ORDER OF THE GENERAL COURT (Seventh Chamber, Extended Composition)

21 September 2011 *

In Case T-1/10,

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

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

represented initially by K. Van Maldegem, lawyer, P. Sellar, Solicitor, and R. Cana, lawyer, subsequently by Messrs Van Maldegem and Cana,

applicants,

v

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

defendant,

* Language of the case: English.

supported by

Kingdom of the Netherlands, represented by C. Wissels, J. Langer, Y. de Vries and M. de Ree, acting as Agents,

and by

European Commission, represented initially by P. Oliver and G. Wilms, subsequently by P. Oliver and E. Manhaeve, acting as Agents,

interveners,

APPLICATION for annulment of the decision of ECHA identifying acrylamide (EC No 201-173-7) as a substance fulfilling the criteria referred to 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), pursuant to Article 59 of that regulation,

THE GENERAL COURT (Seventh Chamber, Extended Composition),

composed of A. Dittrich (Rapporteur), President, F. Dehousse, I. Wiszniewska-Białecka, M. Prek and J. Schwarcz, Judges,

Registrar: E. Coulon,

makes the following

Order

Background to the dispute

1 The first applicant, Polyelectrolyte Producers Group GEIE (PPG), is a European economic interest grouping established in Belgium. It represents the interests of companies that are producers and/or importers of polyelectrolytes, polyacrylamide and/or other polymers containing acrylamide. The member companies of the first applicant are also users of acrylamide and manufacturers and/or importers of acrylamide or polyacrylamide. All European Union producers of acrylamide are members of the first applicant.

2 The second applicant, SNF SAS, is a member company of the first applicant. It is principally active in the manufacture of acrylamide and polyacrylamide which it sells directly to its customers. It has production plants in France, the United States, China and in South Korea.

3 Polyelectrolytes are water-soluble, synthetic, organic polymers that are produced from different monomers, one of which is acrylamide. They are used, for example, to purify drinking water, treat waste water, produce paper and extract precious minerals.

4 Polyacrylamide is a polymer formed by polymerisation of the monomer acrylamide that is most commonly used in water treatment, the paper industry, the mining industry, the oil industry, in agriculture, as a textile additive and in the cosmetics and personal care fields.

5 On 25 August 2009, the Kingdom of the Netherlands submitted to the European Chemicals Agency (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 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), subsequently amended, inter alia, by Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC (OJ 2008 L 353, p. 1), making reference to the classification of acrylamide as a carcinogen category 2 and mutagen category 2 in Annex VI, Part 3, to Regulation No 1272/2008. On 31 August 2009, ECHA published a notice on its website inviting interested parties to submit comments on the acrylamide dossier. On the same day, ECHA also invited Member State competent authorities to submit comments on this subject.

6 After receiving comments on the dossier in question, in particular from the first applicant, and the responses to these 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 acrylamide fulfilled the criteria set out in Article 57(a) and (b) of Regulation No 1907/2006.

7 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 insofar as those substances fulfilled the criteria set out in Article 57 of Regulation No 1907/2006 and, furthermore, that the list of substances identified with a view to their inclusion in Annex XIV of Regulation No 1907/2006 ('the candidate list of substances') would be formally updated in January 2010. On 22 December 2009, the Executive Director of ECHA adopted Decision ED/68/2009, due to enter into force on 13 January 2010, to include those 15 substances, on 13 January 2010, in the candidate list of substances.

Procedure and forms of order sought

8 By application lodged at the Registry of the General Court on 4 January 2010, the applicants brought an action for 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 ('the contested decision').

9 By separate document, lodged at the Court Registry on 5 January 2010, the second applicant made an application for interim measures, in which it essentially requested the President of the Court to suspend operation of the contested decision.

10 By order of the President of the Court of 11 January 2010, operation of the contested decision was suspended until the order terminating the proceedings for interim measures has been made. Following that order, the Executive Director of ECHA suspended the inclusion of acrylamide in the candidate list of substances.

11 By a separate document, lodged at the Court Registry on 17 March 2010, ECHA raised a plea of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the General Court.

12 By order of the President of the Court in Case T-1/10 R *PPG and SNF* v *ECHA* [2010] (not published in the ECR), the application for interim measures brought by the second applicant was dismissed and the costs were reserved.

13 Following that order, ECHA published, on 30 March 2010, the candidate list of substances including acrylamide.

14 By letters registered at the Court Registry on 19 and 20 April 2010 respectively, the European Commission and the Kingdom of the Netherlands sought leave to intervene in support of the form of order sought by ECHA. After hearing the principal parties, that leave was granted by order of 8 June 2010 of the President of the Eighth Chamber of the Court.

15 The applicants submitted their observations concerning the plea of inadmissibility on 4 May 2010.

16 By documents lodged on 17 and 25 May 2010 respectively, the applicants made an application for confidential treatment of their statements of case with regard to the interveners. That application for confidential treatment was not contested.

17 The Commission and the Kingdom of the Netherlands lodged their statements in intervention, limited to the admissibility of the action, on 3 and 5 August 2010 respectively. By documents lodged at the Court Registry on 1 and 4 October 2010, the principal parties submitted their observations on those statements of case.

18 As the composition of the Chambers of the Court had been altered, the Judge-Rapporteur was attached to the Seventh Chamber, to which the present case was therefore assigned. By decision of 30 March 2011, the Court referred the cases to the Seventh Chamber, Extended Composition, in accordance with Article 51(1) of the Rules of Procedure.

19 In the application, the applicants claim that the Court should:

— declare the application admissible and well founded;

— annul the contested decision;

— order ECHA to pay the costs;

— take such other or further measures as justice may require.

20 In its objection of inadmissibility, ECHA contends that the Court should:

— declare the action inadmissible;

— order the applicants to pay the costs.

21 In their observations on the objection of inadmissibility, the applicants claim that the Court should dismiss it.

22 The Commission contends that the Court should dismiss the action as inadmissible.

23 The Kingdom of the Netherlands contends that the Court should declare the action inadmissible and order the applicants to pay the costs.

Law

24 Under Article 114(1) and (4) of the Rules of Procedure, if a party so requests, the Court may make a decision on admissibility without going into the substance of the case. Under Article 114(3), unless the Court otherwise decides, the remainder of the proceedings is to be oral. The Court finds that in the present case it has sufficient information from the case-file not to open the oral procedure.

25 In support of the form of order sought, ECHA raises three pleas of inadmissibility, based on the nature of the contested decision, alleging that the latter is not of direct concern to the applicants and the fact that the contested decision, which it contends is not a regulatory act within the meaning of the fourth paragraph of Article 263 TFEU, is not of individual concern to the applicants.

26 The Commission supports the arguments of ECHA with regard to the nature of the contested decision and the absence of direct effect on the applicants. It also contends that the application does not comply with the requirements of Article 44(1)(c) of the Rules of Procedure in that it lacks clear pleading.

27 The Kingdom of the Netherlands supports all the pleas of inadmissibility raised by ECHA.

Compliance with the requirements of Article 44(1)(c) of the Rules of Procedure

28 The Commission maintains that the application lacks clarity and fails to satisfy the requirements of Article 44(1)(c) of the Rules of Procedure. Accordingly, the applicants which in the application sought annulment of the ECHA decision dated 7 December 2009, identifying acrylamide as a substance meeting the criteria set out in Article 57 of Regulation No 1907/2006, did not identify sufficiently the contested act. According to the Commission, the measure mentioned in the ECHA press release of 7 December 2009 was not the ECHA decision to identify acrylamide, but a step taken by its Member State Committee in the procedure leading to such identification by ECHA.

29 It is true that ECHA did not raise this plea of inadmissibility. The Commission, as an intervener, is not entitled to raise a plea of inadmissibility that has not been raised by the party which it supports (see, to that effect, Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraphs 77 and 78).

30 However, as the admissibility of an action and of the pleas set out therein is an issue of public policy, the Court may examine this of its own motion in accordance with Article 113 of the Rules of Procedure (see, to that effect, Case T-437/05 *Brink's Security Luxembourg* v *Commission* [2009] ECR II-3233, paragraph 54, and the judgment of 9 September 2010 in Case T-63/06 *Evropaïki Dynamiki* v *EMCDDA*, not published in the ECR, paragraph 30, and the case-law cited there).

31 Under the first paragraph of Article 21 of the Statute of the Court of Justice, which applies to the procedure before the General Court pursuant to the first paragraph of Article 53 of that statute, and under Article 44(1)(c) of the Rules of Procedure, the application must state the subject-matter of the dispute. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to give a ruling, if necessary without other information (Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 106; orders in Case T-369/03 *Arizona Chemical and Others* v *Commission* [2005] ECR II-5839, paragraph 120, and in Case T-481/08 *Alisei* v *Commission* [2010] ECR II-117, paragraph 89).

32 In the present case, the application complies with those requirements concerning the subject-matter of the dispute. In these proceedings the applicants seek annulment of the ECHA decision identifying acrylamide as a substance meeting the criteria set out in Article 57 of Regulation No 1907/2006, pursuant to Article 59 of that regulation. They then state that, because of that decision, which was adopted on 7 December 2009 by the Member State Committee, that is, an ECHA body, and which had been brought to their attention by means of the press release of the same date, that substance had to be included in the candidate list of substances published on the ECHA website in January 2010.

33 It is true that the Member State Committee unanimously agreed on the identification of acrylamide as a substance fulfilling the criteria set out in Article 57 of Regulation No 1907/2006 on 27 November 2009 and not 7 December 2009. However, as the ECHA press release of 7 December 2009 stated that the Member State Committee had identified the substances concerned on 7 December 2009, and as the agreement of that committee was not published by ECHA, the applicants were not able to state the correct date of the agreement of the Member State Committee in the application. After they had been informed of the correct date by means of ECHA's objection of inadmissibility, the applicants stated this in their observations on that objection.

34 Thus, the application makes it sufficiently clear that as the subject-matter of the dispute is the measure adopted by ECHA, resulting from the procedure laid down in Article 59 of Regulation No 1907/2006, identifying acrylamide as a substance fulfilling the criteria set out in Article 57 of that regulation, the content of which had been determined by the unanimous agreement of its Member State Committee on 27 November 2009 and which had to be implemented by the inclusion of acrylamide in the candidate list of substances published on the ECHA website, which was planned for 13 January 2010 and finally took place on 30 March 2010. By referring to the unanimous agreement of the Member State Committee of 2009 and the inclusion of acrylamide in that published list, the applicants have unequivocally identified the subject-matter of the proceedings.

35 It follows that that plea of inadmissibility must be rejected.

The plea of inadmissibility based on the nature of the contested decision

36 ECHA and the interveners argue, in essence, that the applicants, by referring to the unanimous agreement of the ECHA Member State Committee of 27 November 2009, contested a preparatory act 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. According to ECHA, the act that produces a potential legal effect is the publication of the candidate list of substances updated on the ECHA website pursuant to Article 59(10) of Regulation No 1907/2006. According to the Commission and the Kingdom of the Netherlands, the final act of the procedure laid down in Article 59 of that regulation is the decision of the Executive Director of ECHA to include a substance in the candidate list of substances in accordance with paragraph 8 of that article.

37 The applicants counter by saying that the contested decision is a measure that definitively fixes the position of ECHA with regard to the identification of acrylamide as a substance of very high concern and its inclusion in the candidate list of substances. It is apparent from Article 59(8) of Regulation No 1907/2006 that the key element of the procedure laid down in that article is the agreement on identification. The subsequent inclusion in the candidate list of substances is an automatic consequence of the decision to identify a substance as being of very high concern. Likewise, the publication and updating of the candidate list of substances pursuant to Article 59(10) of that regulation must be carried out automatically once a decision has been made concerning the inclusion of a substance.

38 In accordance with the second sentence of the first paragraph of Article 263 TFEU, actions may be brought against acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

39 Under settled case-law, an action for annulment is available in the case of all measures adopted by the institutions, bodies, offices or agencies of the Union, whatever their nature or form, that are intended to have legal effects (see, to that effect, Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42, and Joined Cases C-138/03, C-324/03 and C-431/03 *Italy* v *Commission* [2005] ECR I-10043, paragraph 32; order of the General Court of 14 July 2008 in Case T-322/06 *Espinosa Labella and Others* v *Commission*, not published in the ECR, paragraph 25 and the case-law cited there).

40 In the case of acts or decisions worked out in stages, in particular at the end of an internal procedure, only measures definitively laying down the position of the institution, body, office or agency of the Union concerned at the end of that procedure, are, in principle, acts against which an action for annulment will lie. Consequently, measures of a preliminary or purely preparatory nature cannot be the subject of an action for annulment (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 10,

and Joined Cases T-355/04 and T-446/04 *Co-Frutta* v *Commission* [2010] ECR II-1, paragraph 33 and case-law cited there).

41 In the present case, it is not necessary for the Court to rule on the arguments concerning the allegedly preparatory nature of the unanimous agreement of the Member State Committee, as the contested decision was not intended to produce legal effects vis-à-vis third parties, within the meaning of the case-law cited at paragraph 39 above, at the time when the admissibility of the present action must be assessed, that is to say, at the time when the application was lodged (see, to that effect, Joined Cases C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-22/01 *Spain* v *Council* [2002] ECR I-3439, paragraph 23, and order in Case T-539/08 *Etimine and Etiproducts* v *Commission* [2010] ECR II-4017, paragraph 76).

42 Indeed, the act of identifying a substance resulting from the procedure referred to in Article 59 of Regulation No 1907/2006 can indeed give rise, inter alia, to the information requirements set out in Article 7(2), Article 31(1)(c), Article 31(3)(b) and Article 33(1) and (2) of that regulation. Those provisions make reference to the substances identified under Article 59(1) of that regulation or to the substances included in, or appearing in, the list established under Article 59(1) of that regulation. They refer, therefore, to legal obligations arising from the act that results from the procedure referred to in Article 59 of that regulation.

43 However, it should be noted that the procedure laid down in Article 59 of Regulation No 1907/2006, consisting of the identification of the substances fulfilling the criteria referred to in Article 57 of that regulation and the establishment of a candidate list of substances, takes place in several stages.

44 Thus, after the identification procedure has been initiated and after ECHA has made the dossier relating to a substance available to the Member States and published on its website a notice inviting all interested parties to submit comments (Article 59(2) to (4) of Regulation No 1907/2006), the Member States, ECHA and all interested parties may comment on the identification proposed in the dossier (Article 59(4) and (5) of that regulation). If, as in the present case, such comments are submitted, ECHA is to refer the dossier to the Member State Committee and, if that Committee reaches a unanimous agreement on the identification, ECHA is to include the substance in the candidate list of substances (Article 59(7) and (8) of that regulation). Finally, without delay after a decision on inclusion of the substance has been taken, ECHA is to publish and update the candidate list of substances on its website (Article 59(10) of that regulation).

45 In the present case, the application 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 decision of the Executive Director to include that substance in the candidate list of substances. However, given that that decision was not due to enter into force until 13 January 2010 and that acrylamide was not due to be included in the candidate list of substances until that date, that substance was not yet included in that list at the time when the application was lodged.

46 While it is true that the term 'include' in Article 59(8) of Regulation No 1907/2006 makes it clear that the ECHA body responsible for including a substance in the candidate list of substances does not have any discretion in relation to that inclusion, as this automatically follows the agreement of the Member State Committee, it remains the case that, before including a substance in the candidate list of substances under that provision, the act of identifying a substance as being of very high concern, resulting from the procedure set out in Article 59 of that regulation, is not intended to produce legal effects vis-à-vis third parties within the meaning of the case-law referred to in paragraph 39 above.

47 First, the information obligations arising from the act resulting from the procedure set out in Article 59 of Regulation No 1907/2006, provided for in Article 7(2), Article 31(1)(c) and 31(3)(b), and Article 33(1) and (2) of that regulation, make reference, on the one hand, to the substances identified in accordance with Article 59(1) of that regulation and, on the other, to the substances included in, or appearing in, the candidate list of substances. There is nothing in Regulation No 1907/2006 that states that the legislature intended the persons concerned by these obligations to comply with them at different stages of the procedure set out in Article 59 of that regulation. By contrast, it is apparent from Article 59 of that regulation, 'Identification of substances referred to in Article 57 [of that regulation]' that the effective operation of the procedure provided in that article consists of the final identification of the substances that fulfil the criteria set out in Article 57 of that regulation. It is apparent from Article 59(1) of that regulation, which makes reference to paragraphs 2 to 10 of that article with regard to the identification procedure, that the inclusion of a substance in the candidate list of substances, set out in paragraph 8 of that article, is an integral part of that procedure. The references, on the one hand, to the substances identified in accordance with Article 59(1) of that regulation and, on the other, to the substances included in, or appearing in, the candidate list of substances cannot, therefore, correspond to the various stages of the identification procedure, so that the obligations referred to cannot exist before the actual inclusion of the substance in the candidate list of substances.

48 Secondly, it should be noted that, if ECHA does not receive or make any comments in relation to the proposal to identify a substance as being of very high concern, it is to include that substance in the candidate list of substances (Article 59(6) of Regulation No 1907/2006). In such event, a stage of identification in the identification procedure under Article 59 of that regulation, dealt with separately by a distinct ECHA body such as the Member State Committee or a separate institution such as the Commission in accordance with paragraphs 8 and 9 of that article, is lacking. However, as the time from which the act identifying a substance as being of very high concern, and resulting from the procedure set out in Article 59 of that regulation, is intended to produce legal effects cannot depend on the submission of comments by a Member

State, ECHA or an interested party, it is only after a substance is included in the candidate list of substances that such an act can be capable of producing legal effects.

49 As regards the fact that, under Article 59(10) of Regulation No 1907/2006, ECHA must publish and update the candidate list of substances on its website without delay after a decision on inclusion of a substance has been taken, it should be noted that the legal obligations arising from the act of identifying a substance as being of very high concern, resulting from the procedure set out in Article 59 of that regulation, can be imposed on the persons concerned only after publication of the candidate list of substances containing that substance, since it is from that time on that those persons are able to ascertain unequivocally what their rights and obligations are and take steps accordingly (see, to that effect, Case C-345/06 *Heinrich* [2009] ECR I-1659, paragraph 44 and the case-law cited there). Likewise, the period for bringing an action against the act identifying a substance as being of very high concern, resulting from the procedure set out in Article 59 of that regulation, pursuant to the sixth paragraph of Article 263 TFEU, cannot begin to run until the publication of the candidate list of substances containing that substance.

50 As the candidate list of substances exists only on the ECHA website, the inclusion of a substance in that list takes place when the updated list is published. It is, therefore, only upon inclusion in the candidate list of substances published on the ECHA website that the act identifying a substance as being of very high concern, resulting from the procedure set out in Article 59 of that regulation, is intended to produce legal effects.

51 In view of the above, the application must be dismissed as inadmissible without its being necessary to consider the other objections of inadmissibility raised by ECHA.

Costs

52 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Furthermore, under Article 87(4), the Member States and institutions which have intervened in the proceedings are to bear their own costs.

53 Since the applicants have been unsuccessful, they must be ordered to pay, in addition to their own costs, the costs incurred by ECHA, in accordance with the form of order sought by the latter. The second applicant is to bear the costs relating to the proceedings for interim measures, in accordance with the form of order sought by ECHA. The Kingdom of the Netherlands and the Commission are to bear their own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby orders:

1. The application is dismissed as inadmissible.

2. Polyelectrolyte Producers Group GEIE (PPG) and SNF SAS are to bear their own costs and those incurred by the European Chemicals Agency (ECHA).

3. SNF is to bear the costs relating to the proceedings for interim measures.

4. The Kingdom of the Netherlands and the European Commission are to bear their own costs.

Luxembourg, 21 September 2011.

E. Coulon
Registrar

A. Dittrich
President