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INFORMATION NOTE

From: Legal Service

To: Permanent Representatives Committee (Part 1)

Subject: Case T-521/14 Sweden v Commission

- judgment of the General Court of the European Union of 16 December 2015
- obligation to adopt a delegated act specifying scientific criteria for the determination of endocrine-disrupting properties pursuant to Parliament and Council Regulation 528/2012 on biocidal products
- Commission's failure to act

1. The Council intervened in support of the applicant¹ in the abovementioned case. The case concerned the Commission's failure to adopt a delegated act by a deadline, 13 December 2013, as required by Article 5(3) of Parliament and Council Regulation 528/2012 concerning the making available on the market and use of biocidal products². The President of the Third Chamber decided, pursuant to Rule 67(2) of the Rules of Procedure³, to give priority to the

¹ See docs. ST 16874/14 and CM 1164/15. France, Denmark, the Netherlands, Finland and the European Parliament also intervened in support of the applicant.

² OJ L 167/1 of 27.6.2012 ("the Biocidal Products Regulation").

³ *"The President may in special circumstances decide that a case be given priority over others."*

case. In its judgment of 16 December 2015, which was handed down just one month after the oral hearing⁴, the General Court found in favour of the applicant and upheld all of the arguments put forward in support of the applicant's position, including those of the interveners.

2. Article 5(3), first subparagraph, of Regulation 528/2012 reads: "*No later than 13 December 2013, the Commission shall adopt delegated acts in accordance with Article 83 specifying scientific criteria for the determination of endocrine-disrupting properties.*" In October 2013, Sweden expressed concern that a draft of the delegated act had not been put forward, notwithstanding the fact that draft criteria had already been drawn up and made public by the Commission. When the Commission eventually replied, in February 2014, it stated that it intended to carry out an impact assessment and organise a public consultation⁵. In its response to a formal request to act made by Sweden, the Commission stated, in May 2014, that it was still in the process of carrying out the necessary work, which was ongoing⁶.
3. The General Court dismissed the Commission's arguments regarding admissibility, holding that the Commission had not defined its position, within the meaning of Article 265(2) TFEU, so as to bring to an end its failure to act⁷. The General Court then turned to the substance of the case.
4. Unsurprisingly, the General Court found⁸ that the provision in issue imposes a "*clear, precise and unconditional obligation*" on the Commission to adopt the relevant delegated acts by 13 December 2013. The General Court rejected the Commission's arguments⁹ that the provision should be interpreted so as to make the deadline a non-binding target. The General Court also

⁴ This unusually short period probably explains the fact that, at the time of writing, the judgment is only available in Swedish and French. In accordance with Article 56 of the Statute of the Court of Justice and Article 51 of its Rules of Procedure, an appeal may be brought within 2 months and 10 days of the notification of the judgment.

⁵ See paragraphs 13, 16 and 17 of the judgment.

⁶ See paragraph 40 of the judgment.

⁷ See paragraph 41 of the judgment.

⁸ See paragraph 53 of the judgment.

⁹ See paragraph 49 of the judgment.

referred¹⁰ to the fact that the co-legislators, as interveners in the present case, contested the interpretation being put forward by the Commission. The General Court noted that the co-legislators had not amended the deadline either, since the Commission had made no proposal to that effect. The final ground¹¹ on which the General Court rejected the Commission's interpretation was that it would have called into question the system of delegation of powers under Article 290 TFEU, since the Commission would have been acting in a manner inconsistent with the parameters decided by the co-legislators¹².

5. Furthermore, the General Court rejected the Commission's arguments that the obligation contained in Article 5(3) of the Biocidal Products Regulation could be affected by Regulation 1107/2009 on pesticides ("the Pesticides Regulation"), or Decision 138/2013 establishing an environmental action programme for the Union ("the 7th EAP"). The General Court held that it was for the Commission to ensure, in compliance with its obligations under both the Pesticides Regulation and the Biocidal Products Regulation, the coherence of acts adopted pursuant to those legislative acts, whilst having regard to their respective scopes¹³. As to the 7th EAP, the General Court pointed out that it is a non-legally binding act, which in no way calls into question the obligation laid down by the Biocidal Products Regulation¹⁴.
6. As to the Commission's argument that the draft criteria it had already made public had been the subject of criticism, on the grounds that they were allegedly unsound or would have had an impact on the functioning of the internal market, the General Court stated that this could not affect the legal duty to comply with the deadline fixed by the co-legislators. More specifically concerning the alleged impact on the internal market, the General Court held that

¹⁰ See paragraph 60 of the judgment.

¹¹ See paragraph 61 of the judgment.

¹² Although the present case relates to a delegated act, the same considerations apply to implementing acts, since the Commission is also required to respect the limits laid down by the basic legislative act when it adopts implementing acts.

¹³ See paragraph 66 of the judgment.

¹⁴ See paragraph 64 of the judgment.

the co-legislators had already carried out the necessary balancing exercise between the functioning of the internal market and the protection of health and the environment. It was not, therefore, for the Commission to call into question the equilibrium decided upon by the co-legislators¹⁵.

7. Finally, with regard to the Commission's decision to carry out an impact assessment, the General Court held that this could not justify the Commission's inaction, since it was not a requirement laid down by the Biocidal Products Regulation. In any event, carrying out an impact assessment could not affect the legal requirement to comply with the date laid down in Article 5(3) of the Biocidal Products Regulation.¹⁶
8. For all of these reasons, the General Court therefore granted the form of order sought by Sweden, supported by the interveners, and declared that the Commission had failed to comply with its obligations. In accordance with Article 266 TFEU, it will now be for the Commission to take the necessary measures to comply with the judgment, taking into account the grounds on which the judgment was based.

¹⁵ See paragraphs 72 and 73 of the judgment.

¹⁶ See paragraph 74 of the judgment.