

Case C-290/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

8 May 2023

Referring court:

Oberverwaltungsgericht des Landes Sachsen-Anhalt (Germany)

Date of the decision to refer:

6 April 2023

Applicant and appellant:

European Chemicals Agency (ECHA)

Defendant and respondent:

B-GmbH

Subject matter of the main proceedings

Administrative charge under Regulation (EC) No 340/2008

Subject matter and legal basis of the request

Interpretation of the first paragraph of Article 299 TFEU, Article 13(4) and Article 11(3) of Regulation No 340/2008, Article 267 TFEU

Questions referred for a preliminary ruling

1. Must the first half-sentence of the first paragraph of Article 299 of the Treaty on the Functioning of the European Union (TFEU) be interpreted as applying only to decisions taken by the Council, the Commission or the European Central Bank, or does it also apply to decisions of the European Chemicals Agency imposing an administrative charge under Article 13(4) of Commission Regulation (EC) No 340/2008 of 16 April 2008 on the fees and charges payable to the European Chemicals Agency pursuant to Regulation (EC) No 1907/2006 of

the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)?

2. In the event that the decision of the European Chemicals Agency on the imposition of such an administrative charge is not enforceable:

Must the third subparagraph of Article 13(4) in conjunction with the second subparagraph of Article 11(3) of Regulation (EC) No 340/2008 be interpreted as meaning that an action for enforcement of payment of the administrative charge should be ruled out?

Provisions of European Union law relied on

Articles 256 et seq., 299 TFEU;

Commission Regulation (EC) No 340/2008 of 16 April 2008 on the fees and charges payable to the European Chemicals Agency pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (OJ 2008 L 107, p. 6), Articles 11, 13;

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, and corrigendum OJ 2007 L 136, p. 3), Articles 74, 94

Provisions of national law relied on

Verwaltungsgerichtsordnung (Administrative Court Rules; ‘the VwGO’), Paragraph 40

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant requests in an action for enforcement that the defendant be ordered to pay an administrative charge under Article 13(4) of Regulation No 340/2008.
- 2 The applicant, the European Chemicals Agency established in Helsinki, Finland, is a European Union body which has legal personality. It was established by Regulation No 1907/2006. It is responsible for managing and carrying out the technical, scientific and administrative aspects of the regulation and for ensuring consistency in those aspects (Title X, Article 75 et seq. of the regulation). The

regulation imposes, in particular, various registration requirements on manufacturers and importers of chemicals.

- 3 Pursuant to Article 74(1) of Regulation No 1907/2006, the Commission adopted Regulation No 340/2008, Articles 11 and 13 of which contain, inter alia, provisions on the administrative charge and on reduction of fees and charges.
- 4 In 2010, the defendant submitted a registration dossier in accordance with Regulation No 1907/2006 stating that it was a medium-sized enterprise within the meaning of Recommendation 2003/361/EC. According to the information provided by the applicant, the defendant did not, however, produce the necessary evidence of that within the prescribed time limits.
- 5 Subsequently, on 9 August 2016, the applicant adopted Decision SME (2016) 3729, in which it found that the defendant was not entitled to claim reduced fees for medium-sized enterprises for its registration under Regulation 1907/2006 and therefore owed the difference between the fee already paid and the fee for large undertakings pursuant to Article 13(4) of Regulation No 340/2008. The applicant also found that the defendant had to pay an administrative charge equal to 2.5 times the financial advantage which it had gained by providing false information on the size of its undertaking when registering. In an attached invoice of 9 August 2016, the administrative charge was fixed at EUR 17 437.00. Information on how to challenge Decision SME (2016) 3729 was attached, stating that an action could be brought before the General Court of the European Union under Article 94(1) of Regulation No 1907/2006 in conjunction with Article 263 TFEU within two months from the date of the decision in order to have the legality of that decision reviewed.
- 6 The defendant did not bring an action against Decision SME (2016) 3729, but did not pay the amount claimed in spite of repeated reminders from the applicant.
- 7 The applicant then brought an action on 16 May 2019 before the Verwaltungsgericht Halle (Administrative Court, Halle, Germany) requesting that the defendant be ordered to pay to the applicant EUR 17 437.
- 8 The Administrative Court dismissed the action as inadmissible. It found, in essence, that recourse to the administrative courts under Paragraph 40 of the VwGO is not possible. The present case does not concern an act of the German public authorities, but so-called direct EU law enforcement. The imposition of administrative fees pursuant to Article 13(4) of Regulation No 340/2008 constitutes a direct act of a European authority. The competence of German authorities or courts does not follow from Article 299 TFEU. That article does not mention European agencies' own administrative decisions as being enforceable. Since the list in Article 299 TFEU is exhaustive, such decisions cannot be covered under that provision even by way of interpretation. No entitlement (let alone obligation) of national courts to confer competences on European agencies which are not granted to them under EU law can even be inferred in the light of the

principle of ‘effet utile’. Therefore, Article 94 of Regulation No 1907/2006 in conjunction with Article 263 TFEU provides the only possibility for individuals to take action against the applicant’s measures. The applicant is not authorised by Regulation No 1907/2006 or by Regulation No 340/2008 to enforce its own administrative decisions by bringing an action either before European or national courts. With regard to the delegation of decision-making powers to bodies not covered by the Treaty such as the applicant, the European Court of Justice developed a criterion in its *Meroni* case-law of 1958 which was subsequently discussed under the heading ‘institutional balance’. According to that criterion, a delegation of powers can only involve ‘clearly defined executive powers’, the use of which is ‘entirely’ subject to the supervision of the European Commission. According to the wording of Regulation No 340/2008 (Article 13(4) in conjunction with Article 11(3)), it must, however, be assumed that the (only) possible reaction provided for to payment of fees and charges imposed under that regulation not being made in due time is to refuse the request giving rise to the fees. The applicant’s right to bring an action for enforcement at national level would confer on it additional powers which, however, could only be conferred under EU law.

- 9 The Administrative Court granted the applicant leave to appeal against its judgment.

The essential arguments of the parties in the main proceedings

- 10 The applicant claims, in essence, that the decisive public law provisions in this case are provisions of EU law, namely Regulation No 340/2008, in particular Article 13(4) thereof. The Administrative Court is required to exhaust the possibilities of national procedural law in order to help the law of the European Union to have practical effect (‘effet utile’). Thus, Article 94(1) of Regulation No 1907/2006 provides that its decisions may be contested by the bringing of an action before the General Court of the European Union or the European Court of Justice. However, the legislation giving rise to the present question for a preliminary ruling does not provide for any possibility whereby the applicant can bring an action before the General Court of the European Union or the European Court of Justice against natural or legal persons to enforce compliance with their obligation arising from the decisions addressed to them. Nor is the applicant vested with powers entitling it to enforce its decisions against German legal persons.
- 11 Moreover, the EU law principle of sincere cooperation laid down in Article 4(3) TEU requires that national courts must enable an agency of the European Union to enforce an administrative charge imposed under EU law. The Administrative Court’s judgment infringes the EU law principles of equivalence and effectiveness. It is made practically impossible for the applicant to exercise the rights conferred by Article 13(4) of Regulation No 340/2008 in Germany. In a comparable situation involving the enforcement of administrative charges by a

German public authority, recourse to the administrative courts would be possible. Contrary to the Administrative Court's assumption, the legislature naturally assumes that the applicant's decisions, involving the imposition of an administrative charge under Article 13(4) of Regulation No 340/2008, may also be enforced in the Member States – if necessary, mandatorily, with the intervention of the courts of the Member States. Otherwise, the question whether an undertaking pays the administrative charge would depend solely on its probity. The aim of that provision, namely to deter the provision of false information, cannot be implemented in that manner. Moreover, undertakings which complied with the law and paid the administrative charge imposed would be put at a disadvantage.

- 12 The defendant contends, in essence, that the general EU law principles mentioned by the applicant should not be abused in order to close supposed legal loopholes in disregard of the clear allocation of powers and indirectly to the detriment of individual economic operators. A conscious decision was made by the European Parliament and the Council of the European Union not to grant to the applicant any enforcement powers of its own relating to any charges. Even assuming that the present dispute has uncovered a legal loophole, it would be for the EU legislature to adopt the relevant provision for the future and, for example, to incorporate it into Regulation No 1907/2006 or Regulation No 340/2008. The applicant also has courses of action open to it to penalise any infringements in the case of outstanding payments. It would, for example, be free to carry out the registrations of chemicals requested by applicants only when they have paid the fees concerned. Where an undertaking applies for categorisation as a small or medium-sized enterprise (SME), it would also be conceivable not to proceed with that categorisation and issue a correspondingly reduced request for payment until sufficient evidence has been provided. The applicant can, itself, organise its administrative practice so as to enforce its payment requests effectively. It is not, therefore, dependent on appropriate assistance from the German administrative courts.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 13 The questions referred are necessary for the delivery of a judgment on appeal.
- 14 Unlike the court at first instance, the referring court assumes that the action cannot be dismissed as inadmissible on the ground that recourse to the administrative courts under Paragraph 40(1) of the VwGO is not possible.
- 15 Although, in view of the extensive assignment of powers to the European courts in the area of sovereign decisions, national administrative courts do not normally have jurisdiction, the subject matter of the dispute in this case is not a measure adopted by the applicant against which the defendant might have a legal remedy by bringing an action for annulment pursuant to Article 263 TFEU, but a claim for payment made by the applicant in a general action for enforcement in which it

seeks to obtain title by litigation for enforcement of that claim against the defendant.

- 16 On the delimitation of competences between the EU courts and the courts of the individual Member States, the referring court points out that the present case concerns the enforcement of a claim under public law by an EU body which may – within the limits of its jurisdiction *ratione materiae* – act as a public authority in Federal territory. That delimitation is therefore guided by Article 274 TFEU. According to that article, save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party are not on that ground to be excluded from the jurisdiction of the courts or tribunals of the Member States.
- 17 The jurisdiction of the EU courts is – as the Administrative Court rightly stated – exhaustively set out in Article 256 et seq. TFEU.
- 18 In the applicant’s area of competence, Article 94(1) of Regulation No 1907/2006 is relevant. Under that provision, an action may be brought before the General Court or the Court of Justice of the European Union in accordance with Article 263 TFEU contesting a decision taken, *inter alia*, by the Agency. This also applies to the applicant’s decisions imposing an administrative charge in accordance with Regulation No 340/2008 (see, for example, judgment of the General Court of 7 March 2018 in Case T-855/16). On the other hand, in the case of actions of the present kind which concern the enforcement of charges already imposed, Article 256 et seq. TFEU and, in particular also Article 263 TFEU, do not contain any provision establishing the jurisdiction of the General Court or the Court of Justice of the European Union. In the absence of a provision of EU law conferring appropriate jurisdiction on the Court of Justice of the European Union, it cannot give judgment on a dispute brought before it (see order of the General Court of 5 September 2007 in Case T-295/05, paragraph 51 and the case-law cited).
- 19 In those circumstances, the referring court assumes that the applicant can enforce its claim before a German court. Moreover, it should also be possible to have recourse to the administrative courts pursuant to Paragraph 40(1) of the VwGO, because the matter at issue is a public law dispute. The factual circumstances and the legal consequences arising from them are determined in this case by European public law, namely by Regulation No 340/2008. Even if the above recourse were not available, the action could not be dismissed as inadmissible on that ground but must instead be referred to the competent civil court pursuant to Paragraph 17a(2) of the Gerichtsverfassungsgesetz (Law on the judiciary).
- 20 The admissibility of the action for enforcement also depends on whether the applicant has the necessary interest in bringing proceedings.
- 21 In general, there is no interest in bringing proceedings for an action for enforcement where the creditor already has an enforceable title relating to the

claim in the action and can thereby enforce the claim against the debtor without difficulty. By its decision of 9 August 2016, the applicant has already issued a payment demand which has become final (see order of the General Court of 19 November 2018 in Case T-494/17, paragraph 63).

- 22 Accordingly, an interest in bringing proceedings depends on whether the applicant's final decision on the imposition of an administrative charge under Article 13(4) of Regulation No 340/2008 already constitutes an enforceable title. Whether that is the case ultimately depends on whether such decisions fall within the scope of the first paragraph of Article 299 TFEU. The first question for a preliminary ruling raised in that regard requires clarification by the Court of Justice.
- 23 According to the first half-sentence of the first paragraph of Article 299 TFEU, acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons are to be enforceable. According to the first sentence of the second paragraph of Article 299 TFEU, enforcement is to be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. Even if the first half-sentence of the first paragraph of Article 299 TFEU relates only to the enforcement of the enforceable title created by the Council, Commission or European Central Bank, it is not clear to the referring court that decisions of other European Union institutions are not enforceable. Thus, in an order of 8 March 2012 (Case T-573/10, paragraph 43), the General Court of the European Union assumed that non-compliance with a time limit for payment in an invoice in which the European Medicines Agency (EMA) set out in detail amounts claimed against a pharmaceutical company results in it being possible to enforce payment of the sum owed. A Polish court (Sad Rejonowy dla Warszawy-Mokotowa w Warszawie [District Court, Warsaw-Mokotów]) asked the European Court of Justice in Case C-392/20 whether Article 299 TFEU must be interpreted as being applicable solely to decisions taken by the Council, the Commission or the European Central Bank (ECB) or whether it is also applicable to decisions taken by the applicant relating to the imposition of an additional administrative charge. However, the question remained unanswered, since the proceedings were terminated owing to the resolution of the dispute. It is also apparent from the assessment carried out in the Opinion of Advocate General Kokott of 7 November 2019 in Case C-584/17 (point 40) that the question whether European agencies' own administrative decisions can be enforceable within the meaning of Article 299 TFEU cannot be answered in the negative with the clarity evidently assumed by the Administrative Court. The Advocate General stated at that point that the appellant's submission raised the question, first of all, whether the fact that Article 299 TFEU mentions only acts of the Council, the Commission and the ECB means that acts of other European Union institutions, offices or agencies cannot in fact be enforceable under Article 299 TFEU unless this is expressly enshrined in primary law, as in Article 280 TFEU for the judgments of the Court of Justice of the European Union for example, and that that question has not yet been answered by the Court, as far as can be seen.

- 24 In the event that the applicant's decisions on the imposition of such an administrative charge are not enforceable and that therefore there is an interest in bringing proceedings for an action for enforcement, the referring court also seeks, by its second question, to ascertain whether the third subparagraph of Article 13(4) in conjunction with the second subparagraph of Article 11(3) of Regulation No 340/2008 must be interpreted as meaning that an action for enforcement of payment of the administrative charge should be ruled out.
- 25 According to the third subparagraph of Article 13(4) of that regulation, paragraph 3 of Article 11 applies *mutatis mutandis*. That provision states that, where the payment (of fees or other charges) is not made before expiry of the deadline provided for in paragraph 2, the Agency is to set a second deadline for the payment. Where the payment is not made before expiry of the second deadline, the Agency is to reject the request. The legislature accordingly assumes that the request of a natural or legal person for registration or performance of another of the applicant's administrative or technical services may also be refused where the full fee or the full charge and/or the administrative charge under Article 13(4) of Regulation No 340/2008 were imposed but not paid, and that therefore the applicant may require the requesting person to make advance payment in order also to ensure enforcement of the claim to payment of the administrative charge. Regulation No 340/2008 – unlike, for example, Article 10(3) of Council Regulation No 297/95 of 10 February 1995 on fees payable to the European Agency for the Evaluation of Medicinal Products (EMA) – also contains no express indication that, in the event of the charge not being paid within the prescribed period, the applicant can also have recourse to a court. The fact that Regulation (EC) No 340/2008 does not, at any rate expressly, provide for the possibility for the applicant of bringing an action may mean that the EU legislature has exhaustively regulated the consequences of non-payment of the fees and charges (see *Bayerischer Verwaltungsgerichtshof* (Bavarian Higher Administrative Court), judgment of 18 December 2017 – 20 BV 16.2024 – paragraph 20). The question whether, in these circumstances, the applicant cannot, in the case of non-payment of the administrative charge, bring an action for enforcement, in particular where registrations or other administrative or technical services have already been carried out, cannot, however, be given a clear answer but requires clarification by the Court of Justice.