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ECHA – Ten years of REACH related litigation

Panel 2 – Scope of Review by the Courts and Board of Appeal

Introductory remarks

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Ladies and gentlemen,

I would like to thank the ECHA and the Board of Appeal of the ECHA for giving me the opportunity to address the participants of this seminar "Ten years of REACH-related litigation".

Walt Whitman, the American poet, whose collection of verse "Leaves of Grass" is a landmark in the history of American poetry, described chemistry as a "noble science". Reviewing the German chemist Justus Liebig's work "Chemistry in Its Application to Physiology and Agriculture", which was popular in America at that time, Whitman wrote in the Brooklyn Daily Eagle in 1847 that chemistry "involves the essences of creation and the changes, […] the growths, […] the formations and decays of so large a constituent part of the earth". In summary, Whitman, who was enthusiastic about the popular science of his time considered organic chemistry as "the very basis of existence". The reason I start my introduction with Whitman's celebration of the chemical process applied to "food and its preservation" is that I think his description of this relationship between chemistry and human health is constantly, and perhaps, even more valid today.

In that regard, I would like to say straightaway that, as recalled in the case-law of the Court of Justice, the purpose of the REACH regulation, which introduces an integrated system for monitoring chemical substances, is to ensure, in essence, a high level of protection of human health and the environment[1].

The second panel I have the honour to chair focuses on the scope and limits of the Board of Appeal's review of ECHA's decisions and the judicial review on the decisions of the Board of Appeal. Considering the topics of the present panel, one might wonder where the Court of Justice, the

[1] See inter alia, judgment of 17 March 2016, Canadian Oil Company Sweden and Rantén (C-472/14, EU:C:2016:171, paragraph 24)

judicial institution I'm a member of, fits in. Indeed, the Court of Justice has no competence to review ECHA decisions.

However, neglecting the role of the Court of Justice in the implementation of the REACH Regulation and its implementing regulations would certainly be a mistake.

Indeed, the Court of Justice is fully invested in this field of EU law on two counts, even though the number of cases in relation to the REACH Regulation or its implementing regulations is currently limited. I would like to illustrate the diversity of the disputes based on REACH regulations dealt with by the Court of Justice.

On the one hand, the court reviews the judgments and orders of the General Court - in the context of the "pourvoi". And, on the other hand, it intervenes in the context of the preliminary ruling procedure under Article 267 TFEU.

It is on these two points that I would like to make some quick comments.

1. As a court of appeal, the Court of Justice is thus called upon, at the request of private parties but also possibly at the request of ECHA, to review judgments or orders of the General Court as well as interim measures of the President of the General Court.

However, it must be strongly stressed that the Court's review is limited to questions of law. This means - and this is unfortunately forgotten by many appellants - that questions relating to facts do not fall within the competence of the court. The assessment of the facts and evidence falls within the exclusive competence of the General Court, except if the appellant alleges and demonstrates a distortion of the clear sense of that fact or evidence[2]. In practice, there is such distortion where, without recourse to new evidence, the assessment of the existing evidence is clearly incorrect. Furthermore, such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence.

This clarification is particularly important in the context of appeals against judgment of the General Court concerning ECHA's decisions, considering that many of these involve factual assessments which the Court is not called upon to hear.

On the contrary, what does fall into the scope of the review of the Court of Justice is, firstly, questions relating to the interpretation of the REACH Regulation and its implementing regulations (both in their material and procedural aspects). Secondly, those relating to the administration of the evidence by the General Court or, thirdly, those relating to the thoroughness of the review carried out by the General Court on the decisions of ECHA.

[2] It follows from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, secondly, to assess those facts. However, when the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterization of those facts by the General Court and the legal conclusions it has drawn from them (judgment of 11 September 2014, CB v Commission, C-67/13 P, EU:C:2014:2204, paragraph 41)

2. By the preliminary ruling procedure, the Court of Justice may be called upon both to assess the validity of REACH regulations and to interpret their provisions in the framework of proceedings initiated not before the European Courts but before national courts.

Indeed, REACH regulations can be invoked before national courts in the course of disputes involving national administrations, as well as in disputes involving only private parties.

In these disputes, the REACH regulation is not concerned in its administrative part, which is at the heart of ECHA'S activities, but in the perspective of its national implementation, which is of central importance.

Even if, up to now, the Court has had to deal with only 5 cases, all of which are closed, of direct relevance with the REACH Regulation[3], some of them are very representative of the use which can be made of this regulation before the national courts - whether administrative or judicial. And in such actions, national courts can or, sometimes, have to request the support of the Court of Justice in the context of the preliminary ruling procedure.

As mentioned previously, the Court of Justice may be requested to assess the validity of any of the provisions of the REACH Regulation. The first case before the Court concerning that regulation – the **SPCM** case (C-558/07) - is very representative in this respect. The action before the High Court of England and Wales was brought by undertakings which inter alia manufacture polymers or import them into the European market. And the defendant was the Department for Environment, Food and Rural Affairs, the government department responsible for applying the REACH Regulation in the United Kingdom. The core of the dispute concerned the registration requirements applicable to monomer substances according to article 6(3) of Regulation 1907/2006. More precisely, the question was to know whether monomer substance relates only to reacted monomers which are integrated in polymer or, equally, to monomers under unreacted form. Moreover, the British court asked the Court to rule on the validity of the obligation imposed on manufacturers and importers of polymers to submit an application for the monomer substances if this notion includes only the reacted form used in the composition of these polymers, on the ground of the principles of non-discrimination and proportionality. The Court answered that monomer substance relates only to reacted monomers which are integrated in polymer and that such an interpretation does not violate the aforementioned general principle of EU law.

It is certainly within the framework of preliminary ruling for interpretation of the REACH regulation that the Court's case-law has been and will be the most important.

Three cases are particularly representative in this respect and show the importance that the REACH regulation can have in national disputes.

[3] Judgment of 7 July 2009, S.P.C.M. and Others (C-558/07, EU:C:2009:430) ; judgment of 7 March 2013, Lapin ELY-keskus, liikenne ja infrastruktuuri (C-358/11, EU:C:2013:142) ; judgment of 10 September 2015, FCD and FMB (C-106/14, EU:C:2015:576) ; judgment of 17 March 2016, Canadian Oil Company Sweden and Rantén (C-472/14, EU:C:2016:171) ; judgment of 27 April 2017, Pinckernelle (C-535/15, EU:C:2017:315)

The first case is **Lapin** (C-358/11), which originated in an action brought by an environmental protection association concerning repair works to a track made up of duckboards whose infrastructure consists of old wooden telecommunications poles treated with a solution known as 'CCA' (copper-chromium-arsenic). The question was to know whether such poles, now reused as a wood underlay, are waste, in particular hazardous waste, or if they have lost that characteristic as a result of the reuse, even though the REACH Regulation authorizes the use of such treated wood. In that case, the Court of Justice had to interpret the scope of the derogation provided for by the REACH Regulation allowing the use of products containing arsenic, a substance which is subject of a restriction under Annex XVII of that Regulation.

The second case is **FCD and FMB** (C-106/14). The questions referred appeared in the course of an action for annulment against an act of the French Ministry of Ecology dealing with the duty to communicate information on substances contained in articles in accordance with Articles 7(2) and 33 of Regulation No 1907/2006 (REACH) and more precisely with interpretation of the 0.1% (weight by weight) threshold cited in these Articles 7(2) and 33. In support of their action, the applicants argued that this national act was based on an interpretation of the concept of "article" within the meaning of Article 3(3) of the REACH regulation, which does not adhere to either a Commission Note or a ECHA Guidance document. In its judgment, the Court of Justice clarified the obligations of the producers concerning the identification of the substance of very high concern contained in articles they produce and the obligations for the supplier to inform the recipient and the consumer of the presence of such a substance in the products they supply. Meanwhile, the Court of justice recalled that the interpretation given by explicative documents of the ECHA of the REACH regulation's provisions has no legislative effect.

The third case is **Pinckernelle** (C-535/15), delivered on April 27th 2017. In that case, the Court of justice had to interpret the REACH Regulation following a referred question which occurred in the course of an action for annulment against a German decision by which M. Pinckernelle was prohibited to export outside the EU substances which did not, at the time of their importation, fulfil the registration requirement under Article 6 of the REACH Regulation. In that case, the Court considered that substances which did not, at the time of their importation, fulfil the registration requirement can be exported outside the EU.

In conclusion, as mentioned in my introduction, and that is a point I want to stress, the context in which these four cases were addressed to the Court perfectly illustrates the diversity of disputes in which the REACH regulation can be used by both private entities and public authorities.

And I am persuaded that the interpretation of this regulation will in the future be required in many other and different actions. The first of them will certainly be criminal actions in so far as Article 126 of the REACH Regulation states that Member States shall provide for effective, proportionate and dissuasive penalties for infringements of that regulation.

Thank you very much.