ECLI:EU:C:2023:31

Provisional text

JUDGMENT OF THE COURT (Third Chamber)

19 January 2023 (*)

(Reference for a preliminary ruling – Approximation of laws – Biocidal products – Regulation (EU) No 528/2012 – Article 72 – Free movement of goods – Article 34 TFEU – Possibility for Member States to adopt restrictive measures on commercial and advertising practices – Selling arrangements falling outside the scope of Article 34 TFEU – Whether justified – Article 36 TFEU – Objective of protecting human and animal health and the environment – Proportionality)

In Case C-147/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 5 March 2021, received at the Court on 8 March 2021, in the proceedings

Comité interprofessionnel des huiles essentielles françaises (CIHEF),

Florame,

Hyteck Aroma-Zone,

Laboratoires Gilbert,

Laboratoire Léa Nature,

Laboratoires Oméga Pharma France,

Pierre Fabre Médicament,

Pranarom France,

Puressentiel France

v

Ministre de la Transition écologique,

Premier ministre,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, M. Safjan, N. Piçarra, N. Jääskinen and M. Gavalec (Rapporteur), Judges,

Advocate General: N. Emiliou,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 March 2022,

after considering the observations submitted on behalf of:

– Comité interprofessionnel des huiles essentielles françaises (CIHEF), Florame, Hyteck Aroma-Zone, Laboratoires Gilbert, Laboratoire Léa Nature, Laboratoires Oméga Pharma France, Pierre Fabre Médicament, Pranarom France and Puressentiel France, by A. Bost, V. Lehmann and M. Ragot, avocats,

– the French Government, by G. Bain and T. Stéhelin, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Palatiello, avvocato dello Stato,

– the Netherlands Government, by M.K. Bulterman and M.A.M. de Ree, acting as Agents,

– the European Commission, by R. Lindenthal and F. Thiran, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 June 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of provisions of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ 2012 L 167, p. 1), as amended by Regulation (EU) No 334/2014 of the European Parliament and of the Council of 11 March 2014 (OJ 2014 L 103, p. 22) (‘Regulation No 528/2012’).

2 The request has been made in proceedings between the Comité interprofessionnel des huiles essentielles françaises (Inter-Trade Committee for French Essential Oils; CIHEF) and eight companies operating in the essential oils sector, on the one hand, and the ministre de la Transition écologique (Minister for Ecological Transition, France) and Premier ministre (Prime Minister, France), on the other, concerning actions for the annulment, first, of Decree No 2019-642 of 26 June 2019 on prohibited commercial practices relating to certain categories of biocidal products

(JORF of 27 June 2019, p. 10) and, second, of Decree No 2019-643 of 26 June 2019 on prohibited commercial practices relating to certain categories of biocidal products (JORF of 27 June 2019, p. 11).

Legal context

European Union law

3 Recitals 1 to 3, 6, 28 and 31 of Regulation No 528/2012 state:

'(1) Biocidal products are necessary for the control of organisms that are harmful to human or animal health and for the control of organisms that cause damage to natural or manufactured materials. However, biocidal products can pose risks to humans, animals and the environment due to their intrinsic properties and associated use patterns.

(2) Biocidal products should neither be made available on the market nor used unless authorised in accordance with this Regulation. Treated articles should not be placed on the market unless all active substances contained in the biocidal products with which they were treated or which they incorporate are approved in accordance with this Regulation.

(3) The purpose of this Regulation is to improve the free movement of biocidal products within the Union while ensuring a high level of protection of both human and animal health and the environment. Particular attention should be paid to the protection of vulnerable groups, such as pregnant women and children. This Regulation should be underpinned by the precautionary principle to ensure that the manufacturing and making available on the market of active substances and biocidal products do not result in harmful effects on human or animal health or unacceptable effects on the environment. With a view to removing, as far as possible, obstacles to trade in biocidal products, rules should be laid down for the approval of active substances and the making available on the market and use of biocidal products, including rules on the mutual recognition of authorisations and on parallel trade.

…

(6) Taking into account the main changes that should be made to the existing rules, a regulation is the appropriate legal instrument to replace Directive 98/8/EC [of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market (OJ 1998 L 123, p. 1)] to lay down clear, detailed and directly applicable rules. Moreover, a regulation ensures that legal requirements are implemented at the same time and in a harmonised manner throughout the Union.

…

(28) To ensure that only biocidal products that comply with the relevant provisions of this Regulation are made available on the market, biocidal products should be subject to authorisation either by competent authorities for making available on the market and use within the territory of a Member State or part of it, or by the Commission for making available on the market and use within the Union.

…

(31) It is necessary to provide common principles for the evaluation and authorisation of biocidal products to ensure a harmonised approach by competent authorities.'

4 Article 1 of that regulation, entitled 'Purpose and subject matter', provides:

'1. The purpose of this Regulation is to improve the functioning of the internal market through the harmonisation of the rules on the making available on the market and the use of biocidal products, whilst ensuring a high level of protection of both human and animal health and the environment. The provisions of this Regulation are underpinned by the precautionary principle, the aim of which is to safeguard the health of humans, the health of animals and the environment. Particular attention shall be paid to the protection of vulnerable groups.

2. This Regulation lays down rules for:

(a) the establishment at Union level of a list of active substances which may be used in biocidal products;

(b) the authorisation of biocidal products;

(c) the mutual recognition of authorisations within the Union;

(d) the making available on the market and the use of biocidal products within one or more Member State or the Union;

(e) the placing on the market of treated products.'

5 Article 2 of the said regulation, entitled 'Scope', provides:

'1. This Regulation shall apply to biocidal products and treated articles. A list of the types of biocidal products covered by this Regulation and their descriptions is set out in Annex V.

…

3. Subject to any explicit provision to the contrary in this Regulation or other Union legislation, this Regulation shall be without prejudice to the following instruments:

…

(k) Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [(OJ 2006 L 376, p. 21)];

…

(m) Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures [, amending and repealing Directives 67/548/EEC and 1999/45/EC and amending Regulation (EC) No 1907/2006 (OJ 2008 L 353, p. 1)];

…'

6 Under Article 3 of the same regulation, entitled 'Definitions':

‘1. For the purposes of this Regulation, the following definitions shall apply:

…

(i) “making available on the market” means any supply of a biocidal product or of a treated article for distribution or use in the course of a commercial activity, whether in return for payment or free of charge;

(j) “placing on the market” means the first making available on the market of a biocidal product or of a treated article;

(k) “use” means all operations carried out with a biocidal product, including storage, handling, mixing and application, except any such operation carried out with a view to exporting the biocidal product or the treated article outside the Union;

…

(y) “advertisement” means a means of promoting the sale or use of biocidal products by printed, electronic or other media;

…’

7 Chapter IV of Regulation No 528/2012, entitled ‘General principles governing the authorisation of biocidal products’, contains Article 17, itself entitled ‘Making available on the market and use of biocidal products’, which is worded as follows:

‘1. Biocidal products shall not be made available on the market or used unless authorised in accordance with this Regulation.

…

5. Biocidal products shall be used in compliance with the terms and conditions of the authorisation stipulated in accordance with Article 22(1) and the labelling and packaging requirements laid down in Article 69.

Proper use shall involve the rational application of a combination of physical, biological, chemical or other measures as appropriate, whereby the use of biocidal products is limited to the minimum necessary and appropriate precautionary steps are taken.

Member States shall take necessary measures to provide the public with appropriate information about the benefits and risks associated with biocidal products and ways of minimising their use.

…’

8 Article 18 of that regulation, entitled ‘Measures geared to the sustainable use of biocidal products’, provides:

‘By 18 July 2015 the Commission shall, on the basis of experience gained with the application of this Regulation, submit to the European Parliament and the Council a report on how this Regulation is contributing to the sustainable use of biocidal products, including on the need to introduce

additional measures, in particular for professional users, to reduce the risks posed to human health, animal health and the environment by biocidal products. That report shall, inter alia, examine:

(a) the promotion of best practices as a means of reducing the use of biocidal products to a minimum;

(b) the most effective approaches for monitoring the use of biocidal products;

(c) the development and application of integrated pest management principles with respect to the use of biocidal products;

(d) the risks posed by the use of biocidal products in specific areas such as schools, workplaces, kindergartens, public spaces, geriatric care centres or in the vicinity of surface water or groundwater and whether additional measures are needed to address those risks;

(e) the role that improved performance of the equipment used for applying biocidal products could play in sustainable use.

On basis of that report, the Commission shall, if appropriate, submit a proposal for adoption in accordance with the ordinary legislative procedure.'

9 Under Article 19 of the said regulation, entitled 'Conditions for granting an authorisation':

'1. A biocidal product other than those eligible for the simplified authorisation procedure in accordance with Article 25 shall be authorised provided the following conditions are met:

(a) the active substances are included in Annex I or approved for the relevant product-type and any conditions specified for those active substances are met;

(b) it is established, according to the common principles for the evaluation of dossiers for biocidal products laid down in Annex VI, that the biocidal product, when used as authorised and having regard to the factors referred to in paragraph 2 of this Article, fulfils the following criteria:

(i) the biocidal product is sufficiently effective;

(ii) the biocidal product has no unacceptable effects on the target organisms, in particular unacceptable resistance or cross-resistance or unnecessary suffering and pain for vertebrates;

(iii) the biocidal product has no immediate or delayed unacceptable effects itself, or as a result of its residues, on the health of humans, including that of vulnerable groups, or animals, directly or through drinking water, food, feed, air, or through other indirect effects;

(iv) the biocidal product has no unacceptable effects itself, or as a result of its residues, on the environment …'

10 Article 20 of the same regulation, entitled 'Requirement for applications for authorisation', provides, in paragraph 1 thereof:

'The applicant for an authorisation shall submit the following documents together with the application:

(a) for biocidal products other than biocidal products meeting the conditions laid down in Article 25:

(i) a dossier or letter of access for the biocidal product satisfying the requirements set out in Annex III;

(ii) a summary of the biocidal product characteristics including the information referred to in points (a), (b) and (e) to (q) of Article 22(2), as applicable;

(iii) a dossier or a letter of access for the biocidal product satisfying the requirements set out in Annex II for each active substance in the biocidal product;

(b) for biocidal products that the applicant considers meet the conditions laid down in Article 25:

(i) a summary of the biocidal product characteristics as referred to in point (a)(ii) of this paragraph;

(ii) efficacy data; and

(iii) any other relevant information in support of the conclusion that the biocidal product meets the conditions laid down in Article 25.'

11 Chapter V of Regulation No 528/2012, entitled 'Simplified authorisation procedure', comprises Articles 25 to 28 of that regulation, which provide for the authorisation procedure applicable to biocidal products meeting certain conditions.

12 Chapter XIII of that regulation, entitled 'Treated articles', contains Article 58 thereof, itself entitled 'Placing on the market of treated articles', which provides, in paragraph 2 thereof:

'A treated article shall not be placed on the market unless all active substances contained in the biocidal products that it was treated with or incorporates are included in the list drawn up in accordance with Article 9(2), for the relevant product-type and use, or in Annex I, and any conditions or restrictions specified therein are met.'

13 Chapter XV of the said regulation, entitled 'Information and communication', includes Section 2, itself entitled 'Information about biocidal products', comprising Articles 69 to 73 of the same regulation. Article 69, itself entitled 'Classification, packaging and labelling of biocidal products', provides:

'1. Authorisation holders shall ensure that biocidal products are classified, packaged and labelled in accordance with the approved summary of biocidal product characteristics, in particular the hazard statements and the precautionary statements, as referred to in point (i) of Article 22(2), and with Directive 1999/45/EC [of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ 1999 L 200, p. 1)] and, where applicable, Regulation [No 1272/2008].

In addition, products which may be mistaken for food, including drink, or feed shall be packaged to minimise the likelihood of such a mistake being made. If they are available to the general public, they shall contain components to discourage their consumption and, in particular, shall not be attractive to children.

2. In addition to compliance with paragraph 1, authorisation holders shall ensure that labels are not misleading in respect of the risks from the product to human health, animal health or the environment or its efficacy and, in any case, do not mention the indications “low-risk biocidal product”, “non-toxic”, “harmless”, “natural”, “environmentally friendly”, “animal friendly” or similar indications. In addition, the label must show clearly and indelibly the following information:

…

(f) the uses for which the biocidal product is authorised;

(g) directions for use, frequency of application and dose rate, expressed in metric units, in a manner which is meaningful and comprehensible to the user, for each use provided for under the terms of the authorisation;

…

(i) if accompanied by a leaflet, the sentence “Read attached instructions before use” and, where applicable, warnings for vulnerable groups;

…

(m) where applicable, the categories of users to which the biocidal product is restricted;

(n) where applicable, information on any specific danger to the environment particularly concerning protection of non-target organisms and avoidance of contamination of water;

…

3. Member States may require:

(a) the provision of models or drafts of the packaging, labelling and leaflets;

(b) that biocidal products made available on the market in their territories be labelled in their official language or languages.’

14 Chapter XV of Regulation No 528/2012 also includes Article 72, entitled ‘Advertising’, which is worded as follows:

‘1. Any advertisement for biocidal products shall, in addition to complying with Regulation [No 1272/2008], include the sentences “Use biocides safely. Always read the label and product information before use.”. The sentences shall be clearly distinguishable and legible in relation to the whole advertisement.

2. Advertisers may replace the word “biocides” in the prescribed sentences with a clear reference to the product-type being advertised.

3. Advertisements for biocidal products shall not refer to the product in a manner which is misleading in respect of the risks from the product to human health, animal health or the environment or its efficacy. In any case, the advertising of a biocidal product shall not mention “low-risk biocidal product”, “non-toxic”, “harmless”, “natural”, “environmentally friendly”, “animal friendly” or any similar indication.’

15 Annex V to that regulation, entitled ‘Biocidal product-types and their descriptions as referred to in Article 2(1)’, provides:

‘Main group 1: Disinfectants

…

Product-type 2: Disinfectants and algaecides not intended for direct application to humans or animals

…

Product-type 4: Food and feed area

…

‘Main group 3: Pest control

Product-type 14: Rodenticides

…

Product-type 18: Insecticides, acaricides and products to control other arthropods

…’

French law

16 Article L. 522-5-3 of the code de l’environnement (Environmental Code) provides:

‘All commercial advertising shall be prohibited for certain categories of biocidal products defined by [Regulation No 528/2012].

By way of derogation from the first paragraph of this article, advertising directed at professional users shall be authorised at the place where the products are distributed to such users and in publications addressed to such users.

A decree of the Conseil d’État [(Council of State)] shall define the categories of products concerned by reference to the risks they pose to human health and the environment, and the conditions under which advertisements are to be presented. Such advertisements shall clearly indicate the proper use and application of the products, so as to protect human and animal health and the environment, as well as the potential dangers to human and animal health and to the environment.’

17 Article L. 522-18 of that code provides:

‘In connection with the sale of biocidal products defined in Article L. 522-1, discounts, price reductions, rebates, the differentiation of general and special conditions of sale within the meaning of Article L. 441-1 of the code de commerce (Commercial Code), the gift of free units and any equivalent practices shall be prohibited. Any commercial practice designed to circumvent, directly or indirectly, this prohibition by means of the award of discounts, price reductions or rebates on a different range of products which is linked to the purchase of the said products shall be prohibited.

A decree to be adopted after consultation of the Conseil d'État [(Council of State)] shall define the categories of products concerned by reference to the risks they pose to human health and the environment.'

18 Article R. 522-16-1 of the said code, inserted by Decree No 2019-642 of 26 June 2019, adopted pursuant to Article L. 522-18 of the Environmental Code, provides:

'The categories of products mentioned in Article L. 522-18, in relation to which certain commercial practices are prohibited, are the products of types 14 and 18 defined by [Regulation No 528/2012].

These provisions shall not apply to biocidal products eligible for the simplified authorisation procedure in accordance with Article 25 of that regulation.'

19 According to Article R. 522-16-2 of the same code, inserted by Decree No 2019-643 of 26 June 2019, adopted pursuant to Article L. 522-5-3 of the Environmental Code:

'I.- The categories of biocidal products mentioned in Article L. 522-5-3, for which commercial advertising directed at the general public is prohibited, are the following:

1° Products of types 14 and 18 defined by [Regulation No 528/2012];

2° Products of types 2 and 4 defined by that regulation and classified, in accordance with the provisions of [Regulation No 1272/2008], as hazardous to the aquatic environment, category 1: acute category 1 (H400) and chronic category 1 (H410).

II.- For the products mentioned in paragraph I, all advertisements addressed to professionals shall comply with the provisions of Article 72 of [Regulation No 528/2012] mentioned in point 1 of paragraph I. In addition, all such advertisements shall bear clearly and visibly the following:

1° Two sentences worded as follows: "Before each use, check whether use of this product is absolutely necessary, especially in areas to which the general public has access. Whenever possible, use alternative methods and products which present the least risk to human and animal health and to the environment."

2° A statement of the biocidal product-type associated with the product, as defined in Annex V to [Regulation No 528/2012] mentioned previously.

III.- The provisions of this article shall not apply to biocidal products eligible for the simplified authorisation procedure in accordance with Article 25 of [Regulation No 528/2012].'

The dispute in the main proceedings and the question referred for a preliminary ruling

20 By two applications, the applicants in the main proceedings brought actions before the Conseil d'État (Council of State, France) for misuse of powers, seeking annulment, first, of Decree No 2019-642 of 26 June 2019 and, second, of Decree No 2019-643 of 26 June 2019. It is apparent from the order for reference that those decrees inserted the provisions set out in Articles R. 522-16-1 and R. 522-16-2 of the Environmental Code, which constitute the regulatory provisions for the application of Articles L. 522-18 and L. 522-5-3.

21 The applicants in the main proceedings have argued inter alia that those decrees have no legal basis, since they were adopted in breach of Regulation No 528/2012.

22 According to the referring court, that regulation does not contain any provision which either authorises a Member State to provide for restrictive measures such as those set out in Articles L. 522-18 and L. 522-5-3 of the Environmental Code or prohibits one from doing so. The question therefore arises whether such measures, which are not provided for by the said regulation, may be adopted without undermining the same regulation. In that regard, the referring court emphasises that the legislative provisions under which the decrees referred to in paragraph 20 of the present judgment were adopted have the objective of preventing the adverse effects that the excessive use of certain biocidal products poses to public health and the environment. Admittedly, that objective is not in contradiction with those pursued by Regulation No 528/2012. However, the prohibitions laid down by those legislative provisions operate in the context of the placing on the market of biocidal products which that regulation is intended to harmonise at EU level, without the regulation referring to the adoption of implementing measures by the Member States and without such measures being rendered necessary to ensure the full effectiveness of the said regulation.

23 In those circumstances, the Conseil d'État (Council of State) decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does [Regulation No 528/2012] preclude a Member State from adopting, in the interests of public health and the environment, restrictive rules relating to commercial practices and advertising such as those laid down in Articles L. 522-18 and L. 522-5-3 of the Environmental Code? If not, under what conditions may a Member State adopt such measures?'

Consideration of the question referred

24 As a preliminary point, it should be recalled that, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the question referred to it, but also to consider rules of EU law to which the national court has not referred in its question (judgment of 16 May 2019, *Plessers*, C-509/17, EU:C:2019:424, paragraph 32 and the case-law cited).

25 In the present case, the Court is asked, in general, about the interpretation of Regulation No 528/2012, in order to ascertain, in essence, whether the legislation at issue in the main proceedings concerns an area harmonised by the provisions of that regulation and, if so, whether the said regulation precludes that legislation.

26 As such, it should be recalled that, according to the Court's settled case-law, where a matter has been the subject of exhaustive harmonisation within the European Union, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in the light of primary law (judgment of 24 February 2022, *Viva Telecom Bulgaria*, C-257/20, EU:C:2022:125, paragraph 45 and the case-law cited).

27 Thus, the question asked by the referring court must be understood as relating, in the first place, to the interpretation of that regulation and then, in the second place, in the event that that regulation has not brought about exhaustive harmonisation, to the interpretation of the provisions of the FEU Treaty on the free movement of goods, namely Articles 34 and 36 TFEU.

28 Therefore, in order to provide the referring court with a useful answer for the purposes of resolving the dispute before it, it must be understood that, by its question, that court asks, in essence, whether Regulation No 528/2012 and, as the case may be, Articles 34 and 36 TFEU must be interpreted as precluding national legislation:

– which prohibits certain commercial practices such as discounts, price reductions, rebates, the differentiation of general and special sales conditions, the gift of free units or any equivalent practices, relating to biocidal products of product-types 14 and 18, included in group 3 of those product-types, set out in Annex V to that regulation ('biocidal products of product-types 14 and 18');

– which requires the affixing of a statement to advertisements addressed to professionals for biocidal products of product-types 2 and 4, included in group 1 of those product-types, listed in Annex V to Regulation No 528/2012 ('biocidal products of product-types 2 and 4'), as well as of product-types 14 and 18, and

– which prohibits advertising addressed to the general public for biocidal products of product-types 2 and 4 as well as of product-types 14 and 18.

The prohibition of certain commercial practices

29 As a preliminary point, it should be recalled that the commercial practices prohibited by Article L. 522-18 of the Environmental Code consist of discounts, price reductions, rebates, the differentiation of general and special sales conditions, the gift of free units or any equivalent practices, relating to biocidal products.

30 It follows from the information contained in the order for reference that Articles L. 522-18 and R. 522-16-1 of the Environmental Code do not relate to the conditions which biocidal products of product-types 14 and 18 must meet in order to obtain a marketing authorisation, but that they prohibit certain commercial practices during the sale of those products in such a way that they govern only the marketing arrangements for the said products.

31 In the first place, it should be noted that, in accordance with Article 1(1) thereof, the purpose of Regulation No 528/2012 is to improve the functioning of the internal market through the harmonisation of the rules on the making available on the market and the use of biocidal products, whilst ensuring a high level of protection of both human and animal health and the environment. To that end, Article 1(2)(d) of that regulation states that it lays down rules for the making available on the market and the use of biocidal products in one or more Member State or in the European Union.

32 Article 3(1)(i) of Regulation No 528/2012 defines making available on the market as any supply of a biocidal product or of a treated article for distribution or use in the course of a commercial activity, whether in return for payment or free of charge, while use is defined by Article 3(1)(k) of that regulation as all operations carried out with a biocidal product, including storage, handling, mixing and application, except any such operation carried out with a view to exporting the biocidal product or the treated article outside the Union.

33 It follows that the rules of the said regulation relating to the making available on the market and use of biocidal products are sufficiently broad to cover commercial practices linked to the sale of those products. However, it is worth pointing out, as the Advocate General did in points 28 to 30 of his Opinion, that the same regulation does not contain any provision intended to harmonise the rules governing such practices. Furthermore, as is apparent from a combined reading of Articles 17, 19 and 20 of Regulation No 528/2012, read in the light of recitals 2, 3, 28 and 31 thereof, that regulation seeks to establish a system of prior authorisation allowing the making available on the market of biocidal products and to identify common principles for evaluating applications for authorisation of those products without, however, harmonising all aspects of the marketing of the said products.

34 It must therefore be considered that Regulation No 528/2012 does not seek to harmonise the rules relating to commercial practices linked to the sale of biocidal products, such as those set out in Articles L. 522-18 and R. 522-16-1 of the Environmental Code.

35 It follows that that regulation does not preclude national legislation which prohibits certain commercial practices during the sale of biocidal products, such as biocidal products of product-types 14 and 18.

36 In the second place, in order to provide the referring court with a useful answer, it is necessary, in the light of what has been recalled in paragraph 27 of the present judgment, to determine whether Article 34 TFEU precludes such national legislation.

37 In that regard, it is apparent from settled case-law that all measures of a Member State which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of that provision (judgments of 11 July 1974, *Dassonville*, 8/74, EU:C:1974:82, paragraph 5, and of 3 July 2019, *Delfarma*, C-387/18, EU:C:2019:556, paragraph 20 and the case-law cited).

38 However, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States for the purposes of that case-law, on condition that those provisions apply to all relevant traders operating within the national territory and that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products (judgments of 10 February 2009, *Commission* v *Italy*, C-110/05, EU:C:2009:66, paragraph 36; of 2 December 2010, *Ker-Optika*, C-108/09, EU:C:2010:725, paragraph 51; and of 21 September 2016, *Etablissements Fr.Colruyt*, C-221/15, EU:C:2016:704, paragraph 35).

39 In the present case, as has been noted in paragraph 30 of the present judgment, Articles L. 522-18 and R. 522-16-1 of the Environmental Code do not relate to the conditions which biocidal products of product-types 14 and 18 must meet in order to obtain a marketing authorisation. In reality, they prohibit certain commercial practices during the sale of those products in such a way that they govern only the marketing arrangements for the said products. It follows that those provisions must be regarded as governing selling arrangements within the meaning of the case-law of the Court cited in paragraph 38 of the present judgment.

40 National legislation governing the selling arrangements for certain products may, however, escape the prohibition in Article 34 TFEU only if it satisfies the two conditions set out in that paragraph 38.

41 As regards the first condition, it is apparent from the information provided to the Court by the referring court that Articles L. 522-18 and R. 522-16-1 of the Environment Code, referred to in paragraph 39 of the present judgment, apply without distinction to all relevant traders operating within French territory.

42 As for the second condition, it is for that court to assess whether those provisions affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

43 In the present case, it is not apparent from the information brought to the Court's attention that the legislation at issue in the main proceedings draws a distinction according to the origin of the biocidal products in question. Nevertheless, it must be ascertained whether that legislation is not, in fact, such as to impede the access of the biocidal products concerned from other Member States to the French market any more than it impedes the access of domestic products.

44 In that regard, national legislation which prohibits certain commercial practices during the sale of certain types of biocidal products is, in principle, liable to restrict the total volume of sales of those products in the Member State concerned and may, consequently, affect the volume of sales of the said products from other Member States. However, such a finding is not sufficient for that legislation to be classified as a measure having equivalent effect (see, to that effect, judgment of 23 February 2006, *A-Punkt Schmuckhandel*, C-441/04, EU:C:2006:141, paragraph 21 and the case-law cited).

45 It is true, as the Commission and the applicants in the main proceedings submit, that commercial practices such as price reductions and rebates, which are referred to in Articles L. 522-18 and R. 522-16-1 of the Environmental Code, are marketing methods which may prove effective in allowing products from other Member States to gain access to a national market, since those methods influence the selling price of those products.

46 However, the fact that national legislation prohibits purportedly effective marketing methods is not a sufficient ground to consider that that legislation falls within the scope of the prohibition laid down in Article 34 TFEU. Such legislation is liable to constitute a measure having equivalent effect only if the prohibition of the relevant marketing methods affects products from other Member States more than it affects domestic products.

47 In those circumstances, it is for the referring court to determine whether the prohibition of certain commercial practices, laid down in Articles L. 522-18 and R. 522-16-1 of the Environmental Code, affects the access of the biocidal products concerned from other Member States to the market concerned any more than that of such products from France. In particular, it is for that court to assess whether, as the French Government maintained at the hearing, those provisions cover a narrow range of marketing methods for the biocidal products concerned and whether, consequently, marketing methods which are not prohibited by those provisions ensure that products from other Member States are able to gain access to the domestic market.

48 If, at the end of that examination, that court finds that the national legislation at issue in the main proceedings affects the access of the biocidal products concerned from other Member States to the French market any more than that of such products from France, it will be for it to establish whether that legislation is justified by one or more of the public interest grounds listed in Article 36 TFEU or by one or more of the overriding requirements in the public interest recognised by the case-law of the Court.

49 In that regard, first, it is apparent from the order for reference that the objective of Article L. 522-18 of the Environmental Code is to prevent the adverse effects that the excessive use of certain types of biocidal products poses to public health and the environment.

50 In accordance with settled case-law, it should be recalled that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States should be allowed a measure of discretion (judgment of 2 December 2010, *Ker-Optika*, C-108/09, EU:C:2010:725, paragraph 58).

51 In addition, it is settled case-law that protection of the environment constitutes an overriding reason in the public interest capable of justifying a measure having an effect equivalent to a quantitative restriction (see, to that effect, judgment of 6 October 2015, *Capoda Import-Export*, C-354/14, EU:C:2015:658, paragraph 43).

52 Accordingly, it is apparent from the information provided to the Court that the legislation at issue in the main proceedings is liable to meet overriding reasons in the public interest capable of justifying a measure having an effect equivalent to a quantitative restriction, which is, however, a matter for the referring court to verify.

53 Second, it is for the national authorities, in each individual case, to demonstrate that the national legislation at issue satisfies the principle of proportionality, that is to say, that it is necessary to achieve the declared objective and that it could not be achieved by prohibitions or restrictions that are less extensive or have less effect on trade within the European Union. To that end, it is for those authorities to provide the necessary evidence to that effect. The reasons which may be invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and by specific evidence substantiating its arguments (judgment of 23 December 2015, *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraphs 53 and 54).

54 It follows that, where a national court examines national legislation in the light of the justification relating to the protection of the health and life of humans, under Article 36 TFEU, it is bound to examine objectively whether it may reasonably be concluded from the evidence submitted by the Member State concerned that the means chosen are appropriate for the attainment of the objectives pursued and whether it is possible to attain those objectives by measures that are less restrictive of the free movement of goods (see, to that effect, judgment of 23 December 2015, *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845, paragraph 59).

55 In that regard, as regards the appropriateness of the national legislation at issue in the main proceedings to attaining the objectives relied on, the French Government has emphasised that that legislation is intended to prevent and reduce the exposure of the public, animals and the environment to the biocidal products concerned, by limiting the incentives for the excessive and sometimes inappropriate use of those products.

56 Although the said legislation does not appear to be such as to enable all risk of unnecessary dispersal of the biocidal products concerned to be eliminated, the fact remains that, by ruling out the possibility for a purchaser to benefit from any financial advantage when purchasing those products, it is liable to prevent any inappropriate purchase of the said products and, therefore, to reduce the risk associated with exposure of the public, animals and the environment to the excessive use of the same biocidal products. As the French Government has noted, that legislation is appropriate to prevent the accumulation of those products in the environment and the water pollution which may result. It follows from all the foregoing considerations that the legislation at issue in the main proceedings appears appropriate for the attainment of the objectives of protecting human health and the environment, which is, however, for the referring court to verify.

57 As regards the necessity and proportionality of the prohibition of certain commercial practices during the sale of certain types of biocidal products, it must be considered that, as the Advocate General observed in points 72 to 75 of his Opinion, that prohibition does not go beyond what is necessary since the additional information measures required when selling those products, namely those envisaged in the context of Article 17(5) and Article 72(1) of Regulation No 528/2012, cannot counterbalance the attractiveness of the offer of price reductions and rebates or the provision of free samples of biocidal products when purchasing them.

58 Moreover, it is apparent from the information provided by the referring court, first, that the legislation at issue in the main proceedings seeks to prohibit the practice of price reductions and rebates only when biocidal products of product-types 14 and 18 are being sold, that is to say, those which pose the highest risks to human health and, second, that that legislation does not apply to biocidal products eligible for the simplified authorisation procedure under Article 25 of Regulation No 528/2012.

59 Thus, Articles 34 and 36 TFEU must be interpreted as not precluding national legislation which prohibits certain commercial practices such as discounts, price reductions, rebates, the differentiation of general and specific sales conditions, the gift of free units or any equivalent practices, relating to biocidal products of product-types 14 and 18, provided that that legislation is justified by objectives of protection of the health and life of humans and of the environment, that it is suitable for securing the attainment of those objectives and that it does not go beyond what is necessary in order to attain them, which is for the referring court to verify.

The obligations relating to advertisements addressed to professionals

60 As a preliminary point, and as been noted in paragraph 31 of the present judgment, in accordance with Article 1(1) thereof, the purpose of Regulation No 528/2012 is to improve the functioning of the internal market through the harmonisation of the rules on the making available on the market and the use of biocidal products, whilst ensuring a high level of protection of both human health and animal health and the environment. As the Advocate General observed in point 86 of his Opinion, Article 72 of that regulation is the only provision thereof which relates to the advertisement of biocidal products. It is therefore in the light of that provision that it is necessary to assess whether the said regulation precludes national legislation which requires the affixing of a statement to advertisements addressed to professionals for certain types of biocidal products.

61 The referring court should therefore be regarded as asking whether Article 72 of Regulation No 528/2012 must be interpreted as precluding national legislation which requires the affixing of a statement, in addition to that provided for in that article, to advertisements addressed to professionals for biocidal products of product-types 2 and 4 as well as of product-types 14 and 18.

62 In that regard, Article 72(1) of Regulation No 528/2012 provides that any advertisement for biocidal products must comply with Regulation No 1272/2008 and include a specific statement which must be clearly distinguishable and legible in relation to the whole advertisement. That statement is to read: ‘Use biocides safely. Always read the label and product information before use.’ Paragraph 2 of the said article merely stipulates that advertisers may replace the word ‘biocides’ in that prescribed statement with a clear reference to the product-type being advertised. Paragraph 3 of the same article, for its part, provides that advertisements for biocidal products are not to refer to the product in a manner which is misleading in respect of the risks posed by the product to human health, animal health or the environment or its efficacy. The latter provision also prohibits statements such as ‘low-risk biocidal product’, ‘non-toxic’ or ‘environmentally friendly’.

63 It follows that, by Article 72 of Regulation No 528/2012, the EU legislature intended to regulate, in a detailed and comprehensive manner, the wording of statements on the risks of using of biocidal products which may appear in advertisements for those products, in that that article provides for the existence of a mandatory statement, that it expressly prohibits certain statements and that it seeks, more generally, to prohibit any advertising statement which is liable to mislead the user as to the risks that such products may present.

64 Furthermore, it is apparent from recitals 1 and 3 of Regulation No 528/2012 that the EU legislature sought to strike a specific balance between the free movement of biocidal products and a high level of protection of human and animal health and the environment.

65 It follows from a literal interpretation of Article 72 of Regulation No 528/2012, read in the light of recitals 1 and 3 thereof, that the field concerning statements on the risks of using biocidal products which may be used in the advertising of those products has been fully harmonised by the EU legislature.

66 Such an interpretation is supported by the requirement that those statements be legible, as is expressed in the last sentence of Article 72(1) of Regulation No 528/2012. It must be held that statements additional to those referred to in that provision would be at risk of interfering with the legibility of the original ones, even if those additional statements did not contradict the objectives of protecting human and animal health and the environment.

67 Consequently, Article 72 of Regulation No 528/2012 must be interpreted as precluding national legislation which requires the affixing of a statement, in addition to that prescribed in that article, to advertisements addressed to professionals for biocidal products of product-types 2 and 4 as well as of product-types 14 and 18.

The prohibition of advertisements addressed to the general public

68 In the first place, it is necessary to determine whether Regulation No 528/2012 precludes national legislation such as that resulting from Articles L. 522-5-3 and R. 522-16-2 of the Environmental Code, which prohibits all advertising addressed to the general public for biocidal products of product-types 2 and 4 as well as of product-types 14 and 18.

69 As has been noted in paragraph 63 of the present judgment, it follows from Article 72 of Regulation No 528/2012 that the EU legislature intended to regulate, in a detailed and comprehensive manner, the wording of statements on the risks of using biocidal products which may appear in advertisements for those products. However, that legislature did not intend to regulate all aspects relating to the advertising of biocidal products and, in particular, to rule out the possibility for Member States to prohibit advertising addressed to the general public.

70 It follows that Article 72 of Regulation No 528/2012 does not preclude national legislation which prohibits all advertising addressed to the general public for biocidal products of product-types 2 and 4 as well as of product-types 14 and 18.

71 That being so, in the second place, it is necessary to assess whether Article 34 TFEU precludes such legislation.

72 In that regard, as has been recalled in paragraphs 37 and 38 of the present judgment, it is necessary to ascertain whether that legislation constitutes legislation governing selling arrangements for products, within the meaning of the case-law cited in paragraph 38 of the present judgment,

which applies to all relevant traders operating within the national territory and which affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

73 In the present case, it should be recalled that, in the light of the information provided by the referring court, Articles L. 522-5-3 and R. 522-16-2 of the Environmental Code do not relate to the conditions that must be met by biocidal products of product-types 2 and 4 as well as of product-types 14 and 18 in order to obtain a marketing authorisation. In contrast, those provisions lay down a prohibition on advertising addressed to the general public during the sale of those products in such a way that they govern only the marketing arrangements for the said products. It follows that those provisions may be regarded as governing selling arrangements within the meaning of the case-law cited in paragraph 38 of the present judgment.

74 National legislation which governs selling arrangements for certain products may, however, escape the scope of Article 34 TFEU only if it satisfies the two conditions set out in paragraph 38 above.

75 As regards the first condition, it is apparent from the information provided to the Court by the referring court that Articles L. 522-5-3 and R. 522-16-2 of the Environmental Code apply without distinction to all relevant traders operating within French territory.

76 As for the second condition, it is for the referring court to assess whether those provisions affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

77 In the present case, it is not apparent from the information before the Court that the legislation at issue in the main proceedings draws a distinction according to the origin of the biocidal products in question. Nevertheless, it must be ascertained whether that legislation is not, in fact, such as to impede the access of the biocidal products concerned from other Member States to the French market any more than it impedes the access of domestic products.

78 In that regard, although the Court has held that national legislation which restricts or prohibits certain forms of advertising for certain products may be liable to restrict their sales volume and, therefore, that it may have a greater impact on products from other Member States, it nevertheless made that finding conditional on the identification of a specific difficulty characterising a given product market with which an operator is confronted in order to enter the national market, such as the existence of traditional social practices, local habits or customs or indeed the fact that the method of sale concerned by the prohibition was potentially the only one for accessing the national market concerned (see, to that effect, judgments of 8 March 2001, *Gourmet International Products*, C-405/98, EU:C:2001:135, paragraphs 19 and 21; of 19 October 2016, *Deutsche Parkinson Vereinigung*, C-148/15, EU:C:2016:776, paragraph 25; and of 15 July 2021, *DocMorris*, C-190/20, EU:C:2021:609, paragraph 41).

79 It is not apparent from the documents before the Court that the French market in biocidal products is characterised by the existence of one or more specific difficulties, within the meaning of the case-law cited in the previous paragraph of the present judgment, which is, however, for the referring court to verify, with the result that it does not appear that the prohibition of all advertising addressed to the general public for certain biocidal products affects the marketing of products from other Member States to any greater extent.

80 If, at the end of that examination, that court nevertheless finds that the legislation at issue in the main proceedings affects the access of biocidal products from other Member States to the French market any more than that of such products from France, it will be for it to establish whether that legislation is justified by one or more of the public interest grounds listed in Article 36 TFEU or by one or more of the overriding requirements recognised by the case-law of the Court.

81 In that regard, as is apparent from paragraph 49 of the present judgment, the order for reference states that the objective of the legislation at issue in the main proceedings is to prevent the adverse effects that the excessive use of certain biocidal products poses to public health and the environment.

82 Thus, it must be held that that legislation is appropriate for the attainment of the objectives of protecting human health and the environment, in so far as it lays down a prohibition on all advertising addressed to the general public for certain of those products, which constitutes a means of limiting the incentives to purchase and use such products.

83 So far as concerns the necessity and proportionality of that legislation, it must be held that, as the Advocate General observed in points 120 and 121 of his Opinion, the prohibition of all advertising addressed to the general public for certain biocidal products does not go beyond what is necessary to achieve the objectives pursued. Indeed, as the French Government has argued, first, that legislation applies only to advertising addressed to the general public and therefore does not prohibit advertising to professionals. Second, that legislation has a limited scope since it does not cover all biocidal products but only those of product-types 2 and 4 as well as of product-types 14 and 18, that is to say, those which pose the highest risks to human health, and does not apply to biocidal products eligible for the simplified authorisation procedure under Article 25 of Regulation No 528/2012.

84 It follows that Article 72 of Regulation No 528/2012 must be interpreted as not precluding national legislation which prohibits advertising addressed to the general public of biocidal products of product-types 2 and 4 as well as of product-types 14 and 18. The same is true of Articles 34 and 36 TFEU, provided that that legislation is justified by objectives of protection of the health and life of humans and of the environment, that it is suitable for securing the attainment of those objectives and that it does not go beyond what is necessary in order to attain them, which is for the referring court to verify.

85 In the light of all the foregoing considerations, the answer to the question referred is, first, that Article 72 of Regulation No 528/2012 must be interpreted as meaning that:

– it precludes national legislation which requires the affixing of a statement, in addition to that prescribed in that article, to advertisements addressed to professionals for biocidal products of product-types 2 and 4 as well as of product-types 14 and 18;

– and that it does not preclude national legislation which prohibits all advertising addressed to the general public for biocidal products of product-types 2 and 4 as well as of product-types 14 and 18;

and, second, Articles 34 and 36 TFEU must be interpreted as meaning that:

– they do not preclude national legislation which prohibits certain commercial practices such as discounts, price reductions, rebates, the differentiation of general and specific sales conditions, the gift of free units or any equivalent practices, relating to biocidal products of product-types 14 and

18, provided that that legislation is justified by objectives of protection of the health and life of humans and of the environment, that it is suitable for securing the attainment of those objectives and that it does not go beyond what is necessary in order to attain them, which is for the referring court to verify;

– and that they do not preclude national legislation which prohibits advertising addressed to the general public for biocidal products of product-types 2 and 4, as well as of product-types 14 and 18, provided that that legislation is justified by objectives of protection of the health and life of humans and of the environment, that it is suitable for securing the attainment of those objectives and that it does not go beyond what is necessary in order to attain them, which is for the referring court to verify.

Costs

86 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 72 of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, as amended by Regulation (EU) No 334/2014 of the European Parliament and of the Council of 11 March 2014, must be interpreted as meaning that:**

– **it precludes national legislation which requires the affixing of a statement, in addition to that prescribed in that article, to advertisements addressed to professionals for biocidal products of product-types 2 and 4, included in group 1 of those product-types, listed in Annex V to that regulation, as well as of product-types 14 and 18, included in group 3 of those product-types, listed in Annex V to the said regulation;**

– **and that it does not preclude national legislation which prohibits advertising addressed to the general public for biocidal products of product-types 2 and 4, included in group 1 of those product-types, listed in Annex V to Regulation No 528/2012, as amended by Regulation No 334/2014, as well as of product-types 14 and 18, included in group 3 of those product-types, listed in Annex V to that regulation.**

2. **Articles 34 and 36 TFEU must be interpreted as meaning that:**

– **they do not preclude national legislation which prohibits certain commercial practices such as discounts, price reductions, rebates, the differentiation of general and specific sales conditions, the gift of free units or any equivalent practices, relating to biocidal products of product-types 14 and 18, included in group 3 of those product-types, listed in Annex V to Regulation No 528/2012, as amended by Regulation No 334/2014, provided that that legislation is justified by objectives of protection of the health and life of humans and of the environment, that it is suitable for securing the attainment of those objectives and that it does not go beyond what is necessary in order to attain them, which is for the referring court to verify;**

– **and that they do not preclude national legislation which prohibits advertising addressed to the general public for biocidal products of product-types 2 and 4, included in group 1 of**

those product-types, listed in Annex V to that regulation, as well as of product-types 14 and 18, included in group 3 of those product-types, listed in Annex V to the said regulation, provided that that legislation is justified by objectives of protection of the health and life of humans and of the environment, that it is suitable for securing the attainment of those objectives and that it does not go beyond what is necessary in order to attain them, which is for the referring court to verify.

[Signatures]

---

* Language of the case: French.