# ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
6 May 2003 *

In Case T-45/02,

DOW AgroSciences BV, established in Rotterdam (Netherlands),

DOW AgroSciences Ltd, established in Hitchin (United Kingdom),

represented by K. Van Maldegem and C. Mereu, lawyers,

applicants,

supported by

European Crop Protection Association (ECPA), having its registered office in Brussels (Belgium), represented by D. Waelbroeck and D. Brinckman, lawyers,

intervener,

* Language of the case: English.

**European Parliament,** represented by C. Pennera and M. Moore, acting as Agents, with an address for service in Luxembourg,

and

**Council of the European Union,** represented by M. Sims-Robertson and B. Hoff-Nielsen, acting as Agents,

defendants,

supported by

**Commission of the European Communities,** represented by G. Valero Jordana and K. Fitch, acting as Agents, with an address for service in Luxembourg,

intervener,

APPLICATION for partial annulment of Decision No 2455/2001/EC of the European Parliament and of the Council of 20 November 2001 establishing the list of priority substances in the field of water policy and amending Directive 2000/60/EC (OJ 2001 L 331, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,

Registrar: H. Jung,

makes the following

Order

## Legal background

*Directive 91/414/EEC*

1 On 15 July 1991 the Council adopted Council Directive 91/414/EEC concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1). In order to ensure that those products have 'no unacceptable influence on the environment in general and, in particular, no harmful effect on human or animal health or on groundwater', Directive 91/414 provides that the active substances which are authorised to be incorporated in plant protection products must be entered on a Community list attached as Annex I to Directive 91/414 (10th recital and Article 5).

2 The procedure laid down for determining whether an active substance can be listed in Annex I to Directive 91/414 does not preclude Member States from authorising for use in their territory for a limited period, plant protection products containing an active substance not yet entered on that list, provided that the undertaking concerned has submitted a dossier meeting Community requirements and the Member State has concluded that the active substance and the plant protection products satisfy the conditions set in Directive 91/414 (14th recital and Article 8(2)).

*Directive 2000/60/EC and the contested measure*

3 On 23 October 2000, the European Parliament and the Council adopted Directive 2000/60/EC establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1). That directive establishes a 'framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater' (first paragraph of Article 1). In particular, that framework 'aims at enhanced protection and improvement of the aquatic environment, inter alia, through specific measures' designed for the progressive reduction or elimination 'of discharges, emissions and losses of priority substances and... of the priority hazardous substances' (subparagraph (c) of the first paragraph of Article 1).

4 Article 16(2) of Directive 2000/60 requires the Commission to submit to the European Parliament and the Council 'a proposal setting out a list of priority substances selected amongst those which present a significant risk to or via the aquatic environment'. In accordance with Article 16(3), '[t]he Commission's proposal shall also identify the priority hazardous substances'.

5 Article 16(11) of Directive 2000/60 provides that '[t]he list of priority substances of substances mentioned in paragraphs 2 and 3 proposed by the Commission shall, on its adoption by the European Parliament and the Council, become Annex X to this Directive'.

6 On 20 November 2001, the European Parliament and the Council accordingly adopted Decision No 2455/2001/EC establishing the list of priority substances in the field of water policy and amending Directive 2000/60 (OJ 2001 L 331, p. 1, 'the contested measure'). Chlorpyrifos and trifluralin are included in the list of priority substances thereby established. A footnote provides that those substances may be reclassified as priority dangerous substances. It states that the Commission is to submit a proposal to the European Parliament and the Council concerning the definitive classification of chlorpyrifos and trifluralin within 12 months of the date of adoption of the contested measure.

7 For the priority substances in Annex X, the first indent of Article 16(6) provides that 'the Commission shall submit proposals of controls for the progressive reduction of discharges, emissions and losses of the substances concerned'. For priority dangerous substances the second indent of the same provision states that 'the Commission shall submit proposals of controls for... the cessation or phasing-out of discharges, emissions and losses... including an appropriate timetable for doing so'. In addition, Article 16(7) provides that '[t]he Commission shall submit proposals for quality standards applicable to the concentrations of the priority substances in surface water, sediments or biota'. Article 16(8) requires the Commission to submit its 'proposals, in accordance with paragraphs 6 and 7... within two years of the inclusion of the substance concerned on the list of priority substances'.

8 The measures thus proposed by the Commission will then be adopted by the Parliament and the Council, in accordance with Article 16(1) of Directive 2000/60.

## Facts and procedure

9 DOW AgroSciences BV and Dow AgroSciences Ltd ('the applicants') are active in the manufacture and marketing of chlorpyrifos and trifluralin.

10 By application lodged at the Registry of the Court of First Instance on 26 February 2002, the applicants brought this action.

11 By separate documents lodged at the Registry of the Court on 30 and 12 April 2002, respectively, the Parliament and the Council each raised a preliminary objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court. The applicants submitted their observations on the objections on 12 July 2002.

12 By orders of the President of the Third Chamber of the Court made on 5 July 2002 and 26 September 2002, the Commission and the European Crop Protection Association ('ECPA') were granted leave to intervene in support of the defendants and the applicants.

13 The Commission and the ECPA lodged their statements in intervention on the issue of admissibility on 30 August and 8 November 2002, respectively, and the original parties were invited to submit their observations thereon.

## Forms of order sought

14 In their application the applicants claim that the Court should:

— declare the application admissible and well founded;

— annul the contested measure so as to remove chlorpyrifos and trifluralin from its scope;

— order the Parliament and the Council to pay the costs.

15 In its objection of inadmissibility the Council contends that the Court should:

— declare the application manifestly inadmissible or, in the alternative, dismiss it as inadmissible;

— order the applicants to pay the costs.

16 The Parliament, in its objection of inadmissibility, and the Commission, in its statement in intervention, contend that the Court should:

— dismiss the application as inadmissible in its entirety;

— order the applicants to pay the costs.

17 In their observations on the objection of inadmissibility the applicants claim that the Court should:

— declare the application admissible and well founded;

— examine the substance of the case before ruling on the objection of inadmissibility or, in the alternative, reserve any judgment on admissibility until judgment in the main proceedings;

— annul the contested measure so as to remove chlorpyrifos and trifluralin from its scope;

— order the Parliament and the Council to pay the costs.

18 In its statement in intervention, the ECPA submits that the Court should:

— declare the application admissible and examine the substance of the case;

— order the Council to pay the costs of the intervention.

## Admissibility

19 Under Article 114(3) of the Rules of Procedure, the remainder of the proceedings on a plea of inadmissibility is to be oral unless the Court of First Instance otherwise decides. The Court (Third Chamber) considers that, in this case, it has sufficient information from the documents on the file and that there is no need to open the oral procedure.

### *Arguments of the parties*

20 The Parliament and the Council, supported by the Commission, contest the admissibility of the application. They submit, first, that the contested measure is not a challengeable act for the purposes of the fourth paragraph of Article 230 EC. They argue that the contested measure does not bring about any change in the applicants' legal position. In any event, the claim for partial annulment of the contested measure is inadmissible because the contested measure is in reality a directive which does not concern the applicants either directly or individually

21 The applicants, supported by ECPA, submit, first, that the contested measure is a binding act of the Parliament and the Council which produces definitive legal effects which affect the applicants' interests. They stress that under Article 16 of Directive 2000/60, measures will be taken for the progressive reduction of discharges, emissions and losses of the substances identified in the contested measure. Since chlorpyrifos and trifluralin are irreversibly included in the list of priority substances, the contested measure requires economic operators to reduce the production, marketing and use of those substances. In addition, by making provisional listings of chlorpyrifos and trifluralin as priority dangerous substances the production, marketing and use of which is likely to be prohibited, the contested measure creates the legal conditions for the definitive prohibition of chlorpyrifos and trifluralin and products containing those substances within 12 months. They stress that the inclusion of chlorpyrifos and trifluralin is irreversible because the contested measure and Directive 2000/60 do not make any provision for de-listing.

22 In their observations on the objection of inadmissibility the applicants state that the contested measure identifies the priority substances which will be governed by the control measures to be adopted later. Any subsequent rules could only deal with the modalities of reduction and progressive elimination of discharges, emissions and losses contemplated in the contested measure. The applicants will no longer be able to challenge the inclusion of chlorpyrifos and trifluralin in the list in Annex X to Directive 2000/60 as part of an action against control measures subsequently adopted concerning those substances. Thus the contested measure does change the 'legal position' of chlorpyrifos and trifluralin and, therefore, of the applicants in their capacity as distributors of those substances.

23 The applicants add that, contrary to the position taken by the defendants, the contested measure, by virtue of its name and content, does constitute a 'decision' and not a directive. In any event, the debate about the type of the contested measure is of little importance, since it is settled case-law that a provision which

is legislative in nature can still be of direct and individual concern to a natural or legal person (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, page 107; Case C-451/98 *Antillean Rice Mills* v *Council* [2001] ECR I-8949, paragraph 46).

24 Secondly, the applicants submit that they are directly concerned by the contested measure. They observe that the condition relating to direct concern requires that the Community measure directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (Joined Cases 41/70 to 44/70 *International Fruit Company and Others* v *Commission* [1971] ECR 411; Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777; Case 113/77 *NTN Toyo Bearing Company and Others* v *Council* [1979] ECR 1185; Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others* v *Commission and Council* [1985] ECR 2523; and Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477). In the present case, the contested measure includes chlorpyrifos and trifluralin in the list of priority substances without requiring the Member States to adopt any other implementing measure. They are bound by the list as it is established in the contested measure. It thus produces legal effects which are specific, unconditional and directly applicable.

25 Thirdly, the applicants state that they are individually concerned by the contested measure. First, they hold pre-existing rights which are affected by the contested measure. More specifically, they hold authorisations for the marketing of chlorpyrifos- and trifluralin-based products in most of the Member States in accordance with Article 8(2) of Directive 91/414. In addition, they take part in a review procedure aimed at having those substances included in Annex I to Directive 91/414 as active substances meeting the safety criteria laid down in Article 5 of that directive. The contested measure, which limits the use of chlorpyrifos and trifluralin, affects the applicants' rights to market those substances. Since the applicants acquired those rights under Directive 91/414, the contested measure infringes specific rights which the applicants have (Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853). In any event, the contested

measure adversely affects, to a particularly serious degree, a very restricted group of economic operators of which the applicants are part (Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339; Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501; order of the Court of First Instance in Case T-122/96 *Federolio* v *Commission* [1997] II-1559). In fact, all of the applicants' economic activities are jeopardised by the contested measure.

26 Next, the applicants submit that the Community institutions were under an obligation to take account of their specific rights when adopting the contested measure (Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207; *Sofrimport*; Case T-12/93 *CCE de Vittel and Others* v *Commission* [1995] ECR II-1247; and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305). In their observations on the objection of inadmissibility they refer specifically to Article 16(2)(a) of Directive 2000/60, which grants them the right to have their products evaluated according to a risk-based scientific evaluation. The applicants also refer to the judgment in Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365 and to the Opinion of Advocate General Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677.

27 In their observations on the objection of inadmissibility the applicants go on to argue that, in this case, the issue of admissibility cannot be fully apprised without a prior review of the underlying substance. In that respect, they refer to the fact that they hold marketing authorisations for chlorpyrifos- and trifluralin-based products in accordance with Article 8(2) of Directive 91/414. The applicants participate, furthermore, in a review procedure for the inclusion of those substances in Annex I to Directive 91/414 as active substances meeting the safety criteria of Article 5 of that directive. In order to assess fully the applicants' standing, it is necessary to review their rights and legitimate expectations under the regulatory procedure leading to inclusion of chlorpyrifos and trifluralin in Annex I to Directive 91/414.

28 The ECPA submits that, according to Article 13 of Directive 91/414, the scientific data and information communicated by the applicants as part of the review procedure leading to inclusion of chlorpyrifos and trifluralin in Annex I to Directive 91/414 are protected for a period of five years from the time of listing in that annex. Referring to the judgment of the Court of First Instance in Case T-13/99 *Pfizer* v *Council* [2002] ECR II-3305, the ECPA contends that the applicants are holders of specific rights in the sense contemplated in *Cordoniu* v *Council* and that the inclusion of chlorpyrifos and trifluralin in the list established by the contested measure affects the applicants by reason of certain attributes which are peculiar to them and which differentiate them from all other persons.

29 Lastly, the applicants submit that they could not be guaranteed adequate legal protection before the national courts.

*Findings of the Court*

30 Under the fourth paragraph of Article 230 EC 'natural or legal persons may institute proceedings against a decision addressed to them or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to them'.

31 It should be recalled, first, that the term 'decision' in the fourth paragraph of Article 230 EC must be understood in the technical sense in which it is employed in Article 249 EC and that the criterion for distinguishing between a measure of a legislative nature and a decision within the meaning of that latter article must be sought in the general application or otherwise of the measure in question (Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* [1962] ECR 471; and Case C-298/89 *Gibraltar* v *Council* [1993] ECR I-3605, paragraph 15).

32 In this case, the contested measure, which is based directly on Article 175(1) EC is a legislative act adopted by the Parliament and the Council at the end of the procedure provided for in Article 251 EC. It establishes the list of priority substances, including substances identified as priority hazardous substances, provided for in Article 16(2) and (3) of Directive 2000/60. According to Article 16(11) of Directive 2000/60, that list 'shall be added to Directive 2000/60/EC as Annex X' (Article 1 of the contested measure). The contested measure thus amends Directive 2000/60, the general application of which is not disputed, by inserting an annex which lists the substances in respect of which Article 16(6) to (8) of Directive 2000/60 requires the Commission to propose specific measures for the protection and enhancement of the aquatic environment.

33 It follows that, notwithstanding its title, the contested measure cannot be regarded as constituting a decision within the meaning of the fourth paragraph of Article 230 EC. On the contrary, it is of the same general nature as Directive 2000/60 (see, to that effect, *Gibraltar* v *Council*, cited in paragraph 31 above, paragraph 23; order in Case T-268/99 *Fédération nationale d'agriculture biologique des régions de France and Others* v *Council* [2000] ECR II-2893, paragraph 38).

34 It is, however, important to consider whether, notwithstanding the general application of the contested measure, the applicants may nevertheless be regarded as directly and individually concerned by it in so far as it includes chlorpyrifos and trifluralin in the list of priority substances. It is settled case-law that the fact that an act is of general application does not, as such, prevent it from being of direct and individual concern to some of the economic operators concerned (*Extramet Industrie* v *Council*, cited in paragraph 25 above, paragraphs 13 and 14; *Codorniu* v *Council*, cited in paragraph 25 above, paragraph 19; *Antillean Rice Mills* v *Council*, cited in paragraph 23 above, paragraph 46; Case T-135/96 *UEAPME* v *Council* [1998] ECR II-2335, paragraph 69; and Joined Cases T-172/98, T-175/98 to T-177/98 *Salamander and Others* v *Parliament and Council* [2000] ECR II-2487, paragraph 30).

35 As regards, first, the issue whether the applicants are directly concerned by the contested measure, it should be recalled that the condition relating to direct

concern requires that the act complained of should directly affect the legal situation of the individual and leave no discretion to the addressees of that act who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the Community rules alone without the application of other intermediate rules (Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43, and the case-law cited therein; *Salamander and Others* v *Parliament and Council*, paragraph 52).

36 In that respect, it should be pointed out that the applicants hold marketing authorisations in several Member States for chlorpyrifos- and trifluralin-based products.

37 It cannot be held, however, that the contested measure, which lists those substances as priority substances, in itself affects the applicants' legal position. Contrary to what the applicants claim, the inclusion of chlorpyrifos and trifluralin in the list of priority substances does not place economic operators under an obligation to reduce the production, marketing or use of those substances.

38 The contested measure merely lists the substances, including chlorpyrifos and trifluralin, in respect of which the Commission is required to submit proposals to the Parliament and the Council for specific measures in accordance with Article 16(6) to (8) of Directive 2000/60. The Parliament and the Council may then adopt the measures proposed by the Commission, on the basis of Article 16(1) of Directive 2000/60. However, the inclusion of chlorpyrifos and trifluralin in Annex X to Directive 2000/60 does not give any specific indication of the measures which will be proposed by the Commission and which may be subsequently adopted by the Parliament and the Council and thus does not *per se* affect the applicants' legal position.

39 It that respect, it must further be noted that Directive 2000/60 does in fact take account of the possibility that the Commission's proposals regarding the priority substances may not be followed. Thus, Article 16(8) of that directive provides that '[f]or substances included in the first list of priority substances, in the absence of agreement at Community level six years after the date of entry into force of this Directive, Member States shall establish environmental quality standards for these substances for all surface waters affected by discharges of those substances, and controls on the principal sources of such discharges, based, inter alia, on consideration of all technical reduction options'. The same provision adds that '[f]or substances subsequently included in the list of priority substances, in the absence of agreement at Community level, Member States shall take such action five years after the date of inclusion in the list'.

40 It follows from all the foregoing that the contested measure does not have a direct effect on the applicants' legal position. It is therefore not of direct concern to them within the meaning of the fourth paragraph of Article 230 EC.

41 Since the applicants fail to satisfy one of the conditions of admissibility laid down in the fourth paragraph of Article 230 EC, the application must be dismissed as inadmissible.

42 It is appropriate, however, for the sake of completeness, to examine whether the contested measure is of individual concern to the applicants. In that respect, it should be recalled that natural or legal persons may be regarded as individually concerned by a measure of general application only if the measure in question affects them because of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons in the same way as the addressee (*Plaumann*, cited in paragraph 23 above, at page 107; Case C-452/98 *Nederlandse Antillen* v *Council* [2001] ECR I-8973, paragraph 60).

43 The fact that the applicants hold marketing authorisations for chlorpyrifos- and trifluralin-based products in accordance with Directive 91/414 is not such as to distinguish the applicants for the purposes of the fourth paragraph of Article 230 EC. Even if it were assumed that the contested measure does affect their market position, the applicants, which do not assert any exclusive intellectual property right in respect of the substances listed in the contested measure, are in a situation comparable to that of any other economic operator who might now or at some time in the future be active in the marketing of those substances (Case T-47/00 *Rica Foods* v *Commission* [2002] ECR II-113, paragraph 39; and order in *Federolio*, cited in paragraph 25 above, paragraph 67).

44 Nor can the applicants claim that the contested measure affects rights which they acquired under Directive 91/414. Since the contested measure does not place economic operators under an obligation to reduce the production, marketing or use of chlorpyrifos and trifluralin (see paragraph 37 above), that measure cannot be regarded as affecting the authorisations held by the applicants for the marketing of the plant protection products containing those substances. For the same reasons, the applicants cannot validly claim that the contested measure affects specific rights or has caused it exceptional damage such as to differentiate it from all other economic operators (see, to this effect, Case T-597/97 *Euromin* v *Council* [2000] ECR II-2419, paragraph 49).

45 The applicants further maintain that the Community institutions were required to take account of their specific situation before adopting the contested measure.

46 It is important to bear in mind that where the Commission institutions are, by virtue of specific provisions, under a duty to take account of the consequences of an act which they envisage adopting for the situation of certain individuals, that fact may distinguish the latter individually (*Piraiki-Patraiki*, cited in paragraph

26 above; *Sofrimport*, cited in paragraph 24 above; Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraphs 25 to 30; *Antillean Rice Mills and Others* v *Commission*, cited in paragraph 26 above, paragraph 67).

47 It must be observed, however, that there is no provision of Community law which requires the Parliament or the Council, when they establish the list of priority substances in the sphere of water in accordance with Article 16(11) of Directive 2000/60, to take account of the special position of economic operators, such as the applicants, who hold marketing authorisations for plant protection products (see, to that effect, Case T-43/98 *Emesa Sugar* v *Council* [2001] ECR II-3519, paragraph 53). Article 16(2)(a) of Directive 2000/60, referred to by the applicants, is concerned solely with the assessment of the risks to be assumed for the purposes of preparing the contested measure, without granting specific protection to any given economic operator. Under Directive 2000/60 the protection of holders of authorisations issued in accordance with Directive 91/414 arises only at the stage when control measures are being adopted concerning the substances listed in the contested measure. Thus the second subparagraph of Article 16(6) of Directive 2000/60 provides that where control measures include a review of the relevant authorisations issued under Directive 91/414, such review is to be carried out in accordance with the provisions of that directive.

48 Lastly, as regards the ECPA's argument based on *Pfizer* v *Council* (cited in paragraph 28 above), it should be recalled that the contested measure in that case prohibited the use of virginiamycin as an additive in animal feedstuffs. In the present case, by contrast, the contested measure had no binding effects on the applicants. They may continue, without any restriction, to produce and market the substances contained in the list established in the contested measure for as long as the Parliament and the Council or the Member States do not adopt specific control measures relating to those substances.

49 It follows from all the foregoing that the application in this case must be dismissed as inadmissible.

50 However, whilst the applicants cannot apply for the annulment of the contested measure, they may still plead before the national courts, adjudicating in accordance with Article 234 EC, that the measure is unlawful (Case C-70/97 P *Kruidvat* v *Commission* [1998] ECR I-7183, paragraphs 48 and 49; order of the Court of First Instance in Case T-45/00 *Conseil national des professions de l'automobile and Others* v *Commission* [2000] ECR II-2927, paragraph 26). They thus have sufficient legal protection available to them before the national courts (see, to that effect, *Unión de Pequeños Agricultores* v *Council*, cited in paragraph 26 above, paragraph 40).

## Costs

51 Under Article 87(2) 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. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those of the Parliament and the Council, as applied for by those parties.

52 In accordance with Article 87(4) of the Rules of Procedure, the Commission and the ECPA are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. **The application is dismissed as inadmissible.**

2. **The applicants shall bear their own costs and pay the costs incurred by the Parliament and the Council.**

3. **The Commission and the European Crop Protection Association shall bear their own costs.**

Luxembourg, 6 May 2003.

H. Jung

Registrar

K. Lenaerts

President