ORDER OF THE COURT (Eighth Chamber)

22 May 2014 (*)

(Appeal — Article 181 of the Rules of Procedure of the Court of Justice — Regulation (EC) No 1907/2006 (REACH) — Article 59 and Annex XIII — Identification of pitch, coal tar, high temperature as a substance of very high concern, to be made subject to the authorisation procedure — Equal treatment)

In Case C‑287/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 16 May 2013,

Bilbaína de Alquitranes SA, established in Luchana-Baracaldo (Spain),

Cindu Chemicals BV, established in Uithoorn (Netherlands),

Deza a.s., established in Valašske Meziříčí (Czech Republic),

Industrial Química del Nalón SA, established in Oviedo (Spain),

Koppers Denmark A/S, established in Nyborg (Denmark),

Koppers UK Ltd, established in Scunthorpe (United Kingdom),

Rütgers Germany GmbH, established in Castrop-Rauxel (Germany),

Rütgers Belgium NV, established in Zelzate (Belgium),

Rütgers Poland sp. z o.o., established in Kędzierzyn-Koźle (Poland),

represented by K. Van Maldegem, avocat,

appellants,

the other party to the proceedings being:

European Chemicals Agency (ECHA), represented by M. Heikkilä, W. Broere and T. Zbihlej, acting as Agents, assisted by J. Stuyck and A.-M. Vandromme, advocaten,

defendant at first instance,

THE COURT (Eighth Chamber),

composed of C.G. Fernlund (Rapporteur), President of the Chamber, C. Toader and E. Jarašiūnas, Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to give a decision by reasoned order, in accordance with Article 181 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 By their appeal, Bilbaína de Alquitranes SA, Cindu Chemicals BV, Deza a.s., Industrial Química del Nalón SA, Koppers Denmark A/S, Koppers UK Ltd, Rütgers Germany GmbH, Rütgers Belgium NV and Rütgers Poland sp. z o.o. seek to have set aside the judgment of the General Court of the European Union of 7 March 2013 in Case T‑93/10 Bilbaína de Alquitranes and Others v ECHA (EU:T:2013:106; 'the judgment under appeal'), by which the General Court dismissed their application for partial annulment of the decision of the European Chemicals Agency (ECHA), published on 13 January 2010, identifying pitch, coal tar, high temperature (EC No 266-028-2; 'CTPHT') as a substance meeting the criteria set out 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 corrigendum at OJ 2007 L 136, p. 3; 'the REACH Regulation'), in accordance with Article 59 of that regulation (the 'contested decision').

Background to the dispute and the contested decision

2 The appellants are suppliers of CTPHT in the European Union.

3 It is apparent from paragraph 2 of the judgment under appeal that CTPHT is a 'residue from the distillation of high temperature coal tar ... composed primarily of a complex mixture

of three or more membered condensed ring aromatic hydrocarbons. This substance is among the substances of unknown or variable composition, complex reaction products or biological materials ("UVCB substances"), because it cannot be fully identified by its chemical composition. CTPHT is used mainly to produce electrode binders for the aluminium and steel industry. It is also used to produce refractories. Minor uses are clay targets, coating for corrosion protection, kerosene resistant airfield applications, road construction, roofing and briquetting'.

4 At the European Commission's request, the ECHA prepared a dossier on the identification of CTPHT – by reference to its classification among the carcinogenic substances in Category 2 of Part 3, Table 3.2, in Annex VI to 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, and amending Regulation (EC) No 1907/2006 (OJ 2008 L 353, p. 1), and on account of its persistent, bioaccumulative and toxic properties ('PBT properties') and its very persistent and very bioaccumulative properties ('vPvB properties') – as a substance meeting the criteria set out in Article 57(a), (d) and (e) of the REACH Regulation, as subsequently amended by, inter alia, Regulation No 1272/2008.

5 By the contested decision, the ECHA identified CTPHT as a substance meeting the criteria set out in Article 57(a), (d) and (e) of the REACH Regulation, with a view to its eventual inclusion in Annex XIV to that regulation.

The action before the General Court and the judgment under appeal

6 By application lodged at the Registry of the General Court on 17 February 2010, the appellants brought an action seeking partial annulment of the contested decision.

7 That action was based on three pleas in law.

8 By their first plea, the appellants submitted that the ECHA had infringed the principle of equal treatment. The ECHA, they argued, had identified CTPHT as a substance of very high concern, without objective justification, even though other comparable UVCB substances containing anthracene and other polycyclic aromatic hydrocarbons were present on the market.

9 On the grounds set out in paragraphs 69 to 73 of the judgment under appeal, the General Court rejected that first plea.

10 By their second plea, the appellants submitted that the ECHA had made an error of assessment in identifying CTPHT as a PBT or vPvB substance on the basis of an assessment of some of its constituents with a concentration in excess of 0.1%. They submitted, first, that the REACH Regulation did not provide for such a possibility and, secondly, that those constituents were not formally identified by the ECHA as having PBT or vPvB properties. In addition, the ECHA did not comply with those criteria inasmuch as CTPHT contains anthracene, the only substance officially identified as a PBT substance, in concentrations of less than 0.1%.

11 On the grounds set out in paragraphs 74 to 112 of the judgment under appeal, the General Court rejected the second plea in its entirety.

12 By their third plea, the appellants submitted that the contested decision infringes the principle of proportionality. On the one hand, the decision was inappropriate in the light of the objectives pursued by the REACH Regulation, which seek to ensure a high level of protection of human health and the environment. On the other hand, less onerous measures would have made it possible to achieve those objectives.

13 On the grounds set out in paragraphs 114 to 132 of the judgment under appeal, the General Court rejected the third plea.

Forms of order sought

14 The appellants claim that the Court should:

– primarily, set aside the judgment under appeal and annul the contested decision;

– in the alternative, refer the case back to the General Court, and

– order the respondent to pay the costs.

15 The ECHA requests the Court to dismiss the appeal and to order the appellants to pay the costs.

The appeal

16 Pursuant to Article 181 of its Rules of Procedure, where the appeal is, in whole or in part, manifestly inadmissible or manifestly unfounded, the Court may at any time, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide by reasoned order to dismiss that appeal or cross-appeal in whole or in part.

17 In support of their appeal, the appellants raise, in essence, four grounds of appeal, which may be summarised and broken down as follows.

The first ground of appeal, relating to the scope of judicial review

18 By their first ground of appeal, the appellants criticise the General Court for having, in paragraph 76 of the judgment under appeal, limited the scope of its review on the sole ground that the action concerned 'highly complex scientific and technical facts'. The General Court thus erred in law because the action concerned the application of clear provisions of the REACH Regulation. The General Court could, they submit, draw such conclusions when dealing with matters concerning the REACH Regulation, which raises a question of access to justice.

19 In this regard, it should be noted, as the General Court has done as a preliminary point in paragraph 76 of the judgment under appeal, that, where European Union authorities have a broad discretion, in particular as to the assessment of highly complex scientific and technical facts in order to determine the nature and scope of the measures which they adopt, review by the European Union Courts must be limited to verifying whether there has been a manifest error of appraisal or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion. In such a context, the European Union Courts cannot substitute their assessment of scientific and technical facts for that of the institutions on which alone the FEU Treaty has conferred that task (Case C‑425/08 Enviro Tech (Europe) EU:C:2009:635, paragraph 47, and Case C‑15/10 Etimine EU:C:2011:504, paragraph 60).

20 Accordingly, the General Court acted correctly in law in stating, in paragraph 77 of the judgment under appeal, that 'the broad discretion of the authorities of the European Union, which implies limited judicial review of its exercise, applies not only to the nature and scope of the measures to be taken but also, to some extent, to the finding of the basic facts. However, even though such judicial review is of limited scope, it requires that the European Union institutions which have adopted the act in question must be able to show before the Union judicature that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate (Case C‑343/09 Afton Chemical [EU:C:2010:419], paragraphs 33 and 34)'.

21 In so ruling in accordance with the settled case-law of the Court of Justice, the General Court clearly did not breach the appellants' right to access to justice, as the appellants were patently in a position to challenge the contested decision for the purpose of defending their interests.

22 The first ground of appeal is thus manifestly unfounded.

The second ground of appeal, alleging misinterpretation of the REACH Regulation

23 By their second ground of appeal, the appellants submit that the General Court committed a variety of errors in its interpretation of the REACH Regulation when it ruled on the identification of CTPHT and its constituents. There are two parts to this ground. Primarily, the appellants challenge the method by which CTPHT is identified on the basis of the properties of certain of its constituents. In the alternative, they argue that each of those constituents ought to have been individually identified.

The first part of the second ground of appeal, relating to the identification of CTPHT on the basis of the properties of certain of its constituents

24 By the first part of the second ground, the appellants criticise the grounds on the basis of which, in paragraphs 78 to 101 of the judgment under appeal, the General Court rejected their arguments relating to the approach followed by the ECHA in identifying CTPHT as having PBT and vPvB properties. The appellants allege that the General Court interpreted the REACH Regulation as not precluding the ECHA from being able to identify a substance as having PBT and vPvB properties on the basis of the properties of constituents having a rate of concentration in excess of 0.1%.

25 First, the appellants argue that that interpretation, in the absence of explicit provisions, goes beyond the wording of the REACH Regulation and Annex XIII thereto, in disregard of the principle of legal certainty. In particular, the fact that Annex XIII does not lay down a maximum limit of 0.1% indicates clearly, in their view, that the legislature did not wish to introduce such a limit in the substance identification process. That interpretation is corroborated by the fact that, during the work leading to the adoption of Commission Regulation (EU) No 253/2011 of 15 March 2011 amending Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) as regards Annex XIII (OJ 2011 L 69, p. 7), the legislature did not adopt the proposed amendment to Annex XIII consisting in the application of a single concentration threshold of 0.1%.

26 Secondly, the appellants submit that the General Court based its reasoning on false analogies or comparisons. Thus, they disagree with the statement, at paragraphs 88 and 99 of the judgment under appeal, that 'the classification of a substance on the basis of the properties of its constituents appears comparable to the classification of a preparation on the basis of the properties of its substances'. The procedure for the classification of mixtures introduced by Regulation No 1272/2008 is not, they argue, comparable to the procedure for identifying a PBT or vPvB substance, as is clear from recital 75 of the preamble to Regulation No 1272/2008.

27 Even assuming that the principles of Regulation No 1272/2008 are transferable to the situation in question, the appellants submit that those principles favour the method of evaluating the properties of a mixture rather than those of its constituents. In particular, resorting to a maximum limit of 0.1% for the classification of a mixture is possible only in the absence of information on the mixture itself. Consequently, the General Court's reasoning is erroneous in so far as it would lead to systematic application of the limit of 0.1% without it being possible to submit scientific studies, even though Regulation No 1272/2008 does not provide for a single concentration threshold, but rather for different limits between 0.1% and 1%.

28 Thirdly, the appellants dispute the assessment made by the General Court in paragraph 85 of the judgment under appeal, according to which UVCB substances are multiple constituent substances. The REACH Regulation, they submit, makes a distinction between those two types of substances. The appellants refer in this regard to 'ECHA Guidance for identification and naming of substances under REACH and [Regulation No 1272/2008]'. Accordingly, the rules of classification for a preparation cannot be applied by analogy.

29 Fourthly, the appellants challenge the validity of the ground on the basis of which the General Court, in paragraph 90 of the judgment under appeal, held that the identification of a UVCB substance based on the properties of its constituents was justified by the fact that 'once in the environment the individual constituents of such a substance will behave as independent substances'. The General Court thus relied on the risks arising from the use of a substance and not from its placement on the market. In so ruling, the General Court conflated the rules relating to the classification of a substance and those related to the risks posed by its use following its placement on the market.

30 Fifthly, the appellants submit that the General Court, in paragraph 88 of the judgment under appeal, misconstrued the REACH Regulation in stating that Article 57 of that regulation places substances having PBT and vPvB properties at the same level as substances which are carcinogenic, mutagenic or toxic to reproduction. Regulation No 1272/2008 sets out detailed rules for the classification of substances which are carcinogenic, mutagenic or

toxic to reproduction, but contains no provisions for PBT and vPvB substances, which are governed exclusively by Annex XIII to the REACH Regulation.

31 It should be noted that, by the first part of the second ground, the appellants raise the question of whether the General Court erred in law in holding that the REACH Regulation does not preclude the ECHA from being able, at the conclusion of the procedure provided for in Article 59 of that regulation, to identify a substance as having PBT and vPvB properties on the basis of the examination of the intrinsic properties of its constituents.

32 In this regard, it should be noted that Article 59(2) and (3) of the REACH Regulation, in conjunction with Annex XV to that regulation, provides for the preparation of a dossier for a substance which meets the identification criteria as having PBT or vPvB properties, criteria which are set out in Annex XIII to that regulation. Accordingly, as was correctly pointed out by the General Court in paragraph 82 of the judgment under appeal, that substance must meet the criteria which allow it to be regarded as having PBT or vPvB properties.

33 The notion of a 'substance' is defined in Article 3(1) of the REACH Regulation as 'a chemical element and its compounds in the natural state or obtained by any manufacturing process, including any additive necessary to preserve its stability and any impurity deriving from the process used'. Thus defined, the notion of a 'substance' covers not only chemical elements with a unique molecular structure, but also those composed of several constituents, which are, as rightly noted by the General Court in paragraph 83 of the judgment under appeal, an integral part of that substance.

34 Admittedly, it is true that, in the version applicable on the date of adoption of the contested decision, Annex XIII to the REACH Regulation did not expressly provide that a substance may be identified by taking into account the PBT or vPvB properties of its relevant constituents. Contrary to the appellants' submissions, that does not, however, mean that Annex XIII to the REACH Regulation precluded any account from being taken of the PBT or vPvB properties of the relevant constituents of a substance.

35 As was correctly noted by the General Court in paragraph 83 of the judgment under appeal, such an interpretation fails to take account of the objective of the REACH Regulation, set out in Article 1(1) thereof, which is to ensure a high level of protection of human health and the environment, including the promotion of alternative methods for assessment of hazards of substances, as well as the free circulation of substances on the internal market while enhancing competitiveness and innovation. Those considerations, which are related to the purpose served by the REACH Regulation, must be observed all the more strictly when it comes to identifying UVCB substances. Annex XIII to the REACH Regulation does not provide for specific rules relating to the identification of the PBT or vPvB properties of those

substances the composition of which is unknown or variable and which contain different constituents.

36 The General Court therefore acted correctly in law in holding, in paragraph 83 of the judgment under appeal, that '[a]lthough the wording of Annex XIII to [the REACH Regulation], in the version applicable to this case, does not expressly indicate that the identification of substances with PBT and vPvB properties must also take account of the PBT and vPvB properties of the relevant constituents of a substance, it does not preclude such an approach. However, it cannot be held that, merely because a constituent of a substance has a certain number of properties, the substance itself also has them, but, rather, the proportion in which that constituent is present and the chemical effects of such presence must be considered (see, to that effect, Case 187/84 Caldana [EU:C:1985:374], paragraph 17)'.

37 Consequently, the appellants' arguments — set out in paragraphs 26 and 27 of the present order and designed to show that the General Court erred in law in holding, in paragraph 99 of the judgment under appeal, that 'it cannot be concluded that the contested decision is vitiated by a manifest error in that the 0.1% threshold was applied as a factor entailing the identification of the substance at issue on the basis of its constituents' — must be rejected as being manifestly unfounded.

38 In addition, all of the arguments set out in paragraphs 26 to 28 and 30 of the present order, according to which the General Court's reasoning is based on a false analogy with Regulation No 1272/2008 or on a false interpretation of that regulation, are directed against grounds which, since they are intended to support the interpretation of Annex XIII to the REACH Regulation set out in paragraph 83 of the judgment under appeal, are included merely for the sake of completeness. As those arguments cannot invalidate the judgment under appeal, they are ineffective.

39 Finally, it is clear from paragraphs 36 to 38 of the statement of appeal that the argument set out in paragraph 29 of the present order is directed against the ground set out in paragraph 90 of the judgment under appeal. However, that ground in the judgment under appeal contains a summary of the arguments put forward by the ECHA, not an assessment by the General Court. Consequently, that argument must be rejected.

40 It follows from the foregoing that the first part of the second ground of appeal must be rejected as being manifestly unfounded.

The second part of the second ground of appeal, relating to the identification of the constituents of CTPHT as having PBT or vPvB properties

41 By the second part of the second ground, the appellants criticise the General Court for having held, in paragraph 104 of the judgment under appeal, that prior identification of the relevant constituents of CTPHT would have been of no added value compared with the methodology followed in this case. They argue that Article 57 of and Annex XIII to the REACH Regulation require an individual assessment of each substance. Among the relevant substances constituting CTPHT, anthracene alone was subject to such an assessment. However, an individual and thorough evaluation of each of those constituents could have led to an outcome other than the identification of CTPHT, while allowing interested parties to be consulted. Therefore, they submit, the General Court erred in stating that individual identification of those constituents would not have brought any added value.

42 By the second part of the second ground, the appellants question, in essence, whether Article 57 of and Annex XIII to the REACH Regulation require, where the identification of a UVCB substance is based on the examination of the intrinsic properties of certain of its constituents, that each of those constituents be the subject of an identification procedure in accordance with Article 59 of the REACH Regulation.

43 As correctly noted by the General Court in paragraph 104 of the judgment under appeal, Articles 57(d) and (e) and 59 of the REACH Regulation require, for the purposes of identifying a substance, that it should meet the criteria set out in Annex XIII to that regulation. No provision of the REACH Regulation requires, in the case of substances composed of multiple constituents, that each of its constituents should be subject, individually, to an identification procedure under Article 59 of that regulation. Consequently, the second part of the second ground has no legal basis. It must for that reason be rejected.

44 It follows that the second ground of appeal must be rejected as being manifestly unfounded.

The third ground of appeal, alleging failure to adjudicate and distortion of the pleadings at first instance

45 By their third ground of appeal, the appellants submit that the General Court did not respond to the arguments set out in paragraph 31 of their reply, by which they argued that the amendments made, following the contested decision, to Annex XIII to the REACH Regulation by Regulation No 253/2011 do not provide for a threshold of 0.1%. They take the view that those amendments rest on an approach based on the ‘weight of evidence’ or on an assessment based on expert judgment. That approach should, they submit, be followed in relation to PBT or vPvB substances in order for it to be possible to demonstrate that the classification is not warranted.

46 However, it should be noted that that argument is based on Regulation No 253/2011, which was not in force on the date of adoption of the contested decision. In interpreting Annex XIII to the REACH Regulation in its version applicable on that date, the General Court therefore manifestly did not err in law.

47 In addition, the appellants challenge the finding in paragraphs 96 and 99 of the judgment under appeal that they did not challenge 'the application of the 0.1% threshold in general'. They point out that they made it clear that, in order to be valid, such a threshold had to be expressly provided for. The General Court, they submit, also failed to respond to the arguments set out in paragraph 90 of the application concerning the evaluation and individual identification of each of the relevant constituents of CTPHT.

48 That line of argument cannot, however, in any way succeed, since it relates to arguments which were relied on in the context of the second ground of appeal, which has been rejected in its entirety.

49 The third ground of appeal must therefore be rejected as being manifestly unfounded.

The fourth ground of appeal, alleging infringement of the principle of equal treatment

50 By their fourth ground of appeal, the appellants submit that the General Court, in paragraphs 68 to 73 of the judgment under appeal, erred in law in holding that, on the one hand, the ECHA had not infringed the principle of equal treatment on the ground that the Commission had complied with the procedure laid down in Article 59 of the REACH Regulation and, on the other, the ECHA has no power in the choice of substance to be identified. They submit that the fact that the Commission has a wide discretion to choose the substance to be identified as a substance of very high concern does not mean, however, that that institution can create, in relation to other similar substances, a situation of discrimination which is not objectively justified. The General Court, they argue, therefore misinterpreted the principle of equal treatment and failed to examine whether there was an objectively justified difference in treatment.

51 However, contrary to the appellants' submissions, it is clear from paragraphs 69 to 72 of the judgment under appeal that the General Court conducted a detailed analysis of their line of argument alleging infringement of the principle of equal treatment. In order to address the first plea in law in the action, the General Court rightly held that the ECHA has no power in relation to the choice of substance to be identified; that prerogative belongs exclusively to the Commission and the Member States pursuant to Article 59 of the REACH Regulation. From this the General Court inferred that, as the appellants had failed to challenge the legality of the

procedure referred to in Article 59 of the REACH Regulation, the first plea in law of the action had to be rejected.

52 Furthermore, it should be noted that, as part of the first ground of their appeal, the appellants alleged that the ECHA had infringed the principle of equal treatment by identifying CTPHT as a substance of very high concern rather than other UVCB substances composed of constituents containing anthracene and other polycyclic aromatic hydrocarbons. However, in the context of their fourth ground, the appellants rely, in support of their appeal, on a breach of equal treatment attributable to the Commission, which is not a party to the dispute. This therefore constitutes a new plea in law, which is manifestly inadmissible at the appeal stage. Consequently, the fourth ground of appeal must be rejected.

53 In the light of all the foregoing considerations, it must be held that, as none of the grounds raised by the appellants in support of their appeal can be upheld, that appeal must be dismissed as being in part manifestly inadmissible and in part manifestly unfounded.

Costs

54 In accordance with Article 184(2) of its Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the ECHA has applied for costs to be awarded against the appellants, and as the latter have been unsuccessful, the appellants must be ordered to pay the costs.

On those grounds, the Court (Eighth Chamber) hereby:

1. Dismisses the appeal;

2. Orders Bilbaína de Alquitranes SA, Cindu Chemicals BV, Deza a.s., Industrial Química del Nalón SA, Koppers Denmark A/S, Koppers UK Ltd, Rütgers Germany GmbH, Rütgers Belgium NV and Rütgers Poland sp. z o.o. to pay the costs.

[Signatures]

* Language of the case: English.