



EUROPEAN GENERAL COURT

VECCO AND OTHERS VERSUS THE EUROPEAN COMMISSION

(Restriction on the manufacturing, placing on the market and use of certain dangerous substances, preparations and articles – Regulation amending Annex XIV to Regulation (EC) No 1907/2006 – Inclusion of chromium trioxide in the list of substances subject to authorization)

Report from David Elliott following Oral Hearing of Case T-360/13 at the European General Court in Luxembourg on 12th February 2015

Introduction

On 12th February 2015, the European General Court in Luxembourg conducted an oral hearing of Case t-360/13. The case was brought against the European Commission by VECCO (essentially a German consortium of surface engineering companies with an interest in the continued use of chromium trioxide in our sector), supported by a number of Trade Associations and end users of surface engineered components.

Background

On 8th July 2013, VECCO lodged its case with the European Court and was subsequently supported by a number of "interveners" who lodged their statement on 24th April 2014. VECCO and its supporters asked the Court to:

- Declare the application admissible and well founded (this has already been agreed upon)
- Declare that the contested measure is partially unlawful in that it is based on a manifest error of assessment and infringes Article 58(2) of REACH, the principle of proportionality and the rights of the defence (including the principles of sound administration and excellence of scientific advice)
- Partially annul the contested measure in so far as it does not contain an exemption for the continued use of chromium trioxide for use in surface engineering applications

So, in other words, the European Commission should have granted an exemption for the continued use of chromium trioxide in surface engineering applications because the data submitted to ECHA & the European Commission indicated that exposures were well controlled and that authorisation was not a proportionate legislative measure to address any remaining risks.

Oral Hearing



We arrived at the European General Court at 08:30, giving us enough time to clear security and to make our way to courtroom 6 where the oral hearing was taking place. The European General Court takes on around 700 new cases each year and will have around 1200 outstanding at any one time. Our case was being heard by 3 judges, which is the case in around 80% of all the cases heard by the General Court. It appeared that money was no object in the building of the Court and the surroundings could be termed as palatial – they even had their own shops....

The General Court (previously known as the "Court of First Instance") is composed of 28 judges, one from each Member State, plus a registrar. The Judges are appointed for a renewable term of six years by common accord of the governments of the Member States. The General Court has its own Rules of Procedure. As a rule, the Court's procedure includes a written phase and an oral phase. The proceedings are conducted in a language of the petitioner's choosing, in our case English.



Above is view of the courtroom prior to the oral hearing commencing. There were around 30 members of the VECCO consortium present along with myself and two representatives from the Austrian Surface Engineering Association. There was nobody present from ECHA and no REACH experts from the European Commission, so a very one-sided audience.

Both parties had already submitted their evidence and so this was an opportunity for the Judges to question each party on particular aspects of the case. We were represented by Claudio Mereu, a partner at Fieldfisher in Brussels and Jochen Beck, an attorney with the some company. Mr Mereu started by saying that the risks were well controlled in our sector and we are only concerned with worker exposure as there is no consumer use. He suggested that there was already sufficient legislation in place to control risks such as the Carcinogens Directive. Did European Commission carry out sufficient assessment of the risks? We believe that they did not and data available to the European Commission at the time they made their decision shows that use in our sector is well controlled, therefore exemption should have been granted.

The European Commission responded by saying they have discretion to grant exemption - it may be granted, but there is no legal right to have an exemption. REACH is based on precautionary principle and it is unlikely that EU Commission would ever grant an exemption. The Judges were not particularly impressed with this statement. The Judges agree that Commission has discretion but they should not ignore data that is available and just say "no exemption". There was a long discussion on the meaning of the word "specific" in respect of specific European Legislation being in place to control risks. The European Commission said that this meant substance specific legislation but it was pointed out that the guidance produced by ECHA in respect of exemptions under REACH states that classification criteria (eg – the substance is a carcinogen) can be used rather than substance specific criteria (eg – legislation specifically stating chromium trioxide).

By the end of the session, the Judges had a good understanding of our case and our legal team was quite confident of the outcome. Unfortunately, it will take some 4 to 5 months before the decision is made