



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

2 October 2014*

(REACH — Fee for registration of a substance — Reduction granted to micro-, small and medium-sized enterprises — Error in declaration relating to the size of the enterprise — Decision imposing an administrative charge — Proportionality)

In Case T-177/12,

Spraylat GmbH, established in Aachen (Germany), represented by K. Fischer, lawyer,

applicant,

v

European Chemicals Agency (ECHA), represented by M. Heikkilä, A. Iber and C. Schultheiss, acting as Agents, and M. Kuschewsky, lawyer,

defendant,

supported by

European Commission, represented initially by D. Düsterhaus and E. Manhaeve, and subsequently by B. Eggers and M. Manhaeve, acting as Agents,

intervener,

ACTION for annulment of invoice No 10030371 issued by the ECHA on 21 February 2012 setting the amount of the administrative charge imposed on the applicant and a precautionary application to annul Decision SME (2012) 1445 of the ECHA of 15 February 2012 which states that the applicant does not fulfil the conditions to receive a reduction of the fee for small enterprises and imposing an administrative charge on it,

THE GENERAL COURT (Sixth Chamber),

composed of S. Frimodt Nielsen, President, F. Dehousse (Rapporteur) and A.M. Collins, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 May 2014,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

- 1 On 29 November 2010, Spraylat Boya Sanayi ve Ticaret Sirketi ('Spraylat Boya'), established in Turkey, sought the registration of a substance under 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).
- 2 For the purposes of registering the substance concerned, Spraylat Boya was represented by the applicant, Spraylat GmbH, pursuant to Article 8 of Regulation No 1907/2006. During the registration procedure, the applicant indicated that Spraylat Boya was a 'small' enterprise, for the purposes of the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124, p. 36). That declaration enabled the applicant to receive a reduction of the fee due for any application for registration under Article 6(4) of Regulation No 1907/2006. In accordance with Article 74(1) thereof, that fee was specified by Commission Regulation (EC) No 340/2008 of 16 April 2008 on the fees and charges payable to the European Chemicals Agency pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (OJ 2008 L 107, p. 6). Annex I to Regulation No 340/2008 sets out the amounts of the fees due for applications for registration submitted under Article 6 of Regulation No 1907/2006 and the reductions granted to micro, small and medium-sized enterprises. In addition, Article 13(4) of Regulation No 340/2008 provides that, where a natural or legal person that claims to be entitled to a reduction or a fee waiver cannot demonstrate that it is entitled to such a reduction or waiver, the European Chemicals Agency (ECHA) is to levy the full fee or charge as well as an administrative charge. In that connection, on 12 November 2010, the Management Board of the ECHA adopted Decision MB/D/29/2010 on the classification of services for which charges are levied. According to Article 2 and Table 1 of that decision, the administrative charge referred to in Article 13(4) of Regulation No 340/2008 is EUR 20 700 for a large enterprise, EUR 14 500 for a medium-sized enterprise, EUR 8 300 for a small enterprise and EUR 2 700 for a micro enterprise.
- 3 On 1 December 2010, the applicant paid invoice No 10024214, issued by the ECHA for EUR 480. That amount corresponded, according to Annex I to Regulation No 340/2008, as applicable at the material time, to the fee payable by a small enterprise, in a joint submission, for substances of between 1 and 10 tonnes.
- 4 On 27 September 2011, the applicant was selected by the ECHA to be part of a sample of enterprises in order to verify their declarations as being small or medium-sized enterprises. In that context, the applicant was requested to supply a certain number of documents.
- 5 After an exchange of documents and electronic mail between the ECHA and the applicant, the latter admitted that its original declaration as a small enterprise was incorrect and that it should have declared Spraylat Boya as a large enterprise, given the relevant criteria applicable and after verification on its part. The applicant also indicated that it was prepared to pay the fee applicable to a large enterprise.

- 6 On 15 February 2012, the ECHA sent Decision SME (2012) 1445 ('the contested decision') to the applicant. In that decision, the ECHA informed the applicant that Spraylat Boya was to be regarded as a large enterprise and that it was going to send it an invoice covering the difference between the fee originally paid and the fee ultimately due and an invoice for payment of the corresponding administrative charge.
- 7 On 21 February 2012, the ECHA issued invoice number 10030371 for EUR 20 700 for payment of the administrative charge ('the contested invoice').
- 8 On 7 March 2012, the ECHA issued invoice No 10030369 for EUR 720, covering the difference between the fee originally paid by the applicant and the fee ultimately due, that is, EUR 1 200.

Procedure and forms of order sought by the parties

- 9 By application lodged at the Registry of the General on 20 April 2012, the applicant brought the present action.
- 10 By decision of the President of the Court of 15 May 2012, the case was assigned to the Fifth Chamber.
- 11 By order of the President of the Fifth Chamber of the Court of 4 September 2012, after hearing the parties, the Commission was given leave to intervene in support of the form of order sought by the ECHA.
- 12 By decision of the President of the Court of 25 January 2013, the present case was reassigned to the Second Chamber and to a new Judge-Rapporteur.
- 13 The composition of the chambers of the Court having been altered, the Judge-Rapporteur was assigned to the Sixth Chamber, to which this case was therefore assigned.
- 14 Upon hearing the report of the Judge-Rapporteur, the General Court (Sixth Chamber) decided to open the oral procedure.
- 15 On 2 April 2014, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of the General Court, the ECHA was invited to respond to certain arguments put forward by the applicant in its reply. The ECHA did so within the period prescribed.
- 16 The parties presented oral argument and replied to the questions put by the Court at the hearing on 14 May 2014.
- 17 The applicant claims that the Court should:
 - annul the contested invoice;
 - annul the contested decision as a precautionary measure;
 - order the ECHA to pay the costs.
- 18 The ECHA contends that the Court should:
 - dismiss the action and confirm the contested decision;
 - order the applicant to pay the costs.

19 The Commission contends that the Court should dismiss the action.

Law

- 20 The applicant puts forward five pleas in law in support of its action. The first plea alleges an infringement of Regulations Nos 1907/2006 and 340/2008. The second plea is based on a breach of the principle of proportionality. By its third plea, the applicant alleges a breach of the principle of equal treatment. The fourth plea alleges breach of the principles of legal certainty and sound administration. The fifth plea alleges an unlawful delegation of powers to the benefit of the ECHA.
- 21 As a preliminary point, it must be observed that, by the form of order which it seeks, the applicant requests the annulment of the contested decision and the contested invoice. Since the contested decision did not contain all the essential elements relating to the obligations imposed on the applicant, in particular, the amount of the administrative charge, it is, in the present case, the contested invoice which is the document in which the ECHA set out in detail the amount of the sums claimed against the applicant. Therefore, the contested invoice is a document which adversely affects the applicant and may also be the subject of an action for annulment before the Court (see, to that effect, order of 8 March 2012 in *Octapharma Pharmazeutika v EMA*, T-573/10, EU:T:2012:114, paragraph 45).
- 22 As a further preliminary point, it must be observed that, in the light of the arguments put forward in the first to the fourth pleas in law, the applicant in fact raises a plea of illegality against Decision MB/D/29/2010, as it confirmed at the hearing. The ECHA and the Commission also indicated at the hearing that they had understood the applicant's arguments to that effect, which the Court formally noted. Moreover, the ECHA's written pleadings show that it expressed its views on the arguments raised by the applicant in that regard.
- 23 It must be recalled that, under Article 277 TFEU, 'any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the European Union judicature the inapplicability of that act'.
- 24 According to settled case-law, Article 277 TFEU gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Article 263 TFEU to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void (see judgment of 11 December 2012 in *Sina Bank v Council*, T-15/11, ECR, EU:T:2012:661, paragraph 43 and the case-law cited).
- 25 The plea of illegality referred to by Article 277 TFEU must be interpreted broadly as including all measures of general application (judgment of 26 October 1993 in *Reinartz v Commission*, T-6/92 and T-52/92, ECR, EU:T:1993:89, paragraph 56). It must also extend to acts which, although not formally constituting the legal basis for the contested act, have a direct legal link with it (see, to that effect, judgment of 13 December 2006 in *FNCBV and Others v Commission*, T-217/03 and T-245/03, ECR, EU:T:2006:391, paragraph 250 and the case-law cited).
- 26 In the present case, Decision MB/D/29/2010 is a measure of general application in that it applies to situations which have been determined objectively, and has legal effects as regards a category of persons viewed in a general and abstract manner (see, to that effect, order of 4 of June 2012 in *Eurofer v Commission*, T-381/11, ECR, EU:T:2012:273, paragraph 29), a point which the parties accepted at the hearing.

- 27 Furthermore, Decision MB/D/29/2010 has a direct legal link with the contested decision and the contested invoice in so far as it sets out, in Annex I, the level of administrative charges applicable according to the size of the enterprise.
- 28 Finally, there is nothing to suggest that the applicant had the right to bring a direct action against Decision MB/D/29/2010, pursuant to Article 263 TFEU, a matter which, moreover, has not been raised by the parties.
- 29 It follows that the applicant may challenge the legality of Decision MB/D/29/2010 as an incidental plea in the present proceedings.
- 30 The General Court considers that it is appropriate to examine the second plea in law, alleging a breach of the principle of proportionality, first of all as it raises a plea of illegality against Decision MB/D/29/2010.
- 31 The applicant takes the view that the administrative charge of EUR 20 700 does not correspond to the service provided by the ECHA. The setting of that charge therefore breaches the principle of proportionality. At the hearing, the applicant also observed that the assessment of the breach of the principle of proportionality should be assessed in relation to its own position and that there was an enormous difference between a fee of EUR 1000 or EUR 2000 and the over EUR 20 000 which the administrative charge represented. Furthermore, the applicant stated essentially that it had no interest in sending false information to the ECHA for a potential gain of a few hundred euros on the amount of the fee.
- 32 The ECHA, observing that the applicant considers that the administrative charge laid down in Article 2 and Table 1 of Decision MB/D/29/2010 breaches the principle of proportionality, submits that that administrative charge attains the objective of covering the costs incurred during the examination of declarations of small and medium-sized enterprises, without going beyond what is necessary in order to do so. In addition, the ECHA stated at the hearing that the average amount of the fee was EUR 20 000. The difference between that figure and the amount of the administrative charge is thus not great. The ECHA also stated that the administrative charge was intended to ensure that enterprises which register a substance provide accurate information. Enterprises should not be encouraged, on the basis of the amount of the administrative charge, to provide false information.
- 33 It is clear from settled case-law that the principle of proportionality is one of the general principles of EU law and requires that measures implemented through EU law provisions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them (judgment of 8 June 2010 in *Vodafone and Others*, C-58/08, ECR, EU:C:2010:321, paragraph 51). Furthermore, where the institution which adopted the measure has a broad discretion, only if a measure is manifestly inappropriate having regard to the objective which the competent institution is required to pursue can its lawfulness be affected (see judgment of 9 September 2010 in *Usha Martin v Council and Commission*, T-119/06, ECR, EU:T:2010:369, paragraph 45 and the case-law cited).
- 34 In the present case, recital 11 in the preamble to Regulation No 340/2008 states that '[t]he submission of false information should be discouraged by the imposition of an administrative charge by the [ECHA] and a dissuasive fine by the Member States, if appropriate'. It is clear from that recital that the imposition of an administrative charge contributes to the objective of discouraging the transmission of false information by enterprises. However, it is also clear from that recital that the administrative charge cannot be treated as a fine.

- 35 That reading of the objectives of Regulation No 340/2008 is confirmed by the preparatory documents for the adoption of Decision MB/D/29/2010. Thus, the explanatory notes on the draft decision sent to the ECHA Management Board for its meeting of 22 and 23 June 2010 state that the administrative charge ‘is not in the nature of a fine’. The latter falls within the powers of the Member States and may be ‘considerably more than the financial advantage obtained by the transmission of false information’.
- 36 Taking account of that information, and without there being any need in the present dispute to determine whether the ECHA was entitled to allocate all of its costs related to verification to those enterprises which had provided incorrect information concerning their size or whether it had a discretion in fixing the administrative charge, it must be held that the amount of the administrative charge imposed on the applicant in the present case is manifestly disproportionate compared to the objective pursued by the legislation.
- 37 It is clear from the evidence in the file that, taking into account the additional invoice No 10030369 sent to the applicant on 7 March 2012, the fee finally due was EUR 1 200. It is also clear from the additional invoice that the false declaration concerning its size enabled the applicant to avoid paying EUR 720 as requests the fee payable to the ECHA.
- 38 The sum of EUR 20 700 by way of the administrative charge imposed on the applicant was therefore, in the present case, more than 17 times greater than the amount of the fee it had to pay to register the substance concerned. It was also 28 times greater than the amount of the additional invoice, mentioned above and, therefore, the amount of the fee which could have been avoided by the false declaration made by the applicant. In the present case, the amount of the administrative charge was therefore, according to the criteria set out by the ECHA in the preparatory documents for the adoption of Decision MB/D/29/2010 (see paragraph 35 above), ‘considerably more’ than the financial advantage that the applicant could have obtained from making its false declaration.
- 39 In the light of the above, it must be held that the objectives of the legislation do not justify the negative financial consequences for the applicant on the scale set out above. Decision MB/D/29/2010, as applied to the applicant and on such a scale, thus manifestly goes beyond what is necessary to achieve the objective of the administrative charge pursued by the applicable legislation, which is to dissuade the submission of false information without being a fine.
- 40 The other arguments put forward by the ECHA cannot call that finding into question.
- 41 In particular, it is irrelevant, for the purposes of assessing the applicant’s specific situation, that in certain cases a false declaration by an enterprise as to its size may enable it to avoid paying a fee in an amount much higher than that in the present case.
- 42 Furthermore, the argument put forward by the ECHA in its written pleadings and at the hearing that, in essence, it was obliged to pass on the full costs of the verification at issue, cannot justify the manifestly disproportionate amount of the administrative charge imposed on the applicant. First, the amount of the administrative charge imposed on the applicant in this case results from the specific method chosen by the ECHA to calculate that charge. In particular, the ECHA decided to pass the entire amount of the costs incurred in verifying the declarations of a larger sample of enterprises on enterprises which made false declarations and, in accordance with their actual size. In the present case, there is no evidence that a solution which respected the principle of proportionality as regards the applicant and which would enable the objectives of the legislation to be achieved did not exist. Second, the ECHA’s argument is inconsistent with the preparatory documents for the adoption of Decision MB/D/29/2010 (see paragraph 35 above) in which it was stated that if the ECHA did not detect any false declaration it would bear ‘the entire cost’ of the verification undertaken. Third, it must moreover be observed that Article 96(1) of Regulation No 1907/2006 provides that the revenue

of the ECHA is to consist not only of fees paid by undertakings, but also from a subsidy from the European Union, entered in the general budget of the European Union (Commission Section) and any voluntary contribution from the Member States.

- 43 Taking account of all of those factors, the applicant's second plea in law raising a plea of illegality against Decision MB/D/29/2010 must be upheld. Therefore, Decision MB/D/29/2010 must be held to be inapplicable and, accordingly, the applicant's form of order should be upheld and, on that ground, the contested decision and the contested invoice should be annulled without it being necessary to adjudicate on the other pleas.

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 party's pleadings. Since the ECHA has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.
- 45 In accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. Consequently, the Commission, which has intervened in support of the ECHA, must bear its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

- 1. Annuls Decision SME (2012) 1445 of the European Chemicals Agency (ECHA) of 15 February 2012 and invoice No 10030371 issued by the ECHA on 21 February 2012;**
- 2. Orders the ECHA to bear its own costs and to pay those incurred by Spraylat GmbH;**
- 3. Orders the European Commission to bear its own costs.**

Frimodt Nielsen

Dehousse

Collins

Delivered in open court in Luxembourg on 2 October 2014.

[Signatures]