

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

11 July 2019 (*)

(REACH — Establishment of a list of substances identified with a view to their eventual inclusion in Annex XIV to Regulation (EC) No 1907/2006 — Inclusion in that list of Bisphenol A as a substance which is toxic for reproduction — Articles 57 and 59 of Regulation No 1907/2006)

In Case T-185/17,

PlasticsEurope, established in Brussels (Belgium), represented by R. Cana, É. Mullier and F. Mattioli, lawyers,

applicant,

v

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

defendant,

supported by

French Republic, represented initially by D. Colas, J. Traband and B. Fodda and subsequently by D. Colas, J. Traband and E. de Moustier, acting as Agents,

and by

ClientEarth, established in London (United Kingdom), represented by P. Kirch, lawyer,

interveners,

APPLICATION under Article 263 TFEU for annulment of ECHA's decision of 4 January 2017 (ED/01/2017) by which Bisphenol A was included in the list of substances identified for 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), as referred to in Article 59(1) of that regulation, on the ground that that substance had been identified as toxic for reproduction within the meaning of Article 57(c) of Regulation No 1907/2006,

THE GENERAL COURT (Fifth Chamber),

composed of D. Gratsias, President, I. Labucka and A. Dittrich (Rapporteur), Judges,

Registrar: F. Oller, Administrator,

having regard to the written part of the procedure and further to the hearing on 11 December 2018,

gives the following

Judgment

Background to the dispute

- 1 Bisphenol A (2,2-bis(4-hydroxyphenyl)propane or 4,4'-isopropylidenediphenol, EC 201-245-8, CAS 0000080-05-7) is a substance which is mainly used as a monomer for the manufacture of polymers. In that regard, it is used as an intermediate. In addition, Bisphenol A is used for non-intermediate purposes. That is the case where it is used in the manufacture of thermal paper.
- 2 In adopting Commission Regulation (EU) 2016/1179 of 19 July 2016 amending, for the purposes of its adaptation to technical and scientific progress, Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures (OJ 2016 L 195, p. 11), the European Commission amended 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) so that, now, Bisphenol A is classified as toxic for reproduction, category 1B. Under Article 2(2) of Regulation No 2016/1179, that regulation is applicable from 1 March 2018.
- 3 On 30 August 2016, in accordance with Article 59(3) 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), the French Agency for Food, Environmental and Occupational Health and Safety (ANSES) ('the French competent authority') presented the European Chemicals Agency (ECHA) with a dossier, in accordance with Annex XV to that regulation, proposing the identification of Bisphenol A as a substance meeting the criteria set out in Article 57(c) of Regulation No 1907/2006 on the basis of its classification as toxic for reproduction. At point 9 of that dossier, entitled 'Information on uses of the substance', it is stated that Bisphenol A is used as an intermediate, within the meaning of Regulation No 1907/2006, but that that is not that substance's sole use.
- 4 On 20 October 2016, the applicant, PlasticsEurope, submitted comments on the dossier submitted by the French competent authority. The applicant is an international professional association, established in Belgium and governed by Belgian law, which represents and defends the interests of over 100 member undertakings, made up of manufacturers and importers of plastic products. It has legal personality and capacity. Four of the applicant's member undertakings are active in placing Bisphenol A on the market in the European Union and form part of the applicant's 'Polycarbonate/Bisphenol A' group. The members of that group market Bisphenol A for both intermediate and non-intermediate uses.
- 5 In accordance with Article 59(7) of Regulation No 1907/2006, ECHA sent the dossier prepared by the French competent authority in accordance with Annex XV to that regulation to the Member State Committee.
- 6 At its 51st meeting, which took place from 12 to 16 December 2016, ECHA's Member State Committee unanimously decided to identify Bisphenol A as a substance of very high concern that meets the criteria set out in Article 57(c) of Regulation No 1907/2006.
- 7 On 4 January 2017, the Executive Director of ECHA adopted Decision ED/01/2017 whereby Bisphenol A was included in the list of substances identified for eventual inclusion in Annex XIV to Regulation No 1907/2006, as referred to in Article 59(1) of that regulation ('the candidate list of substances'), on the ground that that substance had been identified as toxic for reproduction within the meaning of Article 57(c) of Regulation No 1907/2006 ('the contested decision').

8 On 12 January 2017, the contested decision was published on ECHA's website. On that date, in accordance with paragraph 2 of the operative part of the contested decision, an updated version of the candidate list of substances was published on ECHA's website.

Procedure and forms of order sought

9 By application lodged at the Court Registry on 21 March 2017, the applicant brought the present action. The defence was lodged at the Court Registry on 21 June 2017.

10 By document lodged at the Court Registry on 10 and 11 July 2017, ClientEarth and the French Republic, respectively, applied for leave to intervene in support of the form of order sought by ECHA.

11 The reply was lodged at the Court Registry on 21 August 2017.

12 By separate documents, lodged at the Court Registry on 24 and 28 August 2017, the applicant submitted two requests for confidential treatment of certain information communicated in the application concerning the French Republic and ClientEarth, respectively.

13 On 15 September 2017, at the Court Registry's request to put its application in order, the applicant placed a copy of the contested decision on the Court file.

14 On 2 October 2017, the rejoinder was lodged at the Court Registry.

15 By two orders of 1 December 2017, the President of the Fifth Chamber of the General Court granted the respective applications of the French Republic and ClientEarth for leave to intervene.

16 Since the French Republic did not oppose, within the prescribed time limit, the confidential treatment of certain information communicated in the application, as requested by the applicant on 24 August 2017, that request was granted in accordance with the Rules of Procedure of the General Court.

17 By written submission lodged at the Court Registry on 18 December 2017, ClientEarth opposed the applicant's request for confidential treatment of 28 August 2017.

18 On 15 January 2018, the French Republic and ClientEarth lodged their statements in intervention drafted on the basis of a non-confidential version of the application, and the main parties submitted their observations on those statements on 26 February 2018.

19 By order of 1 March 2018, the President of the Fifth Chamber of the General Court rejected the request for confidential treatment vis-à-vis ClientEarth.

20 On 19 March 2018, ClientEarth lodged a supplementary statement in intervention at the Court Registry.

21 On 9 April 2018, the applicant lodged at the Court Registry a request for confidential treatment seeking the redaction of certain information in ClientEarth's supplementary statement in intervention concerning the French Republic, to which it attached a non-confidential version of that statement. That request was notified to the French Republic.

22 The French Republic did not object to the request for confidential treatment referred to in paragraph 21 above within the prescribed period.

23 On 18 May 2018, the applicant and ECHA lodged their respective observations on ClientEarth's supplementary statement in intervention at the Court Registry.

24 At the hearing, following a question put by the Court on the manner in which paragraph 61 of the application was to be interpreted, the applicant stated that its first plea in law did not relate to the fact that

Bisphenol A had been identified as a substance of very high concern for all its uses, but to the fact that, in the contested decision, ECHA had not explicitly excluded the intermediate uses of that substance from its inclusion in the candidate list of substances. Therefore, according to the applicant, it is the lack of any such explicit exclusion which leads to the conclusion that ECHA has infringed Article 2(8)(b) of Regulation No 1907/2006.

25 The applicant claims that the Court should:

- annul the contested decision;
- order ECHA to pay the costs;
- take such other or further measure as justice may require.

26 ECHA contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

27 ClientEarth contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

28 The French Republic contends, for its part, that the Court should dismiss the action.

Law

The application for annulment of the contested decision

29 The applicant relies on three pleas in law.

30 By its first plea, the applicant submits that, in adopting the contested decision without explicitly excluding intermediate uses from the inclusion of Bisphenol A in the candidate list of substances, ECHA infringed Article 2(8)(b) of Regulation No 1907/2006. The second plea alleges breach of the principle of proportionality. By the third plea, the applicant complains that ECHA committed a manifest error of assessment by failing to take into consideration information on the intermediate uses of Bisphenol A.

First plea in law, alleging infringement of Article 2(8)(b) of Regulation No 1907/2006

31 By its first plea the applicant submits that, by identifying Bisphenol A as a substance of very high concern for all its uses, that is to say by not explicitly excluding intermediate uses from the inclusion of Bisphenol A in the candidate list of substances, ECHA infringed Article 2(8)(b) of Regulation No 1907/2006.

32 In the first place, according to the applicant, Bisphenol A is used in the European Union mainly as an isolated intermediate for the production of other substances. Isolated intermediates are exempt from the procedure for the identification of substances of very high concern pursuant to Articles 57 and 59 of Regulation No 1907/2006.

33 First, the applicant submits that according to the unambiguous wording of Article 2(8)(b) of Regulation No 1907/2006, isolated intermediates are to be exempted from Title VII of that regulation in its entirety, without any exception, and, therefore, from the application of Articles 57 and 59 of that regulation, which are found under Title VII. The wording of Article 2(8)(b) of Regulation No 1907/2006 is in sharp contrast

with the wording, in particular, of Article 2(8)(a) of that regulation, which exempts intermediates from Chapter 1 of Title II ‘with the exception of Articles 8 and 9’.

- 34 Secondly, the heading of Article 57 of Regulation No 1907/2006, ‘Substances to be included in Annex XIV’, shows that the inclusion of a substance in the candidate list of substances is not a self-standing procedure, but is only the first step in the inclusion of that substance in Annex XIV to Regulation No 1907/2006 that cannot be separated from the rest of the procedure nor construed as intended to achieve independent objectives. That assessment is supported by the wording of Article 59 of Regulation No 1907/2006, which specifies that that article is to apply ‘for the purpose of identifying substances meeting the criteria referred to in Article 57 and establishing a candidate list for eventual inclusion in Annex XIV’. In the applicant’s submission, the use of the word ‘eventual’ indicates that the inclusion of a substance in the candidate list of substances will lead, at some point, to its inclusion in Annex XIV to Regulation No 1907/2006. As intermediate uses do not fall within the scope of the authorisation procedure, they also do not fall within the scope of the stages which constitute that procedure, as referred to in Articles 57 and 59 of Regulation No 1907/2006.
- 35 Thirdly, a series of provisions illustrate that, in the context of the scheme for evaluating substances and authorising uses of those substances as established by Regulation No 1907/2006, intermediate substances have a ‘specific legal status’. In that regard, they are a specific category of substances, namely ‘intermediates’, which means, moreover, that the provisions of Regulation No 1907/2006 referring to ‘intermediates’ must not be applied or understood as relating to ‘intermediate uses’. The ‘special nature’ of intermediates is recognised in recital 41 of Regulation No 1907/2006 and follows implicitly but necessarily from the requirements relating to the registration of those substances, as laid down in Articles 17 to 19 of that regulation.
- 36 According to the applicant, if the legislature had considered that the exemption of intermediates from Title VII of Regulation No 1907/2006 in its entirety fell short of a high level of protection because intermediates could not be identified in accordance with Article 59 of that regulation, it would have applied a correction to the exemption referred to in Article 2(8)(b) of Regulation No 1907/2006 similar to that constituted by the reference to ‘strictly controlled conditions’ in Article 17(3) and Article 18(4) of that regulation. By not applying such a correction, the legislature clearly intended, in the applicant’s submission, all intermediates to be exempt from Title VII of Regulation No 1907/2006 in its entirety, with no exceptions or special conditions.
- 37 Fourthly, on-site isolated intermediates that are used under strictly controlled conditions are also exempt from substance evaluation under Article 49 of Regulation No 1907/2006, which concerns the procedure for the request for further information where there are grounds for considering that a given substance presents a risk to human health or the environment. In that context, the applicant notes that the second sentence of Article 49 provides that where the competent authority of the Member State considers that the use of an on-site isolated intermediate gives rise to a risk equivalent to the level of concern arising from the use of substances meeting the criteria in Article 57 of that regulation, it may require the registrant to submit further information directly related to the risk identified and examine any information submitted and, if necessary, recommend any appropriate risk reduction measures to address the risks identified in relation to the site in question. In the applicant’s submission, if the general risk management measures laid down by Regulation No 1907/2006 under authorisation were to apply to intermediates, such a Member State-specific provision for on-site isolated intermediates would be rendered meaningless.
- 38 In the second place, according to the applicant, in various guides and guidance documents drafted by ECHA, that agency itself recognises that it does not take into account uses that do not fall within the scope of the authorisation where it recommends inclusion of substances in Annex XIV to Regulation No 1907/2006, that is to say, when it establishes an order of priority for substances included in the candidate list with a view to their inclusion in the authorisation list, which is the second stage of the authorisation procedure. In those documents, ECHA recognises that intermediate uses are not subject to the authorisation requirement where the substance is included in Annex XIV to Regulation No 1907/2006, which is the third stage of the authorisation procedure.

- 39 In the third place, the applicant submits in its comments on the information obtained on Bisphenol A during the public consultation, referred to in Article 64(2) of Regulation No 1907/2006, the competent French authority itself acknowledged that ‘a monomer is considered as an intermediate that cannot be subject to authorisation under [Regulation No 1907/2006]’.
- 40 In the fourth place, the applicant points out that the inclusion of Bisphenol A in the candidate list of substances triggers significant legal obligations for the suppliers of that substance. Not only are those suppliers required to update their safety data sheet, in accordance with Article 31(9) of Regulation No 1907/2006, but also to communicate to their customers and, at their request, to consumers, information concerning the concentration of Bisphenol A in their products, so as to enable those customers and consumers to assess the suppliers’ compliance with notification and information obligations under Article 33 of Regulation No 1907/2006. In addition, those suppliers must notify ECHA that Bisphenol A is present in articles in amounts above the concentration and tonnage requirements of Article 7(2) of Regulation No 1907/2006 and inform the next actor in the supply chain where there is a change in the applicable risk management measures, pursuant to Article 34 of Regulation No 1907/2006.
- 41 Following the contested decision, any undertaking supplying Bisphenol A for intermediate uses will be subject to the abovementioned obligations even though, in the applicant’s submission, first, those uses will not be considered by ECHA when it assesses the degree of priority to be given to Bisphenol A with a view to its inclusion in the candidate list of substances and, secondly, the undertaking concerned will not have to apply for an authorisation for those uses once Bisphenol A is included in Annex XIV to Regulation No 1907/2006.
- 42 ECHA, supported by the French Republic and ClientEarth, disputes those arguments.
- 43 As a preliminary point, it should be observed that it is common ground between the parties that, at present, Bisphenol A is used in the European Union mainly as an intermediate. More specifically, when Bisphenol A is used in the manufacture of other substances, such as polymers, it meets the definition of an ‘on-site isolated intermediate’, within the meaning of Article 3(15)(b) of Regulation No 1907/2006. As is clear not only from all of its written pleadings, but also from the information which it provided at the hearing, the applicant criticises ECHA for having made an error only in so far as the contested decision relates to the use of the Bisphenol A as an intermediate. On the other hand, none of the applicant’s arguments relate to non-intermediate uses of that substance in the European Union.
- 44 In the first place, it should be noted that, contrary to what the applicant claims and despite what may be inferred from a mere reading of the wording of Article 2(8)(b) of Regulation No 1907/2006, a substance used as an on-site isolated intermediate or as a transported isolated intermediate is not automatically exempted from all the provisions of Title VII of Regulation No 1907/2006. Such a substance does not, therefore, escape the identification procedure provided for in Article 59 of that regulation.
- 45 It follows from paragraph 62 of the judgment of 25 October 2017, *PPG and SNF v ECHA* (C-650/15 P, EU:C:2017:802), that the exemption laid down in Article 2(8)(b) of Regulation No 1907/2006 concerns only the authorisation procedure laid down in Chapters 2 and 3 of Title VII of that regulation. By contrast, as held in paragraph 63 of that judgment, Article 2(8)(b) does not preclude a substance from being capable of being identified as being of very high concern on the basis of the criteria laid down in Article 57 of that regulation, even though it is used merely as an on-site or transported isolated intermediate.
- 46 In the light of the Court of Justice’s interpretation of Article 2(8)(b) of Regulation No 1907/2006 in the judgment of 25 October 2017, *PPG and SNF v ECHA* (C-650/15 P, EU:C:2017:802), it should be concluded that, in the present case, ECHA correctly applied Article 59 of that regulation as the basis for the contested decision.
- 47 In the second place, with regard to the question whether, as the applicant submits (see paragraph 31 above), ECHA was required to insert, in the candidate list of substances, an explicit reference to the fact that intermediate uses were not covered by the inclusion of Bisphenol A on that list, it should be noted that

neither Article 59(1) of Regulation No 1907/2006 nor any other provision of that regulation requires ECHA to act in such a way. In reality, as is apparent from paragraph 79 of the judgment of 25 October 2017, *PPG and SNF v ECHA* (C-650/15 P, EU:C:2017:802), accompanying the inclusion of a substance in the list of substances for future inclusion in Annex XIV to that regulation with a statement that that listing does not affect the uses exempted under Article 2(8)(b) of Regulation No 1907/2006 would serve only to reiterate what is already derived from that regulation.

48 In the light of the foregoing, all the applicant's arguments, referred to in paragraphs 32 to 34 above, must be rejected. Those arguments, which are based on the wording of various provisions of Regulation No 1907/2006, are intended to substantiate the applicant's argument that, in essence, Article 2(8)(b) of Regulation No 1907/2006 precludes the application of Article 59 of that regulation with regard to a substance which is used as an intermediate, whereas the Court of Justice has clearly interpreted Article 2(8)(b) to the contrary.

49 In the third place, the applicant's arguments, other than those which refer to the wording of various provisions of Regulation No 1907/2006, must also be rejected for the reasons set out below.

50 First, the argument concerning the reduced registration conditions for on-site or transported isolated intermediates, as laid down in Article 17(3) and Article 18(4) of Regulation No 1907/2006, must be rejected (see paragraph 35 above).

51 That argument, which seeks, in essence, to demonstrate that isolated intermediates benefit from a special regime, was previously put forward in the case which gave rise to the judgment of 25 October 2017, *PPG and SNF v ECHA* (C-650/15 P, EU:C:2017:802, paragraph 27). The Court of Justice, therefore, took into account the fact that, as regards some uses of substances as intermediates, certain substances may benefit from reduced registration conditions, such as those referred to in Article 17(3) and Article 18(4) of Regulation No 1907/2006. However, that does not lead to an interpretation of Article 2(8)(b) of that regulation which differs from that referred to in paragraph 45 above.

52 Furthermore, the argument referred to in paragraphs 35 and 50 above disregards the purpose of the candidate list of substances. As follows from a combined reading of Article 59(1) of Regulation No 1907/2006, recital 56 and Article 33 of that regulation, one of the objectives of the candidate list of substances is the establishment of information sharing obligations in respect of substances of very high concern within the supply chain and with consumers. The identification of a substance in accordance with Article 59 of Regulation No 1907/2006 serves to improve information for the public and professionals as to the risks and dangers incurred. Consequently, such identification must be regarded as a means of enhancing the protection of human health and the environment (judgment of 7 March 2013, *Rütgers Germany and Others v ECHA*, T-96/10, EU:T:2013:109, paragraph 137).

53 The contested decision is consistent with the objective of sharing information on substances of very high concern within the supply chain and with consumers. The fact that certain substances of very high concern used as intermediates may benefit from the special conditions for registration laid down in Article 17(3) and Article 18(4) of Regulation No 1907/2006 does not call into question the need to subject such substances to the information-sharing regime referred to, *inter alia*, in Article 33 of Regulation No 1907/2006.

54 Secondly, for those same reasons, the argument intended to show that on-site isolated intermediates have a 'special nature', or even a 'specific legal status', because of the existence of reduced conditions for the assessment of the substance, such as those stemming from Article 49 of Regulation No 1907/2006 (see paragraph 37 above), must be rejected.

55 Thirdly, the applicant's arguments concerning the interpretation of the provisions of Regulation No 1907/2006, which are drawn from certain ECHA guides and guidance documents and also from certain documents from the French competent authority (see paragraphs 38 and 39 above), must be rejected. The legal opinions that may be derived from those documents from ECHA and the competent French authority

with regard to the provisions of Regulation No 1907/2006 cannot prevail over the interpretation of Article 2(8)(b) of that regulation given by the Court of Justice in the judgment of 25 October 2017, *PPG and SNF v ECHA* (C-650/15 P, EU:C:2017:802).

56 Fourthly and lastly, the argument that the inclusion of Bisphenol A in the candidate list of substances ‘in respect of all its uses’, that is, including intermediate uses, triggers significant legal obligations for the suppliers of that substance, although that inclusion is not effective since those intermediate uses cannot be the subject of an authorisation under Article 60(2) or (4) of Regulation No 1907/2006 (see paragraph 40 above), must also be rejected. Nor does that argument take account of the objective of the candidate list of substances in connection with the establishment of information-sharing obligations in respect of substances of very high concern, as referred to in paragraph 52 above.

57 In those circumstances, the first plea in law must be rejected as unfounded.

The second plea in law, alleging breach of the principle of proportionality

58 By its second plea, the applicant complains that ECHA breached the principle of proportionality.

59 In the first place, according to the applicant, the difficulties caused by the contested decision are disproportionate to the declared aims. The inclusion of Bisphenol A in the candidate list of substances, including in respect of its intermediate uses, is not necessary to achieve the objectives pursued by Regulation No 1907/2006, since, in the applicant’s view, intermediate uses will not play a role in the inclusion of that substance in Annex XIV to Regulation No 1907/2006.

60 In the second place, according to the applicant, as Bisphenol A is primarily used as an intermediate, an inclusion of that substance in the candidate list of substances which does not expressly exclude intermediate uses, is neither necessary nor appropriate, and is not the least onerous measure. In that regard, the applicant refers to the ‘special nature’ of intermediates, as follows from recital 41 of Regulation No 1907/2006. In the light of the wording of that provision, it should be concluded that the legislature took the view that isolated intermediates were not substances of very high concern and should thus be exempted from the authorisation procedure in its entirety. Taking into account the legislature’s intentions in the light of both Title VII of Regulation No 1907/2006 relating to authorisation and the provisions of that regulation relating to the exemptions granted to intermediates, it must be concluded that the inclusion of the intermediate uses of a substance at the time of its inclusion in the candidate list of substances is not appropriate.

61 ECHA, supported by the French Republic and ClientEarth, disputes those arguments.

62 It is to be recalled, first of all, that the principle of proportionality, which is one of the general principles of EU law and which is set out, inter alia, in Article 5(4) TEU, requires, according to settled case-law, that measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the aim pursued, and where there is a choice between several appropriate measures recourse must be had to the least onerous (see judgment of 21 July 2011, *Etimine*, C-15/10, EU:C:2011:504, paragraph 124 and the case-law cited).

63 In the first place, as regards the necessity and the appropriateness of the contested decision in itself (see paragraph 59 above), it must be noted that the applicant does not indicate clearly and specifically that there are difficulties other than those resulting from legal obligations, namely, inter alia, the updating of the safety data sheet, as provided for in Article 31(9) of Regulation No 1907/2006, and the communication of information concerning the substance in question, in accordance with Article 34 of that regulation.

64 In so far as the applicant refers, in an abstract and general manner, to the difficulties for suppliers of Bisphenol A resulting, following the adoption of the contested decision, from an application of Article 31(9) and Article 34 of Regulation No 1907/2006, it must be pointed out that the Court of Justice held in paragraphs 62 and 63 of the judgment of 25 October 2017, *PPG and SNF v ECHA* (C-650/15 P,

EU:C:2017:802), that a substance used as an intermediate was not exempt from identification as a substance of very high concern in accordance with the procedure referred to in Article 59 of Regulation No 1907/2006. That is the case, since the objective of the candidate list of substances concerning the sharing of information on substances of very high concern within the supply chain and with consumers prevails over the difficulties resulting, inter alia, from an application of Article 31(9) and Article 34 of Regulation No 1907/2006.

65 In so far as the applicant has doubts as to the proportionality of the contested decision because intermediate uses do not play a role in the inclusion of a substance in Annex XIV to Regulation No 1907/2006 (see paragraph 59 above), it should be recalled that the contested decision is intended to achieve the objective in connection with the sharing of information on substances within the supply chain (see paragraph 52 above). The legal effects of the contested decision do not go beyond what is appropriate and necessary to achieve that aim.

66 In the second place, as regards the argument that the principle of proportionality has been breached because there is no reference, in the candidate list of substances, to the intermediate uses of a substance which is capable of being used both for intermediate and non-intermediate uses (see paragraph 60 above), it should be observed that that argument was also raised in the case giving rise to the judgment of 25 October 2017, *PPG and SNF v ECHA* (C-650/15 P, EU:C:2017:802). In paragraph 79 of that judgment, the Court of Justice stated that a measure ‘accompanying the inclusion of a substance in the list of substances for future inclusion in Annex XIV to that regulation with a statement that that listing does not affect the uses exempted under Article 2(8)(b) of that regulation’ was irrelevant for the purposes of applying the principle of proportionality.

67 In the light of the foregoing, all the arguments put forward by the applicant in support of the second plea must be rejected.

68 Moreover, it should be noted, as ClientEarth correctly submitted, that a statement that the inclusion of a substance in the candidate list of substances does not concern intermediate uses, such as that sought by the applicant, could give rise to confusion as to whether the obligations to provide information resulting from inclusion in the candidate list of substances also apply in the case of intermediate use.

69 In view of the foregoing, the second plea in law must be rejected as unfounded.

The third plea in law, alleging a manifest error of assessment

70 By the third plea in law, the applicant complains that ECHA committed a manifest error of assessment by failing to take into consideration information on the intermediate uses of Bisphenol A.

71 According to the applicant, ECHA is required to examine carefully and impartially all the relevant aspects of the individual case. In addition, in paragraph 42 of the judgment of 15 March 2017, *Hitachi Chemical Europe and Polynt v ECHA*, (C-324/15 P, EU:C:2017:208), the Court of Justice held that information on uses and exposure are required in the context of the identification procedure under Annex XV to Regulation No 1907/2006. In the contested decision, ECHA did not take into account the information made available to it on the uses of Bisphenol A as an intermediate. According to the applicant, that information is included in the dossier submitted by the French competent authority in accordance with Annex XV to Regulation No 1907/2006 that served as the basis for the adoption of the contested decision. Annex XV to Regulation No 1907/2006 does not restrict the information which has to appear in the dossier to information relating to the intrinsic properties of the substance. In the applicant’s submission, if ECHA had assessed the information on the intermediate uses of Bisphenol A, it would have had to conclude that that substance could not be included in the candidate list of substances or, at least, that it could only be included with an express exclusion of its intermediate uses.

72 ECHA, supported by the French Republic and ClientEarth, disputes those arguments.

- 73 As a preliminary point, it must be stated that, at the time of the adoption of the contested decision, ECHA was actually aware of the fact that Bisphenol A could be used either as an intermediate or for non-intermediate purposes. It is clear from Part II, point 9, of the dossier drawn up in accordance with Annex XV to Regulation No 1907/2006 submitted by the French competent authority that the intermediate uses had been brought to the attention of ECHA by the French competent authority.
- 74 However, ECHA cannot be criticised for any manifest error of assessment in that regard, for the reasons set out below.
- 75 As follows in essence from the judgment of 25 October 2017, *PPG and SNF v ECHA* (C-650/15 P, EU:C:2017:802), if the conditions for the procedure referred to in Article 59 of Regulation No 1907/2006 are met, a substance which is also used as an intermediate is identified by ECHA as a substance of very high concern. Such identification and, therefore, inclusion of a substance in the candidate list of substances are carried out solely on account of the intrinsic properties of a substance and not on account of the uses of that substance.
- 76 It is true that, as follows from paragraph 44 of the judgment of 15 March 2017, *Hitachi Chemical Europe and Polynt v ECHA* (C-324/15 P, EU:C:2017:208), as regards a substance meeting the criteria set out in Article 57(f) of Regulation No 1907/2006, it is wrong to consider that that provision excludes, in principle, any consideration of data other than those relating to the hazards arising from the intrinsic properties of the substances concerned. As is apparent from paragraphs 40 and 44 of that judgment, Article 57(f) of Regulation No 1907/2006 does not prohibit the taking into consideration of data other than those relating to the hazards arising from the intrinsic properties of the substances concerned.
- 77 However, first, it must be pointed out that, in the present case, Bisphenol A was included in the candidate list of substances on account of its intrinsic properties as a substance toxic for reproduction, within the meaning of Article 57(c) of Regulation No 1907/2006 and not on account of its intrinsic properties referred to in Article 57(f) of that regulation (see paragraph 7 above).
- 78 The clarification provided by the Court of Justice in paragraphs 40 and 44 of the judgment of 15 March 2017, *Hitachi Chemical Europe and Polynt v ECHA* (C-324/15 P, EU:C:2017:208) concerned the interpretation of the concept of ‘concern’, which is used only in Article 57(f) of Regulation No 1907/2006 and not in Article 57(c) of that regulation. That is also apparent from paragraph 32 of that judgment. The interpretation given by the Court of Justice of Article 57(f) of Regulation No 1907/2006, as set out in paragraphs 40 and 44 of the judgment of 15 March 2017, *Hitachi Chemical Europe and Polynt v ECHA* (C-324/15 P, EU:C:2017:208), has no bearing on the interpretation of Article 57(c) of Regulation No 1907/2006 which is at issue in the present case.
- 79 Secondly, contrary to what the applicant suggests, in the judgment of 15 March 2017, *Hitachi Chemical Europe and Polynt v ECHA* (C-324/15 P, EU:C:2017:208), concerning a substance meeting the criteria set out in Article 57(f) of Regulation No 1907/2006, the Court of Justice did not conclude that all the information on a substance, other than that relating to its intrinsic properties, had to be taken into account during the assessment, such as that provided for in Article 57 of Regulation No 1907/2006. On the contrary, it is clear from the wording used by the Court of Justice that ECHA has a discretion but is not obliged to take into account information other than that concerning intrinsic properties.
- 80 Thirdly, it is perfectly clear from paragraph 72 of the judgment of 25 October 2017, *PPG and SNF v ECHA* (C-650/15 P, EU:C:2017:802) that the use of a substance as an intermediate is not relevant for the purposes of identifying it as a substance of very high concern which meets the criteria set out in Article 57 of Regulation No 1907/2006, since the information relating to that use does not concern the intrinsic properties of that substance.
- 81 In light of the foregoing, the third plea in law must be rejected as unfounded.

The application to take such further or other measure as justice may require

82 In the present case, apart from the concise nature of the application for such further or other measure as justice may require, which does not give any indication of any measures that might be of assistance in resolving the dispute before the Court or any reasoning for the application in question, it must be observed that the information contained in the file and the explanations given at the hearing were sufficient to allow the Court to give a ruling, since it has been able to give a proper ruling on the basis of the forms of order sought, the pleas in law and the arguments put forward during the proceedings and in the light of the documents lodged by the parties. Accordingly, the abovementioned application must be dismissed.

Costs

83 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. In the present case, ECHA and ClientEarth have applied for the applicant to be ordered to pay the costs of the present proceedings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those of ECHA and ClientEarth, in accordance with the form of order sought by those parties.

84 In accordance with Article 138(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. Accordingly, the French Republic must bear its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber),

hereby:

- 1. Dismisses the action;**
- 2. Orders PlasticsEurope to bear its own costs and to pay the costs incurred by the European Chemicals Agency (ECHA) and ClientEarth;**
- 3. Orders the French Republic to bear its own costs.**

Gratsias

Labucka

Dittrich

Delivered in open court in Luxembourg on 11 July 2019.

E. Coulon

D. Gratsias

Registrar

President

* [Language of the case: English.](#)