

Field Fisher Waterhouse's Competition and EU Regulatory team successful in UK High Court challenge to REACH

Koen van Maldegem and Ruxandra Cana at Field Fisher Waterhouse have been successful in the UK High Court for the first time obtaining a referral of specific provisions of the new REACH Regulation to the European Court of Justice (ECJ).

The ruling has major implications for the chemical industry in both EU and non-EU countries by providing much needed legal certainty in relation to the interpretation of the law.

In May this year, on behalf of four chemical companies, Koen van Maldegem and Ruxandra Cana brought proceedings before the English Courts in connection with the REACH Regulation. The action was filed in London against the UK Secretary of State for Environment, Food and Rural Affairs (DEFRA).

While endorsing the overall aims of REACH, to protect human health and the environment, the Claimants sought to obtain a clear interpretation of certain provisions relating to polymers and preparations. Depending on the interpretation applied to these provisions, the Claimants sought their annulment before the ECJ because they are manifestly irrational, discriminatory and/or disproportionate.

The thrust of the "polymer" case was that, while polymers are exempt from the registration provisions of REACH, Article 6(3), if interpreted in the way intended by the Commission, this renders that exemption meaningless within the context of the general purpose of REACH.

Polymers are exempt because they are generally deemed to be harmless. Article 6(3), however, appears to require reacted monomers contained within imported polymers to be registered under REACH even though these monomers no longer exist as individual substances and do not present themselves either to humans or to the environment independently of the polymers into which they have been incorporated. The Claimants therefore contended that the requirement that reacted monomers be registered, while polymers are exempt, is irrational and it imposes an excessive administrative and scientific burden on importers of polymers, negating any relief the polymer exemption would otherwise have provided.

The Claimants, therefore, requested that the UK Court make a preliminary reference to the ECJ, in order to seek an interpretation of the "Polymer Rule" laid down in Article 6 (3) of REACH.

In addition, the Claimants sought clarification of the wording in Article 6(3) relating to "supply chain" (e.g. whether this refers to any supply chain or to separate supply chains).

The team were successful and the Judge referred the "Polymer Rule" question to the ECJ, asking the ECJ to rule on its legality. The Judge also issued an interpretation of the wording "up the supply chain" to refer to registrations submitted only in the 'present supply chain'.

The Claimants also sought to obtain a ruling that the requirement to register individual ingredients in imported preparations or mixtures was disproportionate and discriminatory. In this case the Judge did not refer this to the ECJ.

The ECJ is expected to reply in 2009. In the meantime, Member States can submit observations. The Competition and EU Regulatory team at Field Fisher Waterhouse said:

"This is a great result for the chemical industry as it brings much needed clarification and legal certainty to the interpretation of the REACH regulations, and it ensures that its provisions will be subject to legal review by the European Court of Justice."

About Field Fisher Waterhouse's Competition & EU Regulatory Group

Our Competition & EU Regulatory Group is headed by Charles Whiddington. In the area of EU regulatory law, our main area of expertise relates to the fields of chemicals, pesticides, biocides, cosmetics, food, pharmaceuticals, electronic products, public procurement, textiles and medical devices, including related business and antitrust issues that arise when drafting and negotiating commercial agreements or setting up task forces. The Brussels office is involved in advising and representing its clients on matters arising under existing EU chemicals legislation, and is engaged in the emerging new chemicals legislation, known as REACH. We provide a broad spectrum of REACH-related advice, and have experience in dealing with the most significant REACH implementation and compliance issues.