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

21 September 2011 *

In Case T-268/10,

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

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

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

applicants,

v

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

defendant,

* Language of the case: English.

supported by

Kingdom of the Netherlands, represented by M. Noort and J. Langer, acting as Agents,

and by

European Commission, represented 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), and including acrylamide in the list of substances identified with a view to future inclusion in Annex XIV of that regulation, in accordance with Article 59 thereof,

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 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, of Regulation (EC) 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.

4 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.

5 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 to include those 15 substances, on 13 January 2010, in the candidate list of substances.

6 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, under Article 59 of that regulation (Case T-1/10).

7 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 decision of ECHA identifying acrylamide as a substance fulfilling the criteria set out in Article 57 of Regulation No 1907/2006, under Article 59 of that regulation (Case T-1/10 R).

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

9 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 by the second applicant was dismissed and the costs were reserved.

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

Procedure and forms of order sought

11 By application lodged at the Registry of the Court on 10 June 2010, the applicants brought an action for 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 ('the contested decision').

12 By decision of the President of the Eighth Chamber of the Court of 9 July 2010, the applicants were invited to submit their observations regarding observance of the time-limit for bringing an action. The applicants complied with this request by separate document lodged at the Court Registry on 30 July 2010.

13 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.

14 By a separate document, lodged at the Court Registry on 5 November 2010, ECHA raised a plea of inadmissibility under Article 114(1) of the Rules of Procedure of the General Court. The applicants submitted their observations on the objection of inadmissibility on 21 December 2010.

15 By letters registered at the Court Registry on 19 and 25 November 2010 respectively, the Kingdom of the Netherlands and the European Commission 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 the President of the Seventh Chamber of the Court on 10 January 2011.

16 On 18 January 2011, ECHA lodged at the Registry of the Court an additional pleading on the plea of inadmissibility. The applicants submitted their observations on that pleading on 15 February 2011.

17 By document lodged at the Registry of the Court on 22 February 2011, the Kingdom of the Netherlands waived its right to submit a statement in intervention confined to admissibility. The Commission filed such a statement on 24 February 2011.

18 By decision of 30 March 2011, the Court referred the present case to the Seventh Chamber, Extended Composition, under Article 51(1) of its Rules of Procedure.

19 By documents lodged at the Registry of the Court on 19 and 21 April 2011, the principal parties presented their observations on the Commission's statement in intervention confined to admissibility.

20 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.

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

— declare the action inadmissible;

— order the applicants to pay the costs.

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

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

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 that are based, primarily, on failure to observe the time-limit for bringing an action and, alternatively, 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 failure to observe the time-limit for bringing an action. It also contends that the application is inadmissible on grounds of *lis pendens*.

27 Consideration should be given, first, to the primary plea of inadmissibility based on failure to observe the time-limit for bringing an action.

28 In this regard, ECHA and the Commission argue, in essence, that the action was brought out of time. According to them, the contested decision was published on 30 March 2010 and the period provided in paragraph six of Article 263 TFUE to bring an action against a decision of ECHA thus ran from 31 March 2010 to 30 May 2010. On that latter date, the additional period of 10 days on account of distance provided for under Article 102(2) of the Rules of Procedure must be added, so that complete period for lodging the action expired on 9 June 2010. Consequently, the action brought on 10 June 2010 was out of time.

29 The applicants submit, in essence, that under Article 102(1) of the Rules of Procedure, the period for bringing an action begins to run from the end of the 14th day following the date of publication of the contested decision. That provision would apply not only to the publication in the *Official Journal of the European Union*, but to all types of publication, including the publication of a decision on the internet as set out in Article 59(10) of Regulation No 1907/2006. Any other interpretation of Article 102(1) of the Rules of Procedure would result in discrimination and arbitrary treatment of the applicants. Having regard to the application of that provision, the time-limit for bringing an action has been observed.

30 Under the sixth paragraph of Article 263 TFEU, the proceedings provided for in that article are to be instituted within two months of the publication of the measure, or of its notification to the applicant, or, in the absence thereof, of the day on which it came to the knowledge of the applicant, as the case may be.

31 In the present case, ECHA published the contested decision within the meaning of the sixth paragraph of Article 263 TFEU on 30 March 2010. Indeed, in accordance with its obligation under Article 59(10) of Regulation No 1907/2006, ECHA published on its website the candidate list of substances, including acrylamide, on 30 March 2010.

32 It should be noted that the sixth paragraph of Article 263 TFEU does not give any indication as to the method of publication envisaged by that provision and does not restrict the publication within the meaning of that provision to specified methods of publication. Publication within the meaning of that provision cannot, therefore, consist of a publication in the *Official Journal of the European Union* only.

33 Contrary to what is claimed by the applicants, the period for bringing an action does not begin to run from the end of the 14th day following the date of publication of the contested decision. Article 102(1) of the Rules of Procedure, which lays down such a rule, applies, according to its wording, only to acts published in the *Official Journal of the European Union*. In the present case, Regulation No 1907/2006 provides, for ECHA measures in general, publication on the internet only. It thus establishes a specific rule for the publication of measures taken by that agency. More specifically, under Article 59(10) of Regulation No 1907/2006, the candidate list of substances is to be published on the ECHA website and no other form of publication is set out in any other provision of that regulation.

34 Article 102(1) of the Rules of Procedure may not be applied, beyond the confines of its wording, to acts published in another manner such as, in the present case, exclusively on the internet.

35 Indeed, first, Article 102(1) of the Rules of Procedure only represents a specific rule laid down for publication in the *Official Journal of the European Union.* Exclusive publication on the internet is distinct from publication in the *Official Journal of the European Union* because it is done electronically, so that acts published there are accessible to the public throughout the European Union at the same time. As regards the fact that an electronic version of the *Official Journal of the European Union* is also available on the internet, it should be pointed out that only the printed version of that journal is authentic (Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, paragraph 50).

36 Second, it is important to note that the strict application of European Union legislation concerning procedural time-limits satisfies the requirement of legal certainty and the need to avoid any discrimination or any arbitrary treatment in the administration of justice (see judgment of the General Court of 2 October 2009 in Joined Cases T-300/05 and T-316/05 *Cyprus* v *Commission*, not published in the ECR, paragraph 235 and the case-law cited there).

37 Third, contrary to what is claimed by the applicants, the case-law concerning the publication of decisions on State aid cannot be transposed to the present case. It is true that, in cases of State aid, giving third parties access to a full version of the text of a decision placed on its website, coupled with the publication of a summary notice in the *Official Journal of the European Union* allowing interested parties to identify the decision in question and informing them of the possibility of viewing it on the internet, brings it within the scope of Article 102(1) of the Rules of Procedure (Case T-321/04 *Air Bourbon* v *Commission* [2005] ECR II-3469 paragraphs 34 and 42, and Case T-354/05 *TF1* v *Commission* [2009] ECR II-471, paragraphs 35 and 48). However, in such cases, publication in the *Official Journal of the European Union* is expressly provided for in Article 26 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1). In the present case, no provision requires publication of the contested decision in the *Official Journal of the European Union* either in the form of a summary notice or a full version. On the contrary, it follows from Regulation No 1907/2006 that the updated candidate list of substances is published exclusively on the internet.

38 Fourth, contrary to what is claimed by the applicants, the fact that Article 102(1) of the Rules of Procedure does not apply to the publications provided for by European Union law exclusively on the internet does not constitute discrimination or arbitrary treatment with regard to them. Indeed, the factual and legal situation in which a person finds himself following the publication of an act in the *Official Journal of the European Union* is not comparable to that in which he finds himself following publication of an act exclusively on the internet (see paragraph 35 above). Furthermore, consideration of the date of publication of the contested decision on the ECHA website as

the date of publication within the meaning of the sixth paragraph of Article 263 TFEU guarantees equality of treatment between all the interested parties by ensuring that the time-limit for bringing an action against that decision is calculated in the same way for everyone (see, to that effect, *Air Bourbon* v *Commission*, paragraph 37 above, paragraph 44). The differences concerning the calculation of the time-limit for bringing an action between publication in the *Official Journal of the European Union* and publication on the internet are, in any event, also justified because of the characteristics of publication on the internet (see paragraph 35 above).

39 It follows that, as the contested decision was published on 30 March 2010, the time-limit for bringing an action is to be calculated from 31 March 2010, under Article 101(1)(a) of the Rules of Procedure. The period of two months ended on 30 May 2010 since, under Article 101(1)(b) of the Rules of Procedure, a period expressed in months ends with the expiry of whichever day in the last month falls on the same date as the day during which the event or action from which the period is to be calculated occurred or took place (see, to that effect, Case C-406/01 *Germany* v *Parliament and Council* [2002] ECR I-4561, paragraph 17). Given the period of 10 days on account of distance that must be added to the procedural time-limits under Article 102(2) of the Rules of Procedure, the period for bringing an action expired on 9 June 2010.

40 Consequently, the present action, which was brought on 10 June 2010, is out of time.

41 If, by invoking the novelty of the actions against the decisions of ECHA and the absence of case-law relating to the calculation of the time-limit for bringing an action against those decisions published on the internet, the applicants intended to assert that their error of interpretation of the provisions of the Rules of Procedure applicable in the present case amounts to an excusable error, it should be noted that it is apparent from the dossier that, according to the applicants, the publication of the contested decision on the ECHA website constituted a publication within the meaning of the sixth paragraph of Article 263 TFEU. The error of the applicants was therefore based on a misinterpretation either of Article 102(2) of the Rules of Procedure or

Article 101(1) of those rules regarding the calculation of the time-limit for bringing an action. Those provisions do not pose any particular difficulty of interpretation. Accordingly, it cannot be accepted that this is a case of excusable error on the part of the applicant, justifying derogation from the strict application of the abovementioned rules (see, to that effect, *Germany* v *Parliament and Council*, paragraph 39 above, paragraph 21).

42 Furthermore, the applicants have not established or even argued the existence of unforeseeable circumstances or of force majeure which would allow the Courts of the European Union to waive the time-limit in question on the basis of the second paragraph of Article 45 of the Statute of the Court of Justice of the European Union.

43 It follows from the foregoing that the action must be dismissed as inadmissible and that it is unnecessary to consider the other pleas of inadmissibility raised by ECHA and the Commission.

Costs

44 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 partys pleadings. Furthermore, under Article 87(4), the Member States and institutions which have intervened in the proceedings are to bear their own costs.

45 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 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 shall bear their own costs and those incurred by the European Chemicals Agency (ECHA).**

3. **The Kingdom of the Netherlands and the European Commission shall bear their own costs.**

Luxembourg, 21 September 2011.

E. Coulon
Registrar

A. Dittrich
President