows no discretion as to the inclusion of a substance on the candidate list of substances does not mean that that agreement constitutes the final, challengeable measure and is substitutable for the decision of ECHA taken under Article 59(8) of the REACH Regulation.

28 The Commission submits that no provision of that regulation indicates that there is a distinction between the identification of a substance and its inclusion on the candidate list of substances. On the contrary, it is clear from Article 59 of that regulation that substances are identified as substances of very high concern for the sole purpose of being included on the candidate list.

Findings of the Court

29 It should be noted, at the outset, that it is not disputed that the subject-matter of the action brought by PPG and SNF was the measure of the ECHA described by the General Court in paragraph 34 of the order under appeal, namely that resulting from the procedure referred to in Article 59 of the REACH Regulation, identifying acrylamide as a substance which satisfies the criteria laid down in Article 57 of that regulation.

30 As the General Court pointed out in that order, an action for annulment may be brought against such a measure under the second sentence of the first paragraph of Article 263 TFEU, in so far as it was adopted by an agency of the European Union, the ECHA in this instance, and it is intended to produce legal effects vis-à-vis third parties. Several provisions of the REACH Regulation, such as those cited inter alia in paragraph 42 of the order under appeal, provide for information obligations arising from the measure identifying a substance as a result of the procedure referred to in Article 59 of that regulation.

31 The General Court was also right to find, in paragraph 49 of the order under appeal, that the legal obligations arising from the measure identifying a substance as being of very high concern as a result of the procedure referred to in Article 59 of the REACH Regulation, can be imposed on the persons concerned only after publication of the candidate list of substances containing that substance, such publication being provided for in Article 59(10).

32 Where the publication of a measure is provided for under European Union law, it is only as of the time of publication that such persons are able to ascertain unequivocally what their rights and obligations are and to take the necessary measures accordingly (see, to that effect, Case C-345/06 *Heinrich* [2009] ECR I-1659, paragraph 44).

33 Consequently, in order to allow the persons concerned sufficient time to challenge a published measure of the European Union in full knowledge of the facts, the time-limit for bringing an action against such a measure starts to run, in accordance with the sixth paragraph of Article 263 TFEU, only upon its publication.

34 However, contrary to what the General Court considered in the order under appeal, it does not follow that an applicant cannot challenge a measure adopted by the European Union prior to its publication.

35 In that regard, this Court has already held in paragraph 8 of the judgment in Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831 that the third paragraph of Article 33 of the ECSC Treaty, which prescribed notification and publication as the formalities from which the time-limit for bringing an action for the annulment of a decision was to run, did not prevent an applicant from lodging an application with the Court as soon as the contested decision had been adopted, without waiting for it to be notified or published. One of the actions at the origin of that judgment was therefore admissible, notwithstanding the fact that it had been lodged at the Court Registry prior to publication of the contested decision.

36 Nothing in the sixth paragraph of Article 263 TFEU, which corresponds to the third paragraph of Article 33 of the ECSC Treaty, prevents that case-law law from being transposed to the present case.

37 On the contrary, as the Advocate General has noted in point 55 of his Opinion, although it is settled case-law that only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position are measures or decisions which may be the subject of an action for annulment for the purposes of Article 263 TFEU (see Case C-131/03 *Reynolds Tobacco and Others* v *Commission* [2006] ECR I-7795, paragraph 54 and the case-law cited), it is not stated in that article that the bringing of such an action is subject to the publication and notification of those measures.

38 Moreover, the bringing of an action against a European Union measure prior to its publication, provided that that measure has been adopted, does not jeopardise the objective of a time-limit for bringing proceedings, which, according to settled case-law, is to protect legal certainty by ensuring that European Union measures which produce legal effects may not indefinitely be called into question (see Case C-241/01 *National Farmers' Union* [2002] ECR I-9079, paragraph 34, and Joined Cases C-478/11 P to C-482/11 P *Gbagbo and Others* v *Council* [2013] ECR, paragraph 62).

39 Consequently, as the Advocate General has noted in point 56 of his Opinion, while the publication of a measure commences the period for bringing proceedings on expiry of which that measure becomes final, it does not constitute a precondition for entitlement to bring proceedings against that measure.

40 In the present case, the General Court found, in paragraph 45 of the order under appeal, that the application initiating proceedings was lodged after the unanimous agreement of the Member State Committee on the identification of acrylamide as a substance of very high concern and after the action of the Executive Director of ECHA of 22 December 2009, which constitutes a decision. Consequently, on the date that application was lodged, namely on 4 January 2010, the contested decision had been definitely adopted.

41 The General Court was thus wrong to conclude that that application was inadmissible on the ground that it had been brought before the date of publication of the contested decision by means of the inclusion of acrylamide on the candidate list of substances on the ECHA website, initially scheduled for 13 January 2010, but which finally took place on 30 March 2010.

42 In the light of the foregoing, the single ground of appeal raised by the appellants must be upheld, as must their appeal, and the order under appeal must be set aside.

43 According to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the latter may, where the decision of the General Court has been annulled, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

44 Since the state of the proceedings does not permit the Court of Justice to give final judgment in the matter, the case must be referred back to the General Court and the costs reserved.

On those grounds, the Court (Fourth Chamber) hereby:

1. Sets aside the order of the General Court of the European Union of 21 September 2011 in Case T-1/10 *PPG and SNF* v *ECHA;*

2. Refers the present case back to the General Court of the European Union;

3. Reserves the costs.

[Signatures]