



Reports of Cases

ORDER OF THE GENERAL COURT (Eighth Chamber)

17 March 2021 *

(Action for annulment – REACH – Identification of perfluorobutanesulfonic acid (PFBS) and of its salts as a substance of very high concern – Inclusion in the list of substances identified with a view to their eventual inclusion in Annex XIV to Regulation (EC) No 1907/2006 – Time limit for bringing an action – Article 59(10) of Regulation No 1907/2006 – Article 59 of the Rules of Procedure – Inadmissibility)

In Case T-160/20,

3M Belgium, established in Diegem (Belgium), represented by J.-P. Montfort and T. Delille, lawyers,
applicant,

v

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

defendant,

APPLICATION under Article 263 TFEU for the annulment of Decision ECHA/01/2020 of ECHA of 16 January 2020 concerning the inclusion of perfluorobutanesulfonic acid and its salts in the list of substances identified with a view to their eventual inclusion in Annex XIV to 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, corrigendum OJ 2007 L 136, p. 3)).

THE GENERAL COURT (Eighth Chamber),

composed of J. Svenningsen, President, C. Mac Eochaidh and J. Laitenberger (Rapporteur), Judges,

Registrar: E. Coulon,

makes the following

* Language of the case: English.

Order

Background to the dispute

- 1 The applicant, 3M Belgium, is the sole representative, within the meaning of Article 8 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, corrigendum OJ 2007 L 136, p. 3), of the company 3M for all imports of 3MTM Flame Retardant Additive FR-2025. That additive, which is manufactured by legal entities of 3M not established in the European Union, is a mixture composed of 95 to 99% by weight of the substance potassium 1,1,2,2,3,3,4,4,4-nonafluorobutane-1-sulphonate. That substance is one of the salts of perfluorobutanesulfonic acid ('PFBS').
- 2 On 5 August 2019, the competent Norwegian authority submitted a dossier prepared in accordance with Annex XV to Regulation No 1907/2006 proposing the identification of PFBS and its salts as a substance of very high concern under Article 57(f) of Regulation No 1907/2006.
- 3 On 3 September 2019, pursuant to Article 59(4) of Regulation No 1907/2006, the European Chemicals Agency (ECHA) invited interested parties to submit their observations on the dossier prepared in accordance with Annex XV of that regulation by 18 October 2019 at the latest. The applicant submitted observations on 18 October 2019.
- 4 Having received observations on the identification of PFBS and its salts in the context of the public consultation organised pursuant to Article 59(4) of Regulation No 1907/2006, ECHA referred the dossier to the Member State Committee ('the MSC'), pursuant to Article 59(7) of that regulation.
- 5 At its meeting on 11 December 2019, the MSC reached a unanimous agreement on the identification of PFBS and its salts as a substance meeting the criteria laid down in Article 57(f) of Regulation No 1907/2006, namely substances for which there is scientific evidence of probable serious effects to human health or the environment which give rise to an equivalent level of concern to those of other substances listed in Article 57(a) to (e) of Regulation No 1907/2006.
- 6 On 16 January 2020, ECHA adopted Decision ECHA/01/2020 ('the contested decision') by which PFBS and its salts were identified as a substance of very high concern and were included in the list of substances identified with a view to their eventual inclusion in Annex XIV to Regulation No 1907/2006, as referred to in Article 59(1) of that regulation ('the candidate list').
- 7 The contested decision contains the following observation concerning the identification of PFBS and its salts as a substance of very high concern:

'The combined intrinsic properties justifying the inclusion as a substance for which there is scientific evidence of probable serious effects to human health and the environment which give rise to an equivalent level of concern are the following: very high persistence, high mobility in water and soil, high potential for long-range transport, and difficulty of remediation and water purification as well as moderate bioaccumulation in humans. The observed probable serious effects for human health and the environment are thyroid hormonal disturbances and reproductive toxicity seen in rodents, and effects on liver, kidney and haematological system in rats, hormonal disturbances and effects on reproduction in marine medaka fish and effects on expression of hormone receptors in tadpoles. Together, these elements lead to a very high potential for irreversible effects.'

Procedure and forms of order sought

- 8 By application lodged at the Court Registry on 27 March 2020, the applicant brought the present action. It claims that the Court should:
- annul the contested decision in so far as it concerns the entry relating to PFBS and its salts, namely the identification of PFBS and its salts as a substance of very high concern, and the observation in that decision relating to that identification;
 - order ECHA to pay the costs incurred in these proceedings.
- 9 By a separate document lodged at the Court Registry on 15 July 2020, ECHA raised a plea of inadmissibility on the basis of Article 130(1) of the Rules of Procedure of the General Court. It claims that the Court should:
- declare the action for annulment admissible;
 - order the applicant to pay the costs of all parties.
- 10 By document lodged at the Court Registry on 23 July 2020, the European Chemical Industry Council (CEFIC) sought leave to intervene in the present proceedings in support of the form of order sought by the applicant.
- 11 By document lodged at the Court Registry on 1 September 2020, the applicant submitted its observations on the plea of inadmissibility and claims that the Court should:
- reject the plea of inadmissibility raised;
 - declare the action for annulment admissible.
- 12 On 21 October 2020, the General Court (Eighth Chamber), on a proposal from the Judge-Rapporteur and in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put a written question to ECHA, asking it to reply in writing.
- 13 On 29 October 2020, ECHA submitted its reply to the question put by the Court.
- 14 On 3 November 2020, the Court set a deadline for the applicant to submit observations on that reply.
- 15 On 12 November 2020, the applicant submitted its observations on that reply.

Law

- 16 Under Article 130(1) and (7) of the Rules of Procedure, the Court may, if the defendant so requests, rule on the question of admissibility without considering the merits of the case.
- 17 In the present case, since ECHA has requested a ruling on inadmissibility, the Court, considering that it has sufficient information from the documents in the file, has decided to rule on the action without continuing the proceedings and, notwithstanding the request to that effect made by the applicant, without opening the oral phase of the proceedings on the plea of inadmissibility.
- 18 In support of the plea of inadmissibility, ECHA argues that the action was brought out of time. ECHA submits that the time limit of two months for bringing an action from the publication of the measure, laid down in the sixth paragraph of Article 263 TFEU and extended on account of distance by the

period of 10 days provided for in Article 60 of the Rules of Procedure, must be calculated from the date of publication of the contested decision, that is to say, in the present case, from 16 January 2020. Consequently, that time limit expired on 26 March 2020 and the action, brought on 27 March 2020, is, according to ECHA, inadmissible on the ground that it was out of time.

- 19 The applicant submits, however, that its action is admissible.

The publication of the contested decision

- 20 ECHA submits that it published on its website the updated candidate list including PFBS and a copy of the contested decision on 16 January 2020, in accordance with its obligation under Article 59(10) of Regulation No 1907/2006. In support of that claim, it refers to its website, where that date appears as the date of inclusion of that substance in the candidate list. ECHA also refers to its press release of the same date indicating that it updated the candidate list in order to include, inter alia, PFBS and its salts and that the decision to include that substance was taken with the participation of the MSC.
- 21 In its reply to the question put by the Court, ECHA submitted additional evidence indicating that the press release was sent by e-mail on 16 January 2020 to 13 940 recipients (of which 13 890 successfully), an article also dated 16 January 2020 on the inclusion, inter alia, of PFBS and its salts in the candidate list published on the ChemicalWatch website and metadata saved in the ‘Dissemination Platform’ application used by ECHA for the publication of information on its website. Those metadata concern, according to ECHA, the entry relating to PFBS and its salts and indicate one publication on 16 January 2020 and a single subsequent publication, on 26 June 2020, which, according to ECHA, was the result of an update for technical reasons.
- 22 The applicant submits that ECHA, in support of its contention that the contested decision was published on its website on 16 January 2020, merely referred, first, to that same website, on which that date appears to be the date of inclusion of the substance at issue in the candidate list and, second, to a press release also dated 16 January 2020 concerning the update to the candidate list which did not, however, contain the contested decision.
- 23 According to the applicant, the date of actual publication on ECHA’s website cannot be verified, although the candidate list on ECHA’s website contains a copy of the contested decision, dated 16 January 2020, and states that PFBS was included in that list on that date. The applicant submits that there are no rules or mechanisms to ensure the authenticity, integrity and unalterability of decisions published on ECHA’s website such as the rules that are provided for the electronic publication of the Official Journal by Council Regulation (EU) No 216/2013 of 7 March 2013 on the electronic publication of the *Official Journal of the European Union* (OJ 2013 L 69, p. 1). The applicant argues that issuing a press release or updating the candidate list cannot amount to a proper publication in the Official Journal. According to the applicant, ECHA’s request that the Court dismiss the action as inadmissible thus does not contain the documents relied on in support of that request, which is contrary to the requirements of Article 130(3) of the Rules of Procedure.
- 24 Furthermore, according to the applicant, the date of adoption of a decision to identify a substance as a substance of very high concern does not always correspond to the date on which that substance is included in the candidate list or to the date of publication of that updated list. In that connection, the applicant takes as an example the case of the identification of 4-tert-butylphenol as a substance of very high concern, in respect of which the date of adoption of the decision at issue and the date of publication of that decision did not coincide.
- 25 The applicant also submits that the contested decision, since it is a regulatory act, should have been published in the Official Journal in accordance with Article 297 TFEU. The applicant maintains that legal acts are not binding on individuals if they have not been duly published in the Official Journal.

In view of the fact that ECHA did not publish the contested decision in the Official Journal, the time limit for bringing an action against ECHA did not start to run at all and therefore did not start to run on the alleged date of publication of the contested decision on ECHA's website.

- 26 The applicant submits that, consequently, the evidence submitted by ECHA does not establish that the contested decision was actually published on 16 January 2020, since the updating of the candidate list on ECHA's website constitutes a separate operation from the publication of the contested decision on that site. Moreover, the metadata do not show in which update which documents were published, nor, in particular, that the contested decision was published on 16 January 2020.
- 27 The Court considers it appropriate to examine, first, the applicant's arguments relating to the validity of the method of publication and, second, the arguments of the parties relating to the date of publication.

The validity of the method of publication

- 28 As regards the applicant's claim that the contested decision should have been published in the Official Journal, it is appropriate to note that the concept of 'publication' in the sixth paragraph of Article 263 TFEU does not necessarily and in all cases have to correspond to the concept of 'publication' in Article 297 TFEU.
- 29 First, that finding is corroborated by the fact that, contrary to the case of Article 297 TFEU, it does not appear from the wording of Article 263 TFEU that the concept of 'publication' referred to in the latter provision concerns only publication in the Official Journal (see, by analogy, judgment of 26 September 2013, *PPG and SNF v ECHA*, C-625/11 P, EU:C:2013:594, paragraph 30). The sixth paragraph of Article 263 TFEU has been drafted in such a way as to refer to the publication of measures in general (judgment of 26 September 2013, *PPG and SNF v ECHA*, C-625/11 P, EU:C:2013:594, paragraph 31). Moreover, the General Court previously held in its judgment of 10 September 2019, *Poland v Commission* (T-883/16, under appeal, EU:T:2019:567, paragraph 37) that the time limit for bringing an application under Article 263 TFEU for the annulment of a decision of the European Commission in that case started to run from the date of publication of that decision on the Commission's website.
- 30 Second, although the Court of Justice has indeed read Articles 263 and 297 TFEU together for the purpose of interpreting the sixth paragraph of Article 263 TFEU (see, to that effect, judgments of 17 May 2017, *Portugal v Commission*, C-337/16 P, EU:C:2017:381, paragraph 36; of 17 May 2017, *Portugal v Commission*, C-338/16 P, EU:C:2017:382, paragraph 36, and of 17 May 2017, *Portugal v Commission*, C-339/16 P, EU:C:2017:384, paragraph 36), the cases which gave rise to those judgments concerned the subsidiary nature of the criterion of publication as compared to that of notification of the measure to the addressee within the meaning of the sixth paragraph of Article 263 TFEU and not, as in the present case, the interpretation of the criterion of publication alone. In any event, in those judgments, the Court of Justice did not hold that the concept of 'publication' in the latter provision must necessarily and in all cases correspond to the concept of 'publication' referred to in Article 297 TFEU.
- 31 Furthermore, the applicant's claim concerning the unverifiable nature of a publication on ECHA's website as compared to a publication in the Official Journal amounts to depriving of utility any other form of publication which would not meet the requirements applicable to a publication in the Official Journal. The fact that the EU legislature, in adopting Regulation No 216/2013, wished to regulate the electronic publication of the Official Journal does not imply that similar requirements must govern dissemination on ECHA's website and, moreover, that is not apparent from the sixth paragraph of Article 263 TFEU or from any other provision of the applicable law.

- 32 In so far as the applicant, in its observations on ECHA's reply, refers to the case-law resulting from the judgment of 22 January 1997, *Opel Austria v Council* (T-115/94, EU:T:1997:3, paragraph 124), according to which the principle of legal certainty requires that every measure of the institutions having legal effects must be clear and precise and must be brought to the notice of the person concerned in such a way that he can ascertain exactly the time at which the measure comes into being and starts to have legal effects, it is sufficient, in any event, to find that it is clear from paragraph 4 of the contested decision that that decision takes effect on 16 January 2020 and from the candidate list that PFBS and its salts were included in that list on 16 January 2020, it being understood that, since that decision did not have any addressee, the taking effect of that decision did not depend on its notification to an addressee, nor, moreover, on its notification to the applicant.
- 33 Next, the Court finds that, unlike the sixth paragraph of Article 263 TFEU, Regulation No 1907/2006 provides for a specific method of publication. Article 59(10) of Regulation No 1907/2006 provides that ECHA is to publish and update on its website the candidate list as soon as a decision has been taken on the inclusion of a substance in that list.
- 34 It is not necessary, in the present case, to rule on whether the updating of the candidate list on ECHA's website is the relevant publication triggering the calculation of the time limit for bringing an action against a measure identifying a substance as being of very high concern (see, to that effect, judgment of 26 September 2013, *PPG and SNF v ECHA*, C-626/11 P, EU:C:2013:595, paragraph 31 et seq.) or whether, as the applicant argues, the contested decision, which does not have a specific addressee, is separate from the updating of the candidate list, and Article 59(10) of Regulation No 1907/2006 provides for publication on ECHA's website only for the latter, thus suggesting that the date of publication of the decision of the Executive Director of ECHA is decisive for the calculation of the triggering of the time limit. The decisions of the Executive Director of ECHA ordering the updating of the candidate list are published only in that list. Thus, the date of publication of such a decision corresponds to the date of publication of the updated candidate list.
- 35 It follows from the foregoing considerations, first, that ECHA could validly publish the contested decision on its website and, more particularly, in the entry, included in the candidate list, relating to PFBS and its salts and, second, that that publication could cause the two-month time limit for bringing an action provided for in the sixth paragraph of Article 263 TFEU to run. It is now necessary to examine the evidence presented by ECHA to demonstrate that that publication took place on 16 January 2020.

The date of publication of the contested decision

- 36 In that regard, it should be noted that, in its observations on ECHA's request for a ruling on the inadmissibility of the action, the applicant submits, in essence, that, because of the manner in which the contested decision was published, the date of publication of that decision cannot be verified.
- 37 The Court notes that ECHA submitted documents containing metadata extracted from the platform it uses to disseminate information on its website. It appears from the metadata that ECHA made two postings on its website relating to PFBS and its salts, one on 16 January 2020 and the other on 26 June 2020, so that the contested decision could have been made available to the public on that website on each of those two dates. However, the applicant does not dispute that it was able to access that decision from that website on a date prior to the filing of the application, namely 27 March 2020, and therefore prior to 26 June 2020. It follows that the contested decision was necessarily published on ECHA's website on the earlier of those dates, namely 16 January 2020.
- 38 Contrary to the applicant's suggestions in its observations on ECHA's reply to the question put by the Court, the metadata submitted by ECHA concern the entry relating to PFBS and its salts, since it appears from the evidence submitted by that agency that those metadata relate to the identifier

'0b0236e183da8013' and that that identifier corresponds to PFBS and its salts. Moreover, that identifier appears, in particular, in the internet address of the entry relating to PFBS and its salts in the candidate list (<https://echa.europa.eu/fr/candidate-list-table/-/dislist/details/0b0236e183da8013>).

- 39 In addition, the press release on the inclusion, inter alia, of the substance at issue in the candidate list, its dispatch to 13 940 recipients (of which 13 890 successfully) and the article published on the ChemicalWatch website in reaction to that publication, all dated 16 January 2020, also tend to corroborate ECHA's claim that PFBS and its salts were included in the candidate list updated on 16 January 2020.
- 40 As regards the applicant's argument based on the fact that the date of adoption of a decision identifying a substance as being of very high concern does not always correspond to that of the implementing measure seeking to include that substance in the candidate list, nor that of the publication of an updated version of that list, that fact is not, in itself, such as to give rise to doubt as to the date of publication of an updated version of that list, nor, consequently, as to the date of publication of a decision such as the contested decision.
- 41 The adoption of a decision identifying a substance, the possible adoption of a measure purely implementing the decision identifying a substance and the publication of the updated version of the candidate list constitute three separate events, so that the fact that the dates of occurrence of each of those events do not coincide cannot justify calling into question the actual date of occurrence of one of them. As regards, more particularly, the inclusion of 4-tert-butylphenol in the candidate list, it is sufficient to note, first, that the entry on ECHA's website relating to that substance contains two separate measures, in that case the decision adopted by the Commission identifying a substance and the measure adopted by ECHA purely implementing that decision, and, second, that the 'date of inclusion' in that entry, namely 16 July 2019, corresponds to the date, laid down in that implementing measure, for the publication of an updated version of that list. In any event, it should be noted that, as regards the substance at issue in the present case, namely PFBS and its salts, the date of adoption of the contested decision corresponds to the date of entry into force of that decision and the 'date of inclusion' appearing on ECHA's website, namely 16 January 2020.
- 42 In the light of the information provided by ECHA in support of its request for a ruling on the inadmissibility of the action and in its reply to the question put by the Court and the absence of any evidence capable of giving rise to doubt as to the date of publication of the contested decision and the updating of the candidate list, the Court concludes that it has been proved to the requisite legal standard that that decision and the entry in that list relating to PFBS and its salts were published on ECHA's website on 16 January 2020.
- 43 Finally, with regard to the requirements laid down in Article 130(3) of the Rules of Procedure relied on by the applicant, the Court notes that that provision provides that the documents relied on in support of a request for a ruling on the inadmissibility of an action must be annexed to that request and not submitted separately. Article 130(3) of the Rules of Procedure cannot, however, be understood as prescribing the submission of certain specific documents in support of such a request. On the contrary, it is for the Court to examine whether the arguments and documents submitted in support of such a request provide sufficient legal grounds for the inadmissibility of the action.
- 44 In any event, that provision cannot be interpreted as meaning that the Court should confine itself to ascertaining, on the sole basis of the documents annexed to such a request, whether the time limit for bringing an action under the sixth paragraph of Article 263 TFEU has been observed. Such an interpretation would not be in line with established case-law, in accordance with which that time limit for bringing an action is a matter of public policy, having been established in order to ensure that legal positions are clear and certain and to avoid any discrimination or arbitrary treatment in the administration of justice, and it is for the EU Courts to ascertain, of their own motion, whether that

time limit has been observed (judgments of 23 January 1997, *Coen*, C-246/95, EU:C:1997:33, paragraph 21, and of 18 September 1997, *Mutual Aid Administration Services v Commission*, T-121/96 and T-151/96, EU:T:1997:132, paragraphs 38 and 39).

The calculation of the time limit for bringing an action and Article 59 of the Rules of Procedure

- 45 ECHA submits that Article 59 of the Rules of Procedure, which provides for a deferral of the beginning of the time limit for bringing an action by 14 days when a time limit for bringing an action against an act of an institution begins to run from the publication of that act in the Official Journal, is not applicable in the present case. According to ECHA, the judgment of 26 September 2013, *PPG and SNF v ECHA* (C-625/11 P, EU:C:2013:594), does not call that finding into question, since that judgment concerns the article that preceded the current Article 59 of the Rules of Procedure, namely Article 102(1) of the Rules of Procedure of the General Court of 2 May 1991, which differs considerably, in its title and wording, from the article currently in force. The case-law of that Court following the reform of the Rules of Procedure shows, moreover, that that Article 59 does not apply to cases such as the present in which the contested measures were not published in the Official Journal.
- 46 The applicant submits that the additional time limit of 14 days provided for in Article 59 of the Rules of Procedure is applicable in the present case, either because the contested decision should have been published in the Official Journal, or because Article 59 of the Rules of Procedure is applicable to any measure published only on the internet.
- 47 The applicant claims that the findings in the judgment of 26 September 2013, *PPG and SNF v ECHA* (C-625/11 P, EU:C:2013:594), are still applicable in the present case, despite the fact that it concerned Article 102(1) of the Rules of Procedure of 2 May 1991, which has in the meantime been replaced. Without expressly excluding other forms of publication, the wording of the current Article 59 of the Rules of Procedure does not limit its scope to measures published in the Official Journal only. Moreover, the *ratio legis* of the additional time limit granted by Article 59 of the Rules of Procedure applies to all published measures, as opposed to notified measures, and does not justify unequal treatment as between measures published in the Official Journal and those published exclusively on the internet.
- 48 Furthermore, the applicant submits that an interpretation of Article 59 of the Rules of Procedure as referring only to measures published in the Official Journal constitutes unjustified discrimination with regard to measures published on the internet. According to the applicant, that discrimination is all the more serious given that there are situations in which the decision to identify a substance as being of very high concern is published in the Official Journal, in particular when such a decision is taken by the Commission in the absence of unanimous agreement in the MSC on the identification of substances as being of very high concern. Furthermore, the applicant submits that the wording of Article 50 of the Rules of Procedure of the Court of Justice is still similar to the wording of Article 102 of the Rules of Procedure of 2 May 1991 and that its interpretation could therefore be similar to the interpretation adopted in the judgment of 26 September 2013, *PPG and SNF v ECHA* (C-625/11 P, EU:C:2013:594). Consequently, according to the applicant, the interpretation of Article 59 of the Rules of Procedure advocated by ECHA leads to an unjustified difference in treatment as between actions brought before the Court of Justice and those brought before the General Court.

49 In that regard, Article 59 of the Rules of Procedure of the General Court, entitled ‘Proceedings against a measure adopted by an institution and published in the *Official Journal of the European Union*’, provides as follows:

‘Where the time limit allowed for initiating proceedings against a measure adopted by an institution runs from the publication of that measure in the *Official Journal of the European Union*, that time limit shall be calculated, for the purposes of Article 58(1)(a), from the end of the fourteenth day after such publication.’

50 Contrary to the applicant’s arguments, the time limit for bringing the present action was not to run from the end of the fourteenth day following the date of publication of the contested decision. Article 59 of the Rules of Procedure applies, pursuant to its title and wording, only to documents published in the Official Journal.

51 The applicant’s argument that there is no objective difference between measures published in the Official Journal and measures published solely on the internet must be rejected. First, there is an objective difference between those measures, namely the form of publication, on the one hand, on ECHA’s website and, on the other, in the Official Journal. The Court was entitled to lay down specific rules extending the time limit for bringing an action only in respect of measures of the institutions published in the Official Journal. Second, the contested decision was published only on ECHA’s website, with the result that all potential applicants benefited from the same time limit for bringing an action. Third, the publication in the Official Journal or on ECHA’s website of a decision on the identification of a substance as being of very high concern, and thus the question of whether or not to apply Article 59 of the Rules of Procedure, is not a matter of choice on the part of ECHA, but of whether such a decision is adopted by ECHA or by the Commission, as provided for in Article 59 of Regulation 1907/2006.

52 It is true that the Court of Justice, in its judgment of 26 September 2013, *PPG and SNF v ECHA* (C-625/11 P, EU:C:2013:594), held that Article 102(1) of the Rules of Procedure of 2 May 1991, which provided that ‘where the period of time allowed for commencing proceedings against a measure adopted by an institution runs from the publication of that measure, that period shall be calculated, for the purposes of Article 101(1)(a), from the end of the 14th day after publication thereof in the *Official Journal of the European Union*’, also applied to ECHA’s publications on the internet.

53 However, a distinction must be made between the present case and the case that gave rise to the judgment of 26 September 2013, *PPG and SNF v ECHA* (C-625/11 P, EU:C:2013:594). First, it should be pointed out that, although the Court of Justice could find, in paragraph 31 of that judgment, that the reference to the Official Journal in the second part of the sentence of Article 102 of the Rules of Procedure of 2 May 1991 was capable of being explained by the mere fact that publication in the Official Journal was the only conceivable option at the time of the adoption of those Rules of Procedure, that finding cannot apply with regard to Article 59 of the Rules of Procedure, which was adopted on 4 March 2015, that is to say, on a date on which publication on the internet, as distinct from publication in the Official Journal, whether in electronic or printed form, was conceivable.

54 Second, the title and wording of Article 59 of the Rules of Procedure are unambiguous and refer exclusively to publication in the Official Journal. Therefore, contrary to the findings of the Court of Justice in its judgment of 26 September 2013, *PPG and SNF v ECHA* (C-625/11 P, EU:C:2013:594) with regard to the doubts to which the wording of Article 102(1) of the Rules of Procedure of 2 May 1991 could have given rise, the applicant cannot rely on such doubts with regard to Article 59 of the Rules of Procedure.

55 Moreover, Article 59 of the Rules of Procedure was amended during the process leading up to the reform of those rules precisely in order to limit the scope of the additional 14-day time limit provided for in Article 102 of the Rules of Procedure of 2 May 1991. While in the draft Rules of Procedure of

the General Court of 14 March 2014, the version of Article 59 originally envisaged was entitled ‘Proceedings against a published measure adopted by an institution’ and the wording of that version in that draft was almost identical to that of Article 102(1) of the Rules of Procedure of 2 May 1991, the title and wording of the version of Article 59 of the Rules of Procedure finally adopted clearly differed from those of the originally envisaged version.

- 56 Furthermore, and as ECHA rightly points out, the General Court has previously held that Article 59 of the Rules of Procedure applied only in a situation where the time limit allowed for instituting proceedings against a measure adopted by an institution ran from the publication of that measure in the Official Journal (see, to that effect, order of 30 April 2019, *Romania v Commission*, T-530/18, EU:T:2019:269, paragraph 33). In a case concerning an application for annulment of a decision published on the Commission’s website, the Court also calculated the time limit for bringing an action from the date of that publication, and not from the end of the fourteenth day following that date (see, to that effect, judgment of 10 September 2019, *Poland v Commission*, T-883/16, under appeal, EU:T:2019:567, paragraph 37).
- 57 Finally, contrary to the applicant’s arguments, the difference between the wording of Article 59 of the Rules of Procedure of the General Court and that of Article 50 of the Rules of Procedure of the Court of Justice does not constitute unjustified discrimination. In accordance with Article 63 of the Statute of the Court of Justice of the European Union, the Rules of Procedure of the General Court and the Rules of Procedure of the Court of Justice are different acts, adopted by different courts, which govern different proceedings before separate courts and are therefore not – and need not necessarily be – identical.
- 58 It follows that the time limit for bringing an action started to run on 17 January 2020, in accordance with Article 58(1)(a) of the Rules of Procedure. The time limit of two months therefore expired on 16 March 2020 since, in accordance with Article 58(1)(b) of the Rules of Procedure, a time limit 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 time limit is to be calculated occurred or took place. In view of the extension on account of distance of 10 days which must be added to the procedural time limits pursuant to Article 60 of the Rules of Procedure, it must be held that the time limit for bringing an action expired on 26 March 2020.
- 59 Consequently, the present action, brought on 27 March 2020, was not brought within the time limit prescribed by the Rules of Procedure.

The existence of an excusable error

- 60 ECHA submits that the applicant has not established that the delay in bringing the action was justified by the existence of an excusable error, unforeseeable circumstances or *force majeure*.
- 61 In particular, ECHA submits that the applicant cannot rely on the existence of an excusable error to justify a derogation from the rules on time limits. In the present case, neither the conduct of ECHA nor that of the Court of Justice was such as to lead the applicant to believe that it was still open to it to bring the present action on 27 March 2020. In particular, according to ECHA, the judgment of 26 September 2013, *PPG and SNF v ECHA* (C-625/11 P, EU:C:2013:594), was not such as to cause such confusion, since, at the time the action was brought, Article 59 of the Rules of Procedure, the wording of which specifies that it is applicable only to actions brought against measures published in the Official Journal, had already been in force and publicly accessible for more than four years.
- 62 According to the applicant, even if the General Court were to find that the action was brought out of time, such a delay is the result of the existence of an excusable error. The applicant argues that, in the light of the judgment of 26 September 2013, *PPG and SNF v ECHA* (C-625/11 P, EU:C:2013:594), it

was entitled to regard the 14-day time limit provided for in Article 59 of the Rules of Procedure as applying to an action for annulment brought against a measure published on the internet. In addition, it alleges confusion as to the date of publication of the contested decision as a result of ECHA's practice. According to the applicant, such confusion cannot, in the absence of any imperative reasons to the contrary, result in the applicant's being time-barred and therefore deprived of its right to resort to legal proceedings.

- 63 In this respect, it should be recalled at the outset that the strict application of procedural rules, including the rules on time limits for bringing actions, meets the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (see, to that effect, order of 11 June 2020, *GMPO v Commission*, C-575/19 P, not published, EU:C:2020:448, paragraph 38 and the case-law cited).
- 64 In so far as the applicant claims to have made an excusable error regarding its assessment of the time limit for bringing an action, it is important to note that it is clear from the case-law of the Court of Justice that, under the EU rules on time limits for bringing an action, the concept of excusable error must be strictly construed and relates only to exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either in itself or to a significant extent, such as to give rise to understandable confusion on the part of a party acting in good faith and exercising all the diligence required of a normally experienced trader (see order of 11 June 2020, *GMPO v Commission*, C-575/19 P, not published, EU:C:2020:448, paragraph 36 and the case-law cited).
- 65 However, the interpretation of Article 102(1) of the Rules of Procedure of 2 May 1991 adopted by the Court of Justice in its judgment of 26 September 2013, *PPG and SNF v ECHA* (C-625/11 P, EU:C:2013:594), is not such as to establish that the error committed by the applicant with regard to Article 59 of the Rules of Procedure was excusable. That article has been applicable since 1 July 2015, the date on which the current Rules of Procedure entered into force. As explained in paragraphs 49 et seq. above, it is clear, in particular, from the wording and title of that article that it refers exclusively to measures published in the Official Journal.
- 66 In so far as the applicant alleges confusion as to the date of publication of the contested decision on account of the practice followed by ECHA, it should be noted that the publication, on that agency's website, of decisions relating to the identification of a substance as being of very high concern is in fact a long-standing practice of that agency. Furthermore, all the data available and accessible on ECHA's website indicate that the publication in question did indeed take place on 16 January 2020, specifically the 'date of inclusion' referred to in the entry relating to PFBS and its salts, the effective date indicated in the contested decision and the date of the press release.
- 67 Consequently, it must be held that the applicant has not shown the existence of exceptional circumstances in which, in particular, the conduct of ECHA has been, either in itself or to a significant extent, such as to give rise to understandable confusion on the part of a party acting in good faith and exercising all the diligence required of a normally experienced trader.
- 68 As to the remainder, the applicant has neither relied on nor established the existence of unforeseeable circumstances or *force majeure* which would have enabled the General Court to derogate from 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.
- 69 It follows from all the foregoing that the plea of inadmissibility raised by ECHA must be upheld and that, accordingly, the action must be dismissed as inadmissible on the ground that it was out of time.

- 70 Pursuant to Article 144(3) of the Rules of Procedure, where the defendant lodges a plea of inadmissibility or of lack of competence, as provided in Article 130(1) of those rules, a decision on the application to intervene is not to be given until after the plea has been rejected or the decision on the plea reserved. Furthermore, pursuant to Article 142(2) of those rules, the intervention becomes devoid of purpose, in particular when the application is declared inadmissible.
- 71 Since the plea of inadmissibility raised by ECHA has been upheld in the present case and the present order therefore ends the proceedings, there is no longer any need to rule on the application to intervene submitted by CEFIC.

Costs

- 72 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 applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by ECHA, in accordance with the form of order sought by the latter, with the exception of those relating to the application to intervene.
- 73 Furthermore, under Article 144(10) of the Rules of Procedure, if the proceedings in the main case are concluded before an application to intervene has been decided upon, the applicant for leave to intervene and the main parties must each bear their own respective costs relating to the application to intervene. Consequently, CEFIC, the applicant and ECHA shall each bear their own costs relating to the application to intervene.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby orders:

- 1. The action is dismissed as inadmissible.**
- 2. There is no longer any need to adjudicate on the application to intervene by the European Chemical Industry Council (CEFIC).**
- 3. 3M Belgium shall bear its own costs and shall pay the costs incurred by the European Chemicals Agency (ECHA), with the exception of those relating to the application to intervene.**
- 4. 3M Belgium, ECHA and CEFIC shall each bear their own costs relating to the application to intervene.**

Luxembourg, 17 March 2021.

E. Coulon
Registrar

J. Svenningsen
President