Case C-29/20

Request for a preliminary ruling

Date lodged:

23 January 2020

Referring court:

Oberlandesgericht Köln (Germany)

Date of the decision to refer:

10 January 2020

Applicant:

Biofa AG

Defendant:

Sikma D. Vertriebs GmbH und Co. KG

[…] Made on 10 January 2020

[…]

Oberlandesgericht Köln (Higher Regional Court, Cologne)

Order

In the case of

Biofa AG, […] Gutsbezirk Münsingen,

applicant and appellant,

[…]

v

Sikma D. Vertriebs GmbH und Co KG, […] Everswinkel,

defendant and respondent,

[…]

the 6th Civil Chamber of the Oberlandesgericht Köln (Higher Regional Court, Cologne)

[…]

hereby orders:

I. The proceedings are stayed.

II. The following question on the interpretation of Article 3(1)(a), Article 9(1)(a) and Article 95(3) of Regulation (EU) **[Or. 2]** 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 is referred to the Court of Justice of the European Union for a preliminary ruling:

Where an active substance is approved in an implementing regulation adopted pursuant to Article 9(1)(a) of Regulation (EU) No 528/2012, can it be taken as given in court proceedings in a Member State that the substance on which the approval is based is intended within the meaning of Article 3(1)(a) of Regulation (EU) No 528/2012 to act by any means other than mere physical or mechanical action, or is it for the adjudicating national court to establish in fact whether the preconditions for the application of Article 3(1)(a) of Regulation (EU) No 528/2012 are fulfilled even after an implementing regulation has been adopted?

Grounds:

I.

The parties are in dispute as to whether the defendant is entitled to distribute a pesticide containing Kieselguhr as an active substance, even though it is not obtained from a listed importer or manufacturer.

The applicant is a medium-sized undertaking that develops primarily biologically-based agricultural products, applies for authorisations and distributes the authorised products in the territory of the Federal Republic of Germany, other EU Member States or EEA Member States.

Some of those products contain the active substance Kieselguhr (which is known by various names), which the applicant distributes under the ‘InsectoSec®’ brand name. These products are used to control creeping vermin, especially poultry red mite, in poultry houses. **[Or. 3]**

The active substance Kieselguhr is a mineral obtained from microscopically small shells of dead diatoms and consists primarily of silicon dioxide. Contact with the active substance covers the harmful insects and mites with dust; this affects the

cuticle of their exoskeleton (which protects the insects from dehydration). This causes the harmful insects and mites to dehydrate and die.

The applicant applied for authorisation of the active substance Kieselguhr in accordance with Regulation (EU) No 528/2012. It submitted the necessary dossier, which was compiled at no little financial cost.

Silicon dioxide Kieselguhr was approved as an active substance for use in biocidal products of product-type 18 under Commission Implementing Regulation (EU) 2017/794 of 10 May 2017 approving silicon dioxide Kieselguhr as an existing active substance for use in biocidal products of product-type 18, subject to the specifications and conditions set out in the annex thereto. The implementing regulation entered into force on the twentieth day following that of its publication. The applicant is entered on the list referred to in Article 95 of Regulation (EU) No 528/2012 […], currently as the only manufacturer of this active substance.

The defendant supplies products for stock farmers and the compound feed industry, including for the purpose of 'parasite management, especially in the poultry sector' via an online shop and the online marketplace eBay. The range distributed includes a product used to control poultry mites, especially poultry red mites, sold under the brand name 'HS Mikrogur', which likewise contains the active substance Kieselguhr, which it does not obtain from the applicant.

The applicant argues that the distribution of that product by the defendant infringes Paragraphs 3 and 3a of the Gesetz gegen den unlauteren Wettbewerb (Law on Unfair Competition; 'the UWG'), read in combination with Article 95(2) and (3) of Regulation (EU) No 528/2012, and is thus anti-competitive, and that the active substance Kieselguhr does not act by mere physical or mechanical action. The applicant therefore sought, as against the defendant, an order to desist, information, a determination as to its liability in damages and reimbursement of the costs of the warning notice. **[Or. 4]**

Having taken evidence from an expert witness, the Landgericht (Regional Court) rejected the application. It found that, according to Paragraph 8(3).1 and Paragraphs 3 and 3a of the UWG, read in combination with Article 3(1)(a) and Article 95(2) and (3) of Regulation (EU) No 528/2012, the claims made did not have any basis.

II.

Judgment in these proceedings depends on the interpretation of Article 3[(1)](a) and of Article 9(1)(a) of Regulation (EU) No 528/2012 and the binding effect of an implementing regulation adopted pursuant to it. For that reason, before a ruling is given on the appeal, the proceedings may be stayed and a preliminary ruling obtained from the Court of Justice of the European Union pursuant to the first paragraph, under (b), and the second paragraph of Article 267 TFEU. The Chamber holds that this is necessary in the present proceedings.

1. The Landgericht found the application to be unfounded. It held in this regard that:

although the parties are competitors and a specific competitive relationship exists, Article 95(3) of Regulation (EU) No 528/2012 is a provision that regulates the market within the meaning of Paragraph 3a of the UWG; that, however, the defendant had not made biocidal products available on the market in breach of Article 3(1)(a) and Article 95(3) of Regulation (EU) No 528/2012; that distribution of the defendant's products does not infringe Regulation (EU) No 528/2012, because the product is not a product within the meaning of Article 3(1)(a), first indent, of Regulation (EU) No 528/2012; that the defendant's product is not used with the intention of destroying, deterring, rendering harmless, preventing the action of, or otherwise exerting a controlling effect on harmful organisms by any means other than mere physical or mechanical action; that the Landgericht is entitled to examine this question, notwithstanding Commission Implementing Regulation (EU) 2017/794; and that it followed from the evidence taken that the defendant's product does not fulfil the described preconditions for the application of that latter regulation.

2. The question that arises in this case is whether, in the case where an active substance is approved in an implementing regulation adopted under Article 9(1)(a) of Regulation (EU) No 528/2012, it can be taken as given in court proceedings in a Member State that the substance is intended, within the meaning of Article 3(1)(a) of Regulation (EU) No 528/2012, to act by means **[Or. 5]** other than mere physical or mechanical action or whether it is for the adjudicating national court to establish in fact whether the preconditions for the application of Article 3(1)(a) of Regulation (EU) No 528/2012 are fulfilled.

2. The merits of the claims at issue may follow from Paragraph 8(1) and 8(3).1 and Paragraph 3(1) of the UWG, read in combination with Paragraph 3a of the UWG on breach of the law prohibiting unfair commercial practices, read in combination with Article 3(1)(a) and Article 95(2) and (3) of Regulation (EU) No 528/2012. The application of these provisions has given rise to questions concerning the interpretation of EU law.

(a) The general preconditions for a desist claim under competition law based on a breach of law are fulfilled (Paragraph 8(1), Paragraph 3(1), Paragraph 3a of the UWG).

[…].

(b) In order to decide whether the form of order sought by the applicant is justified, the referring court needs to establish whether the product 'HS Mikrogur', which is the specific subject matter of the form of order sought, comes within the scope of Article 3(1)(a) and Article 95(3) of Regulation (EU) No 528/2012. This gives rise to the question, which requires clarification, as to the

binding effect of an implementing regulation adopted pursuant to Article 9(1)(a) of Regulation (EU) No 528/2012.

(aa) Article 95[(2)] of Regulation (EU) No 528/2012 states that, as of 1 September 2015, a biocidal product may not be made available on the market if the manufacturer or importer of the active substance contained in the product, or where relevant, the importer of the biocidal product, is not included in the list published by the Agency. **[Or. 6]**

(1) The substance 'Kieselguhr' is an 'active substance' in the above sense that acts on or against harmful organisms as defined in Article 3(1)(g) of Regulation (EU) No 528/2012. It is common ground that certain mites (thus harmful organisms) dehydrate following contact with Kieselguhr and then die of dehydration. The defendant has also made available on the market products which contain Kieselguhr, a substance included in the list referred to in Article 95(1) of Regulation (EU) No 528/2012 and approved as of 1 November 2018 further to an application and the submission of a dossier.

The product 'HS Mikrogur' is intended to control harmful organisms. The 'intended purpose' of a product is judged by how it is perceived by an averagely informed consumer. Although Kieselguhr can be used for a broad spectrum of applications, for example in the food industry as a supplement and as animal feed, it is advertised, supplied and distributed by the defendant in this particular case as a pesticide under the brand name 'HS Mikrogur'.

(2) It is common ground that the applicant is included in the list referred to in Article 95(2) of Regulation (EU) No 528/2012 as a sole substance supplier or product supplier and that the defendant did not obtain the substance from the applicant, even indirectly, which it should have done in keeping with Article 95(3) of Regulation (EU) No 528/2012 if the substance is a biocidal product within the meaning of that regulation. This is because the Agency publishes a list, in accordance with Article 95(1) of Regulation (EU) No 528/2012, of all active substances and of all substances used to generate an active substance for which a dossier complying with the requirements of Annex II to the Regulation or of Annex IIA or IVA to Directive 98/8/EC or, where appropriate, of Annex IIIA to that directive has been submitted and has been accepted or validated by a Member State in a procedure provided for in that regulation or in that directive. According to Article 95[(2)] of Regulation (EU) No 528/2012, a biocidal product consisting of, containing or generating a relevant substance included in the list referred to in paragraph 1, cannot be made available on the market unless either the substance supplier or the product supplier is included in the list referred to in paragraph 1 for the product-type(s) to which the product belongs.

(3) The question arises as to whether the product distributed by the defendant is a biocidal product within the meaning of Article 3(1)(a), first indent, of Regulation (EU) No 528/2012, **[Or. 7]**, that is to say, a substance (or mixture) consisting of or containing one or more active substances intended to destroy, deter, render

harmless, prevent the action of, or otherwise exert a controlling effect on harmful organisms by any means other than mere physical or mechanical action.

Having heard the evidence, the Landgericht proceeded on the basis that the defendant's product does not control harmful organisms by any means other than mere physical or mechanical action within the meaning of Article 3(1) of Regulation (EU) No 528/2012; that this could be taken as given on the basis of the convincing testimony of the expert witness called by the court;

that the mechanism of action of the product is sorption through the accumulation of substances in one phase, in the case of Kieselguhr by adsorption, that is to say, the deposition of atoms and molecules on a surface; that, to be more precise, the primary mechanism of action is physical adsorption, during which the electronic structures of the adsorbate and the surface remain broadly unchanged; that the acting forces are weak and comparable to Van der Waals forces in molecules, that is to say, they are caused by dipole or multipole interactions; that the adsorbed molecules are not perturbed, but are polarised (unlike with chemical adsorption, during which the molecules decay and a new chemical bond can be formed with the adsorbent);

that, as Kieselguhr is chemically inert, a direct chemical interaction following adsorption cannot be assumed; that, according to the testimony of the expert witness, it has to be assumed that no chemical bonds are formed or broken and that the interactions are essentially caused by Van der Waals forces with one dipole/dipole interaction or another; that the action is comparable to that of a sponge; that adsorption to the coarse Kieselguhr particles breaks the water barrier, resulting in dehydration via the broken surface; that, however, the lipid layer may be regenerated in a humid atmosphere;

and that, although abrasive action cannot be entirely discounted, it can be disregarded in this situation and case, as it is a purely mechanical action. **[Or. 8]**

The Chamber intends to uphold these findings made by the Landgericht. The expert witness, who was proposed by agreement between the parties and who is renowned for his research, including into Kieselguhr, clearly has the necessary expertise, as proven by numerous scientific publications. Furthermore, the expert witness provided the evidence requested by describing in detail how Kieselguhr acts on pests. That description essentially reflects the common ground between the parties. Then, having explained how scientific debate had progressed, he provided a clear and comprehensible explanation of the mechanism of action, which included a cogent classification. There do not appear to be any technical shortcomings in the expert testimony, nor have any been argued.

Therefore, judgment in this case depends on whether authorisation as an active substance, which was granted in this case under Commission Implementing Regulation (EU) 2017/794 of 10 May 2017, necessarily requires the product to be a biocidal product within the meaning of Article 3(1)(a) of Regulation (EU)

No 528/2012, such that there is no need to consider in the present proceedings whether the preconditions for classification as a biocidal product within the meaning of Article 3(1)(a) of Regulation (EU) No 528/2012 are fulfilled.

[…]