

REACH – The Scope of Review by the General Court

Ten years of REACH related litigation

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Helsinki, 24 May 2017

Outline



- I. Actions for annulment: review of legality
- II. Admissibility
- III. Substantive issues: principles of the judicial review
- IV. Full judicial review: field of application
- V. Limited judicial review: rules: field of application and criteria; practice
- VI. Proportionality
- VII. Conclusions

I. Jurisdiction of the GC and the standard of review



- The GC has jurisdiction for actions for annulment (Article 263 TFEU) against
 - ECHA's decisions (Art. 94 REACH) – be it directly or after decisions of the Board of Appeal
 - Commission decisions
- Article 263 TFEU : nature of the action: review of legality
 - not the *opportunité* (appropriateness or merits) of the act
 - not any general declaration or statement of principle (T-673/13, European Coalition)
 - the Court cannot order the EU authorities to take measures; it follows directly from Article 266 TFEU that they have to take the necessary measures

II. Admissibility of applications



Admissibility questions are subject to full judicial review. The GC has to examine such questions of its own motion.

Initially, the questions of admissibility were controversial. Important clarifications could be made meanwhile:

- The identification of a substance as SVHC is a regulatory act which does not entail implementing measures and is of direct concern for suppliers (T-93/10, Bilbaína; T-134/13, Polynt; T-135/13, Hitachi)
- An animal welfare group has no standing to challenge a decision obliging a registrant to carry out further studies (T-673/13, European Coalition)

III. Substantive issues – Principles of the judicial review



- Generally, distinction between
 - full judicial review of facts and legal questions (matter of principle)
 - limited judicial review on highly complex scientific, technical and political issues, in which the institutions have a wide discretion
- Both approaches also applicable to issues related to the REACH Regulation.

IV. Full judicial review (1)



- Infringement of essential procedural requirements

ECHA's and the Commission's decisions are adopted according to complicated procedures following the participation of interested parties and Member States, implying the expertise of different committees. Examples:

- Compliance of the dossier of a Member State for the identification of a substance as a SVCH when it contains no information on alternative substances (T-94/10, Rüttgers Germany)
- Possibility of identifying a substance as SVHC for reasons other than those mentioned in the Member State dossier, based on comments from ECHA (T-95/10, Cindu Chemicals)

IV. Full judicial review (2)



- Interpretation of substantive rules of the REACH Regulation by the ECHA or the Commission
 - Possibility of identifying a substance as a SVHC on the basis of the characteristics of its constituents (T-93/10, Bilbaína)
 - Possibility of identifying a substance as a SVHC when evidence is available only for its use as an intermediate product (T-268/10 RENV, PPG)
- Interpretation in the light of the objectives of the Regulation

IV. Full judicial review (3)



- General principles of law
 - Sound administration (T-360/13, VECCO)
 - Obligation to state reasons, article 130 of the REACH Regulation, Art. 296 TFEU; highly important considering the technical nature of the decisions and the limited scope of the judicial review; but only few examples in practice (T-368/11, PPG)
 - Equal treatment: gradual identification of substances does not violate equality (T-93/10, Bilbaína)

V. Limited judicial review (1)



Field of application

- As to the assessment of highly complex scientific and technical circumstances EU authorities have broad discretion in determining the nature and extent of the measures they adopt (T-93/10, *Bilbaína*, T-94/10, *Rüttgers Germany*, T-95/10, *Cindu Chemicals*), also in fields entailing political, economic and social choices and complex assessments
- The broad discretion of the EU authorities applies also, to some extent, to the finding of the basic facts (*ibidem*)
- Review is limited. In such a context, the European Union judicature cannot substitute its assessment of scientific and technical facts for that of the institutions on which alone the FEU Treaty has placed that task (*ibidem*)

V. Limited judicial review (2)



Criteria

- The Union judge must limit itself to examining:
 - if there is is manifest error of assessment or
 - if there is a misuse of powers or
 - if the authorities manifestly exceeded the limits of their discretion.
- The EU institutions must be able to show before the Union judicature that they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances

V. Application in practice



- In practice, **detailed analysis of the documentary evidence**
 - Identification of certain respiratory sensitizers as a substance giving rise to a equivalent level of concern. Detailed examination of the Member State Committee's support document. No manifest assessment error (T-135/13, Hitachi)
 - Classification of a substance as toxic in the water: "Background document" of the Risk Assessment Committee of ECHA on which the Commission based its decision was examined. Court held that Commission failed to comply with its obligation to take into account all the relevant factor and circumstances Decision (T-689/13, Bilbaína)
 - Restriction on certain cadmium pigments. Court examined a range of documents submitted to the Court file. No adequate risk assessment could be found (T-456/11 ICdA)

VI. Proportionality



- Scope of review has an intermediate position: In principle, compliance with the principle of proportionality is subject to full legal review. However, in a sphere which entails political, economic and social choices and complex assessment where ECHA and the Commission have a wide margin of discretion, a measure is illegal only if it is manifestly inappropriate to achieve the objective (T-93/10, Bilbaína)
- The procedures for registration, evaluation, authorization and restriction are not in an order of priority. They are independent of each other. The attempt on the part of the companies to refer the ECHA or the Commission to a procedure different from that applied by the principle of proportionality was therefore unsuccessful (T-93/10, Bilbaína).

VII. Conclusions

Crucial points of review



- Admissibility: for acts not yet covered by case-law diligent argumentation as to whether an act is open to challenge and whether the applicant has standing
- Procedural requirements
- Substance: statement of reasons and the support documents.



Thank you for your attention!