Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

15 September 2016*

(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 — Recommendation 2003/361/EC — Decision imposing an administrative charge — Obligation to state reasons)

In Case T-587/14,

Crosfield Italia Srl, established in Verona (Italy), represented by M. Baldassarri, lawyer,

applicant,

v

European Chemicals Agency (ECHA), represented initially by M. Heikkilä, E. Bigi, J.-P. Trnka and E. Maurage, and subsequently by M. Heikkilä, J.-P. Trnka and E. Maurage, acting as Agents, and by C. Garcia Molyneux, lawyer,

defendant,

APPLICATION, first, under Article 263 TFEU, for annulment of Decision SME(2013) 4672 of the ECHA of 28 May 2014, 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 and, second, under Article 263 TFEU for annulment of the invoices issued by the ECHA following adoption of Decision SME(2013) 4672,

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 stage of the procedure and further to the hearing on 16 December 2015,

gives the following

* Language of the case: Italian.

Judgment

Background to the dispute

1 On 9 and 29 September 2010, the applicant, Crosfield Italia Srl, registered several substances 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 During the registration procedure, the applicant indicated that it was a 'small' enterprise, for the purposes of Commission Recommendation 2003/361/CE 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) of that regulation, 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 (OJ 2008 L 107, p. 6). Annex I to Regulation No 340/2008 sets out inter alia 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 ('SMEs'). 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 ('Decision MB/D/29/2010'). It is stated in Article 2 and in Table 1 set out in annex to that decision, as amended by Decision MB/21/2012/D of the ECHA Management Board, of 12 February 2013, that the administrative charge referred to in Article 13(4) of Regulation No 340/2008 is EUR 19 900 for a large enterprise, EUR 13 900 for a medium-sized enterprise and EUR 7 960 for a small enterprise.

3 On 9 and 29 September 2010, the ECHA issues two invoices (Nos 10007578 and 10004921), each amounting to EUR 9 300. 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 above 1 000 tonnes.

4 On 11 February 2013, the applicant was requested by the ECHA to supply a certain number of documents for purposes of verifying the declaration by which it had indicated that it was a small enterprise.

5 On 28 May 2014, following exchanges of documents and emails, the ECHA adopted Decision SME(2013) 4672 ('the contested decision'). In that decision, the ECHA found that the applicant should be regarded as a large enterprise and that it was required to pay the corresponding fee. In those circumstances, the ECHA informed the applicant that it was going to send it invoices covering the difference between the fees originally paid and the fees ultimately due as well as an invoice of EUR 19 900 for payment of the administrative charge.

6 On 4 August 2014, the applicant filed, under Articles 91 and 92 of Regulation No 1907/2006, an appeal against the contested decision before the Board of Appeal of the ECHA.

7 On 8 December 2014, the Board of Appeal of the ECHA decided to suspend the procedure before it, pending a decision of the General Court in the present case.

Procedure and forms of order sought

8 By application lodged at the Registry of the Court on 6 August 2014, the applicant brought the present action. This action is part of a series of related cases.

9 The first case of that series of related cases was the subject of an annulling judgment of 2 October 2014, *Spraylat* v *ECHA* (T-177/12, EU:T:2014:849).

10 On 8 January 2015, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of the General Court of 2 May 1991, the parties were requested to submit their observations on the potential relevance of the judgment of 2 October 2014 *Spraylat* v *ECHA* (T-177/12, ECR, EU:T:2014:849) for the present dispute and to reply to a question. The parties complied with that request within the time allowed.

11 On 16 October 2015, on a proposal from the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 89 of its Rules of Procedure, requested the parties to reply to a question and produce certain documents. The parties complied with those requests within the prescribed period.

12 The parties presented oral argument and answered the oral questions put to them by the Court at the hearing on 16 December 2015.

13 The applicant claims that the Court should annul and thus declare invalid the contested decision and, consequently, deprive that decision of any effect, including by annulling the invoices issued for the recovery of higher fees and in respect of penalties allegedly payable.

14 At the hearing, the applicant withdrew its head of claim seeking annulment of the invoices issued pursuant to the contested decision, note of which was taken.

15 The ECHA contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

The Court's jurisdiction

16 The ECHA states that the Board of Appeal does not have jurisdiction in this dispute, which was also referred to it, to the extent that the contested decision is not one of the decisions subject to appeal before it.

17 The applicant states that this action does not imply any withdrawal on its part from the appeal that it lodged before the Board of Appeal of the ECHA. The applicant also specified, at the hearing, that it took the view that the Court has jurisdiction to hear this dispute.

18 It should be recalled that Article 94(1) of Regulation No 1907/2006 provides that 'an action may be brought before the [General Court] or the Court of Justice, in accordance with Article [263 TFEU], contesting a decision taken by the Board of Appeal or, in cases where no right of appeal lies before the Board, by the [ECHA]'.

19 In that regard, Article 91(1) of Regulation No 1907/2006 provides that '[a]n appeal may be brought [before the Board of Appeal] against decisions of the [ECHA] taken pursuant to Article 9, Article 20, Article 27(6), Article 30(2) and (3) and Article 51 [of Regulation No 1907/2006]'.

20 The contested decision was not taken under the provisions referred to in Article 91(1) of Regulation No 1907/2006 but under Article 13(4) of Regulation No 340/2008 and Articles 2 and 4 of Decision MB/D/29/2010. It should also be pointed out that neither Regulation No 340/2008 nor Decision MB/D/29/2010 was adopted under the provisions referred to in Article 91(1) of Regulation No 1907/2006.

21 Furthermore, it should be noted that the provisions of Articles 9, 27, 30 and 51 of Regulation No 1907/2006, referred to in Article 91(1) of that regulation, concern decisions that have no connection with the fee to be paid by registering enterprises.

22 Article 20 of Regulation No 1907/2006 covers the '[d]uties of [the ECHA]'. Article 20(5) provides that '[a]n appeal may be brought, in accordance with Articles 91, 92 and 93 [of Regulation No 1907/2006], against [ECHA] decisions under paragraph 2 of this Article'. Article 20(2) concerns the ECHA's check of the 'completeness' of each registration, including the payment of the fee. It should be noted, however, that that check '[does] not include an assessment of the quality or the adequacy of any data or justifications submitted'. Moreover, the third and fourth paragraphs of Article 20(2) Regulation No 1907/2006 provide that if a registration 'is incomplete' and the registrant 'fails to complete his registration within the deadline set', the ECHA '[is to] reject the registration'. In the present case, in addition to the fact that the contested decision is not based on Article 20(2) of Regulation No 1907/2006, it is not based on refusal of registration of the substances at issue.

23 Accordingly, in the light of all those factors, it must be held that the Court has jurisdiction in this action, notwithstanding the appeal against the contested decision also lodged by the applicant before the Board of Appeal of the ECHA (see, to that effect, order of 16 September 2015, *Calestep* v *ECHA*, T-89/13, EU:T:2015:711, paragraphs 16 to 22).

Admissibility of certain pleas raised in the course of the proceedings

24 In the context of its response to the measures of organisation of procedure of 8 January 2015 (see paragraph 10 above), the applicant stated that, as was decided by the Court in the judgment of 2 October 2014, *Spraylat* v *ECHA* (T-177/12, EU:T:2014:849), Decision MB/D/29/2010 should be declared illegal on account of infringement of the principle of proportionality.

25 In that regard, it must be borne in mind that, under Article 48(2) of the Rules of Procedure o 2 May 1991, new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which have come to light in the course of the procedure. A plea which amplifies a submission put forward previously, whether directly or by implication, and which is closely connected with that submission, will be declared admissible (see judgment of 5 October 2011, *Romana Tabacchi* v *Commission*, T-11/06, EU:T:2011:560, paragraph 124 and the case-law cited).

26 However, in the present case, the plea raised by the applicant is a new submission and is not based on matters of law or of fact which have come to light in the course of the procedure. Moreover, that new plea does not amplify a submission put forward previously.

27 Accordingly, it must be held that the plea raised by the applicant in its response to the measures of organisation of procedure of 8 January 2015 (paragraph 10 above), seeking to have Decision MB/D/29/2010 declared illegal on account of infringement of the principle of proportionality, is inadmissible.

Substance

28 The applicant puts forward two pleas in law in support of its action. The first plea alleges a failure to state reasons for the contested decision. The second plea alleges, in essence, an error of assessment of the facts of the present case.

29 In its first plea, the applicant states that the contested decision does not specify the reasons why it should be classified as a large enterprise. The only reference to the applicant's size is in the document entitled 'SME calculation report', annexed to the ECHA's letter of 19 November 2013. It is apparent from that document that, in order to determine the applicant's size, the ECHA should have taken account not only of its turnover, but also the turnover of Marchi Industriale SpA, Esseco Group Srl (in proportion to Marchi Industriale's interest in Essemar SpA) and Marfin Srl. That calculation, as is apparent from the arguments put forward by the applicant, has no foundation. The applicant states, in particular, that the ECHA failed to take account of the clarifications made in an email of 26 February 2013. Similarly, the applicant stated, in a letter of 16 December 2013, the reasons why Esseco Group's data could not be taken into account. The ECHA's letter of 28 May 2014 merely recalls the parameters and criteria for classifying an enterprise as an SME. The applicant is not able to understand the reasoning followed by the ECHA in adopting the contested decision. The documents annexed to the contested decision do not permit a better understanding of the ECHA's reasoning.

30 The ECHA states that, in its first plea, the applicant fails to mention that the contested decision contains, in annex, a document entitled 'SME calculation report'. The contested decision refers expressly to that document as well to other annexes. Moreover, by its email sent to the ECHA on 26 February 2013, the applicant merely referred to a number of documents. It is clear that, in the contested decision, the ECHA was referring expressly to the documents sent by the applicant on 26 February 2013. It is also clear that the applicant was able to understand from the wording of the contested decision and annexes the reasoning followed by the ECHA when taking account of the data of Marchi Industriale and Esseco Group. The ECHA adds that, according to the case-law, a brief statement of reasons is to be considered adequate on condition that the adopting authority attaches as an annex to the decision in question documents appropriate for the purpose of clarifying the reasoning that it followed or where it refers to a document which is already in the possession of the addressee of that decision. In the present case, the contested decision contains sufficient information to enable the applicant to understand on what basis the decision was adopted. The ECHA refers in particular to the explicit references in the contested decision to the relevant legislative provisions and the documents taken into consideration. With respect to the letter of 16 December 2013, mentioned by the applicant, the ECHA specifies that, even though that letter was addressed in error to the Board of Appeal, the ECHA responded to the observations made in that letter.

31 It should be recalled that the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged. Moreover, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its

context and to all the legal rules governing the matter in question (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, EU:C:2015:184, paragraphs 93 and 94 and case-law cited).

32 Moreover, it should be pointed out that both Regulation No 1907/2006 (Article 3) and Regulation No 340/2008 (recital 9 and Article 2) refer to Recommendation 2003/361 for a definition of SMEs.

33 Recommendation 2003/361 contains an annex, Title 1 of which concerns the '[d]efinition of micro, small and medium-sized enterprises adopted by the Commission'. Article 2 thereof is entitled 'Staff headcount and financial ceilings determining enterprise categories'.

34 In the case of an autonomous enterprise, that is to say an enterprise which is not classified as a 'partner enterprise' or as a 'linked enterprise' within the meaning of Article 3(2) and (3) of the Annex to Recommendation 2003/361, the data, including the number of staff, are determined exclusively on the basis of the accounts of that enterprise, in accordance with Article 6(1) of that annex.

35 In the case of an enterprise having partner enterprises or linked enterprises, the data, including the headcount, are determined on the basis of the accounts and other data of the enterprise or, where they exist, the consolidated accounts of the enterprise, or the consolidated accounts in which the enterprise is included through consolidation, in accordance with the first paragraph of Article 6(2) of the Annex to Recommendation 2003/361. Under the second and third paragraphs of Article 6(2) of the Annex to Recommendation 2003/361, it is necessary to add to those data, first, the data of partner enterprises (situated immediately upstream or downstream from the enterprise in question) in proportion to the percentage interest in the capital or voting rights (whichever is greater), and, second, 100% of the data of enterprises, which are linked directly or indirectly to the enterprise in question, where the data were not already included through consolidation in the accounts.

36 For the application of Article 6(2) of the Annex to Recommendation 2003/361, the data of the partner enterprises of the enterprise in question are derived from their accounts and their other data, consolidated if they exist. To these is added 100% of the data of enterprises which are linked to these partner enterprises, unless their accounts data are already included through consolidation, pursuant to the first paragraph of Article 6(3) of the Annex to Recommendation 2003/361. As regards the data of the enterprises which are linked to the enterprise in question, they are to be derived from their accounts and their other data, consolidated if they exist. To these is added, pro rata, the data of any possible partner enterprise of that linked enterprise, situated immediately upstream or downstream from it, unless it has already been included in the consolidated accounts with a percentage at least proportional to the percentage interest in the capital or voting rights (whichever is greater), pursuant to the second paragraph of Article 6(3) of the Annex to Recommendation 2003/361.

37 In the present case, the ECHA found in the contested decision that the applicant had a staff headcount equal to or greater than 250 persons, an annual turnover exceeding EUR 50 million and an annual balance sheet exceeding EUR 43 million. On that basis, the ECHA took the view that the applicant could not be classified as a small enterprise.

38 The ECHA's calculation was set out in detail in a report annexed to the contested decision. In that report, the ECHA included the data of the enterprises classified as 'linked' (Marchi Industriale) and 'partner' (Marfin and Esseco Group) and subsequently added those data, in whole or in part, to the applicant's data. As regards the enterprises classified as 'partner' enterprises, the ECHA inter alia took into account 49.9995% of Esseco Group's data. The taking into account of Esseco Group's data was contested by the applicant in its letter of 16 December 2013 addressed in error to the Board of Appeal and which, according to the ECHA's statements, was taken into account during the administrative procedure.

39 As a preliminary point, it is necessary to recall the links at the material time between the applicant and other enterprises. First of all, the applicant was linked to Marchi Industriale, to the extent that the latter owned the majority of its share capital. Subsequently, the applicant was a partner of Marfin (which owned between 25% and 50% of its share capital) and of Essemar (in which Marchi Industriale owned between 25% and 50% of the share capital). Lastly, according to the ECHA, Essemar was linked to Esseco Group, to the extent that the latter enterprise officially owned a majority of the share capital and, thus, the shareholder voting rights of Essemar; the applicant acknowledged this at the hearing.

40 In the first place, as regards the taking into account of the data of Marchi Industriale and of Marfin, the report annexed to the contested decision enabled the applicant to understand the reasoning of that decision, in the light inter alia of the relevant provisions of Recommendation 2003/361. In particular, it is clearly apparent from those provisions and the elements of the case that the ECHA took into account all the data of Marchi Industriale, to the extent that that enterprise was linked to the applicant (pursuant to the third paragraph of Article 6(2) of the Annex to Recommendation 2003/361), and the prorated data of Marfin, to the extent that that enterprise was a partner of the enterprise linked to the applicant (pursuant to the second paragraph of Article 6(3) of the Annex to Recommendation 2003/361). The applicant does not indeed specifically contest the taking into account of the data of those enterprises in the context of this action.

41 In the second place, as regards the taking into account of Esseco Group's data, which was contested by the applicant during the administrative procedure and which is the subject specifically of this action, the Court would point out that the facts of this case do not fall within the situations provided for in the Annex to Recommendation 2003/361. Where the Annex to Recommendation 2003/361 provides for the taking into account of the data of enterprises which are not situated immediately upstream or downstream from the enterprise in question, it merely refers to the enterprises linked to the partner enterprises of the enterprise in question (first paragraph of Article 6(3) of the Annex to Recommendation 2003/361) and the partner enterprises of the enterprises linked to the enterprise in question (second paragraph of Article 6(3) of the Annex to Recommendation 2003/361). However, in the present case, Esseco Group was an enterprise linked to a partner enterprise of the enterprise linked to the applicant.

42 Moreover, it is not apparent from the elements of the case that the applicant was a partner of Esseco Group, as the ECHA none the less stated in the report annexed to the contested decision, without further explanation.

43 Lastly, no indication as to the legal basis applicable to the present case for the purposes of using Esseco Group's data was given to the applicant during the administrative procedure, as the ECHA confirmed at the hearing. In particular, the ECHA specified that the third paragraph of Article 6(2) of the Annex to Recommendation 2003/361, relied upon in its pleadings, had not been mentioned during the administrative procedure. Moreover, the reference before the Court to that legal basis, which concerns enterprises directly or indirectly linked to the enterprise in question, is at odds with the classification as partner enterprise used by the ECHA in the report annexed to the contested decision.

44 In the light of those considerations, it must be held that the statement of reasons for the contested decision does not enable the applicant to ascertain the reasons for that decision in relation to the taking into account of Esseco Group's data or the Court to exercise its powers of review.

45 Accordingly, the first plea raised by the applicant in support of the action must be upheld and, consequently, the contested decision must be annulled, without it being necessary to examine the second plea.

Costs

46 Under Article 134(1) 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 and the applicant did not apply for costs, each party must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Annuls Decision SME(2013) 4672 of the European Chemicals Agency (ECHA) of 28 May 2014;**

2. **Orders each party to bear its own costs.**

Frimodt Nielsen Dehousse Collins

Delivered in open court in Luxembourg on 15 September 2016.

[Signatures]