

**Case C-147/21**

**Request for a preliminary ruling**

**Date lodged:**

8 March 2021

**Referring court:**

Conseil d'État (France)

**Date of the decision to refer:**

5 March 2021

**Applicants:**

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

**Defendants:**

Ministre de la Transition écologique

Premier ministre

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**CONSEIL D'ETAT**

**(Council of State, France)**

[...]

ruling

in the action

[...]

COMITE INTERPROFESSIONNEL DES

HUILES ESSENTIELLES FRANÇAISES

and Others

[...]

1° By an application registered under no 433889 on 23 August 2019 and a reply registered on 31 December 2020 at the Judicial Affairs Secretariat of the Conseil d'Etat, the Comité interprofessionnel des huiles essentielles françaises, the company Florame, the company Hyteck Aroma-Zone, the company Laboratoires Gilbert, the company Laboratoire Léa Nature, the company Laboratoires Oméga Pharma France, the company Pierre Fabre Médicament, the company Pranarom France and the company Puresentiel France ask that the Conseil d'Etat:

1°) annul Decree No 2019-642 of 26 June 2019 on prohibited commercial practices relating to certain categories of biocidal products, on the ground that it was adopted ultra vires;

2°) refer, if appropriate, to the Court of Justice of the European Union a question for a preliminary ruling concerning the exhaustive harmonisation brought about by Regulation (EU) No 528/2012 concerning the making available on the market and use of biocidal products;

3°) [...] **[Or. 2]**

They submit that:

– [...]

– [...]

– the decree lacks any legal basis since it was adopted in breach of Regulation (EU) No 528/2012 of 22 May 2012;

– the decree infringes the right to property protected by Article 17 of the Charter of Fundamental Rights of the European Union and disregards the provisions of Article 1 of the additional protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

– the decree is contrary to Directive 2000/31/EC of 8 June 2000 in that it constitutes an unjustified and disproportionate interference with the freedom to provide services;

– [...]

By a defence registered on 17 September 2020, the *Ministre de la Transition écologique* (Minister for Ecological Transition, France) contended that the application should be dismissed. She argues that none of the pleas in law set out in the application is well founded.

[...]

2° By an application registered under no 433890 on 23 August 2019 and a reply registered on 31 December 2020 at the Judicial Affairs Secretariat of the *Conseil d'Etat*, the *Comité interprofessionnel des huiles essentielles françaises* (CIHEF), the company *Florame*, the company *Hyteck Aroma-Zone*, the company *Laboratoires Gilbert*, the company *Laboratoire Léa Nature*, the company *Laboratoires Oméga Pharma France*, the company *Pierre Fabre Médicament*, the company *Pranarom France* et the company *PuresSENTIEL France* ask that the *Conseil d'Etat*:

1°) annul Decree No 2019-643 of 26 June 2019 on commercial advertising for certain categories of biocidal products, on the ground that it was adopted ultra vires;

2°) refer, if appropriate, to the Court of Justice of the European Union a question for a preliminary ruling concerning the exhaustive harmonisation brought about by Regulation (EU) No 528/2012 concerning the making available on the market and use of biocidal products;

3°) [...] **[Or. 3]**

They submit that:

– [...]

– [...]

– the decree lacks any legal basis since it was adopted in breach of Regulation (EU) No 528/2012 of 22 May 2012 concerning the making available on the market and use of biocidal products;

– the decree infringes the right to property protected by Article 17 of the Charter of Fundamental Rights of the European Union and disregards the provisions of Article 1 of the additional protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

– it is unlawful in that it constitutes an excessive interference with the right to freedom of expression guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

– [...]

By a defence registered on 17 September 2020, the *Ministre de la Transition écologique* contended that the application should be dismissed. She argues that none of the pleas in law set out in the application is well founded.

[...]

Having regard to:

- the European Convention for the Protection of Human Rights and Fundamental Freedoms;
- the Treaty on the Functioning of the European Union, in particular Article 267 thereof;
- the Charter of Fundamental Rights of the European Union;
- Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012;
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000;
- the Code de l'environnement (Environmental Code);
- Law No 2018-938 of 30 October 2018;
- [...] **[Or. 4]**

[...]

Whereas:

1. The abovementioned applications seek the annulment of two decrees adopted under the same law and raise the same issues for the court to decide. They should therefore be joined for the purposes of a single judgment.

2. The purpose 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 is, in accordance with paragraph 1 of Article 1 thereof, 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.’ In accordance with paragraph 2 of that same article: ‘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 States or the Union; (e) the placing on the market of treated articles.’ Pursuant to Article 72 of the same regulation: ‘1. Any advertisement for biocidal products shall, in addition to complying with Regulation (EC) 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.’*

3. In accordance with new Article L. 522-18 of the Environmental Code, inserted by Article 76 of the loi du 30 octobre 2018 pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine, durable et accessible à tous (Law of 30 October 2018 promoting equilibrium in commercial relationships in the agricultural and food sector and healthy, sustainable food accessible to all): *‘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 Commercial Code, the gift of free units and any [Or. 5] 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. The Conseil d’Etat shall define by decree the categories of products concerned by reference to the risks they pose to human health and the environment.’* In accordance with new Article L. 522-5-3 of the Environmental Code, inserted by the Law of 30 October 2018: *‘All commercial advertising shall be prohibited for certain categories of biocidal products defined by Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 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. The Conseil d’Etat shall define by decree the categories of products concerned by reference to the risks they pose to human health and the environment, and the manner in which advertisements may 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.'*

4. The contested Decree No 2019-642 of 26 June 2019, adopted under new Article L. 522-18 of the Environmental Code, inserts into that code Article R. 522-16-1, which provides that: '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 (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. These provisions shall not apply to biocidal products eligible for the simplified authorisation procedure in accordance with Article 25 of that regulation.' The contested Decree No 2019-643 of 26 June 2019, adopted under Article L. 522-5-3 of the Environmental Code, inserts in that code a new Article R. 522-16-2, which is worded as follows: '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 (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; 2° Products of types 2 and 4 defined by that regulation and classified, in accordance with the provisions of 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, 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 (EU) No 528/2012, mentioned in point 1 of paragraph I. In addition, all such advertisements shall bear clearly and visibly the following: 1° The following two sentences: "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 (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012, mentioned above. 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 (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.' **[Or. 6]**

5. It is apparent from the legislative and regulatory provisions cited in paragraphs 3 and 4 that certain types of commercial practice are prohibited, such as discounts, price reductions, rebates, the differentiation of general and special conditions of sale within the meaning of Article L. 441-1 of the Commercial Code, the gift of free units and all equivalent practices, as is commercial advertising directed at the general public in relation to biocidal products to control

rodents and arthropods falling within product-types 14 and 18 of Annex V to the regulation of 22 May 2012, with the exception of biocidal products eligible for the simplified authorisation procedure in accordance with Article 25 of the regulation.

6. In the first place, while it is not disputed that the two contested decrees have the effect of prohibiting certain commercial practices and advertising directed at the general public in relation to certain biocidal products which the applicant companies sell, the plea alleging that the decrees are liable to infringe their right to property, protected by Article 17 of the Charter of Fundamental Rights of the European Union, is not supported by sufficiently detailed information to enable the merits of the plea to be assessed, and it must therefore be dismissed.

7. In the second place, although the applicants maintain that the two contested decrees are liable to cause a decrease in sales of their products and a reduction in their turnover, the prohibition of commercial practices and of advertising to the general public which they lay down is justified by the objectives of protecting public health and safeguarding the environment. The circumstances to which the applicants refer, even if proven, cannot in themselves establish that the contested decrees disregard the provisions of Article 1 of the first additional protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

8. In the third place, although the applicants maintain that the decree of 26 June 2019 on commercial advertising for certain categories of biocidal products constitutes an excessive interference with the right to freedom of expression guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the restriction, laid down in Article L. 522-5-3 of the Environmental Code, on commercial advertising directed at the general public in relation to biocidal products to control rodents and arthropods does not, in any event, prevent consumers from having access to the information and is, in light of the objective of protecting public health, a necessary and proportionate measure. Consequently, that plea must be dismissed.

9. In the fourth place, Directive 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market establishes rules relating to the free movement of services and lays down the conditions under which Member States may impose proportionate restrictions on that free movement in pursuit of a public interest objective. In that it provides for measures which are necessary for and proportionate to the objective of public health protection which it pursues, the decree of 26 June 2019 on prohibited commercial practices relating to certain categories of biocidal products does not infringe that directive.

10. [...] **[Or. 7]** [...].

11. [...] [pleas relating to national law]

12. In the last place, since the regulation cited in paragraph 2 contains no provisions which authorise Member States to adopt restrictive measures of the type which appear in Articles L. 522-18 and L. 522-5-3 of the Environmental Code, or prohibit them from doing so, the question arises of whether such measures, not provided for in the regulation, may be adopted without derogating from or infringing that regulation and without impeding its proper operation. The legislative provisions under which the contested regulatory provisions were adopted have the objective of preventing the adverse effects that the excessive use of certain biocidal products would cause to public health and the environment. While that objective is not in contradiction with the objectives of the EU regulation cited, the prohibitions which those legislative provisions lay down have an effect on the placing on the market of biocidal products, which the regulation is intended to harmonise at EU level, without reference to the adoption of implementing measures by the Member States and without such measures being rendered necessary in order for that regulation to be fully effective. The decision on the plea which alleges that the contested decrees were adopted pursuant to legislative provisions adopted in breach of Regulation (EU) No 528/2012 of the European Parliament and Council of 22 May 2012 depends on the answer to the question of whether that regulation precludes the national legislature from adopting, in the interests of public health and the environment, measures which restrict commercial practices and advertising such as those laid down in Articles L. 522-18 and L. 522-5-3 of the Environmental Code.

13. That question is decisive to the resolution of the dispute before the Conseil d'Etat and presents serious difficulty. Consequently, it is necessary to make a reference to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union and, until the Court of Justice gives its ruling, to stay the proceedings relating to the applications lodged by the Comité interprofessionnel des huiles essentielles françaises and Florame and the other applicant companies. **[Or. 8]**

HEREBY ORDERS:

[...] that proceedings are stayed in relation to applications nos 433889 and 433890 until the Court of Justice of the European Union has given its ruling on the following question: Does the regulation of 22 May 2012 concerning the making available on the market and use of biocidal products 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?

[...] **[Or. 9]**

[...]