Case C-830/21

Request for a preliminary ruling

Date lodged:

23 December 2021

Referring court:

Hanseatisches Oberlandesgericht Hamburg (Germany)

Date of the decision to refer:

9 December 2021

Applicant, respondent and appellant:

Syngenta Agro GmbH

Defendant, appellant and respondent:

Agro Trade Handelsgesellschaft mbH

Hanseatisches Oberlandesgericht (Hanseatic Higher Regional Court)

[…]

Order

In the matter of

Syngenta Agro GmbH, […] Maintal

- applicant, respondent and appellant -

[…] v

Agro Trade Handelsgesellschaft mbH, […]

[…] Lauschied

- defendant, appellant and respondent -

[…] the Hanseatic Higher Regional Court (3rd Civil Chamber) […] [composition of the court] ordered as follows on 9 December 2021:

I. The proceedings are stayed.

II. The following questions on the interpretation of Article 1 of Commission Regulation (EU) No [54]7/2011 of 8 June 2011 implementing as regards labelling requirements for plant protection products Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, read in combination with paragraph 1(b) and (f) of Annex I thereto, are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Is Article 1 of Regulation (EU) No [54]7/2011, read in combination with paragraph 1(b) of Annex I thereto, to be interpreted as meaning that, in the case of a parallel import of a plant protection product, the name and address of the holder of the authorisation in the Member State of origin from which the plant protection product was imported must be stated on the packaging when it is distributed in another Member State?

2. Is Article 1 of Regulation (EU) No [54]7/2011, read in combination with paragraph 1(f) of Annex I thereto, to be interpreted as meaning that, in the case of a parallel import of a plant protection product, the batch number initially allocated by the manufacturer must be indicated on the packaging, or is it compatible with that provision for the parallel importer to remove the original batch number and to affix its own identification number to the packaging, provided it keeps records showing the correlation between the batch numbers used by it and the batch numbers used by the holder of the authorisation of the plant protection product imported in parallel?

Reasons:

A.

The applicant is the German distribution company of the Syngenta Group, which manufactures and distributes plant protection and other products in the Federal Republic of Germany and other EU Member States. The defendant, a trading company in the agricultural sector, distributes plant protection and other products, including plant protection products imported in parallel. The imported products include the applicant's plant protection products, which it distributes in the Federal Republic of Germany in the applicant's original, unopened, canisters, on which it replaces the original label with its own self-adhesive label. That label includes information on the defendant, as the importer and distributor, but not on the holder of the authorisation of the plant protection product in the Member State of origin. It also replaces the manufacturer's original batch number with its own identification number and keeps a register showing the correlation between the identification number allocated by it and the original batch number.

The applicant argues that this infringes Article 1 of Regulation (EU) No [54]7/2011, read in combination with paragraphs 1(b) and (f) of Annex I thereto.

It claims, in so far as this is still relevant to the appeal proceedings and preliminary ruling proceedings, that the court should order the defendant, on pain of punitive administrative measures to compel specific conduct ('Ordnungsmittel'), to desist from:

> 1. (…)
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> c) placing a plant protection product on the market in the Federal Republic of Germany in its original packaging, under the name 'ABAREX PRO', 'AGRO TRIO' and/or 'REXTOP', as a parallel import of a plant protection product authorised in Germany by Syngenta Agro GmbH, either in the course of its own business or through third parties, i.e. from holding it ready for sale, offering it for sale, keeping it for sale or otherwise supplying it, where the information on the name and address of the authorisation holder printed on the original packaging has been removed, as in the case of the packaging shown in Annex K6;
>
> and/or
>
> d) placing a plant protection product on the market in the Federal Republic of Germany in its original packaging, under the name 'ABAREX PRO', 'AGRO TRIO' and/or 'REXTOP', as a parallel import of a plant protection product authorised in Germany by Syngenta Agro GmbH, either in the course of its own business or through third parties, i.e. from holding it ready for sale, offering it for sale, keeping it for sale or otherwise supplying it, where the batch number printed on the original packaging has been removed and replaced by some other identification number, as in the case of the packaging shown in Annex K6;
>
> (…)

In addition, it is also seeking, by heads of claim 2, 3 and 4, that the court also order the defendant to provide it with information, pay damages and reimburse the costs of pre-litigation proceedings.

The Landgericht (Regional Court) found against the defendant in respect of head of claim 1(c) and the related follow-on heads of claim and dismissed the action in respect of head of claim 1(d) and the related follow-on claims.

On head of claim 1(c), the Regional Court held that the requirements of Annex I to Regulation (EU) No 547/2011 have to be defined by reference to Article 3(10) of Regulation (EC) No 1107/2009 of the European Parliament and of the Council as regards labelling requirements for plant protection products; that Article 3(24) of Regulation (EC) No 1107/2009 defines 'authorisation holder' as 'any natural or legal person holding an authorisation of a plant protection product'; that Article 3(10) of Regulation (EU) No 1107/2009 defines 'authorisation of a plant protection product' as 'an administrative act by which the competent authority of a Member State authorises the placing on the market of a plant protection product

in its territory'; that, consequently, the authorisation holder is the person who obtained the first authorisation of a plant protection product in a Member State; that the same term ('authorisation') is used in Article [2]8 of Regulation (EC) No 1107/2009, whereas, as regards the parallel trade, Article 52(1) of Regulation (EC) No 1107/2009 refers to the need for a 'parallel trade permit' for 'a plant protection product that is authorised in one Member State (Member State of origin)'; that it follows from the use of these terms in Regulation (EC) No 1107/2009 that 'the name and address of the holder of the authorisation and the authorisation number of the plant protection product' in paragraph 1(b) of Annex I to Article 1 of Regulation (EU) No 547/2011 mean the name and address of the authorisation holder in the Member State of origin, as the term 'permit' is used in connection with the parallel trade; and that distribution of the plant protection product imported in parallel without providing information on the authorisation holder in the Member State of origin infringes paragraph 1(b) of Annex I to Article 1 of Regulation (EU) No 547/2011.

On head of claim 1(d), the Regional Court held that the term 'batch number' in paragraph 1(f) of Annex I to Article 1 of Regulation (EU) No 547/2011 is defined neither in that regulation nor in Regulation (EC) No 1107/2009; that, in contrast to the name and address of the holder of the authorisation of the plant protection product, the wording of Annex I to Article 1 of Regulation (EU) No 547/2011 does not preclude the defendant's interpretation that it may also mean the parallel importer's own batch number; that an interpretation of paragraph 1(f) of Annex I to Regulation No 547/2011 in the light of the free movement of goods suggests that changing the batch number is permissible, as it may be necessary in order to prevent or stop foreclosure measures; and the fact that the applicant does not appear to have taken foreclosure measures in the present case has no bearing on the interpretation of Regulation (EU) No 547/2011 and Regulation (EC) No 1107/2009.

Both parties lodged an appeal against that judgement.

B.

The success of those appeals depends upon the interpretation of Article 1 of Regulation (EU) No 547/2011, read in combination with paragraphs 1(b) and (f) of Annex I thereto. Before judgment can be given, it is therefore necessary to stay the proceedings and to request a preliminary ruling by the Court of Justice of the European Union pursuant to point (b) of the first paragraph and the third paragraph of Article 267 TFEU.

The applicant might have the claims at issue pursuant to Paragraph 8(1), Paragraph 9, first sentence, Paragraph 3(1) and Paragraph 3a of the Gesetz gegen den unlauteren Wettbewerb (Law on Unfair Competition, 'the UWG'), read in combination with the requirements of Article 1 of Regulation (EU) No 547/2011, read in combination with paragraphs 1(b) and (f) of Annex I thereto.

I.

The general requirements for claims under competition law are fulfilled. The parties are competitors within the meaning of Paragraph 2(1), point 3, of the UWG. Article 1 of Regulation (EU) No 547/2011 regulates market conduct within the meaning of Paragraph 3a of the UWG, breach of which is likely to appreciably harm competition to the detriment of competitors and consumers within the meaning of Paragraph 3a of the UWG. The product at issue is, moreover, a plant protection product within the meaning of Article 1 of Regulation (EU) No 547/2011, read in combination with Article 2(1) of Regulation (EC) No 1107/2009.

II.

If, as a parallel importer, the defendant was required under Article 1 of Regulation (EU) No 547/2011, read in combination with paragraph 1(b) of Annex I thereto, to also name the holder of the authorisation of the plant protection product imported from the Member State of origin for the purpose of distribution in the Federal Republic of Germany, then it is in breach of that requirement (Question 1).

1. Paragraph 1 of Annex I to Regulation (EU) No 547/2011 requires certain information to be 'included clearly and indelibly on the packaging of plant protection products'. According to point (b), that includes 'the name and address of the holder of the authorisation and the authorisation number of the plant protection product'. Article 33(1) of Regulation (EC) No 1107/2009 requires an application for authorisation of a plant protection product to be made 'to each Member State where the plant protection product is intended to be placed on the market', although the authorisation initially extends only to the Member State in which that product is to be placed on the market. Article 52(1) of Regulation (EC) No 1107/2009 allows for parallel trade in a plant protection product in another Member State, where the Member State in which the parallel import is to take place determines that the plant protection product is identical in composition to a plant protection product already authorised in its territory (reference product). Article 52(5) of Regulation (EC) No 1107/2009 stipulates that that product may be placed on the market and used only in accordance with the provisions of the authorisation of the reference product.

2. The applicant claims that the labelling requirements laid down in Regulation No 547/2011 also apply without restriction to parallel importers which, based on the clear and unambiguous wording of paragraph 1(b) of Annex I to Regulation (EU) No 547/2011, must provide information on the packaging on the holder of the authorisation in the Member State of origin. In that regard, the applicant concurs with the view taken by the Regional Court in the judgment at first instance.

3. The defendant contends that Regulation No 547/2011 does not lay down a clear rule in that regard; that it must be borne in mind that the imported product

has not been separately authorised in the Member State of importation and therefore there is no holder of an authorisation of the product within the meaning of the regulation; that the product simply depends upon a reference product which, for its part, is authorised in the Member State of importation, but whose authorisation holder does not necessarily have to be identical to the authorisation holder in the Member State of origin; that naming the authorisation holder in the Member State of origin would give the agricultural trade and users the false impression that the indications and rules of use for the imported product on which the authorisation in the Member State of origin is based apply in the Member State of importation, which is contrary to the rule laid down in Article 52(5) of Regulation (EC) No 1107/2009; that, as the authorised conditions differ between the Member State of origin and the Member State of importation, there is a risk that the agricultural trade and users will unlawfully distribute the product and use it for applications not authorised in Germany or not authorised with the same application rate; and that the erroneous impression would be created that the authorisation holder in the Member State of origin is also the undertaking responsible for placing the product on the market in the Member State of importation.

It further contends that, based on the spirit and purpose of that provision, the only relevant factor is who placed the plant protection product on the market in the Member State concerned; that this is also consistent with the labelling rules on ‘suppliers’ adopted in the law on chemicals (see Article 17(1) of Regulation (EC) No 1272/2008, read in combination with Article 2(26) thereof); that, in the case of the parallel trade, this is the parallel trader alone, not the holder of the authorisation of the product in the Member State of origin; and that it is therefore not contrary to EU law to provide the name and address of the parallel trader on the label in lieu of an authorisation holder.

The defendant in the main proceedings further argues that the country from which the product is being traded in parallel to Germany can be deduced from the information on the original authorisation holder and its address; that, in its opinion, this would encourage a large number of agricultural undertakings to import the product privately without any German labelling, by purchasing it directly in the other Member State, which might potentially have negative effects on human and animal health and on the environment, for example as a result of probable infringements of Article 52(5) of Regulation (EC) No 1107/2009.

III.

If, as a parallel importer, the defendant was required under Article 1 of Regulation (EU) No 547/2011, read in combination with paragraph 1(f) of Annex I thereto, to leave the original batch number unchanged on the canisters, then it is in breach of that requirement That depends upon whether the defendant was entitled to remove the original batch number, replace it with its own identification number and keep a register showing the correlation between the identification numbers allocated by it and the original batch numbers (Question 2).

1. According to Article 1 of Regulation (EU) No 547/2011, read in combination with paragraph 1(f) of Annex I thereto, the 'formulation batch number' is one of the items of information that must be included 'clearly and indelibly' on the packaging of plant protection products. Paragraph 49(4) of the Pflanzenschutzgesetz (Law on the Protection of Cultivated Plants, 'the PflSchG') lays down the following rule for the parallel trade in plant protection products: 'Permit holders which do not use the batch number of the holder of the authorisation for the plant protection product imported in parallel for the label referred to in Paragraph 47(1) must keep records, to be retained for at least 5 years, showing the correlation between the batch number which they use and the batch numbers of the holder of the authorisation of the plant protection product imported in parallel.'

Thus, this provision of national law presupposes that there are cases in which parallel importers are allowed to replace the original batch number with their own identification number. In light of the primacy of EU law, that provision could not allow the original batch number to be replaced if parallel importers are required under Article 1 of Regulation (EU) No 547/2011, read in combination with paragraph 1(f) of Annex I thereto, to leave the initial batch number on the packaging unchanged.

2. The applicant argues that the very wording of paragraph 1(f) of Annex I to Regulation (EU) No 547/2011 suggests that the original batch number must be left on the packaging unchanged; that this can be inferred both from the definition of 'batch', which is determined by the production of the plant protection product, and from the definition of 'formulation', which must necessarily be attributed to the authorisation holder; and that this is corroborated, moreover, by the need to include the batch number 'indelibly'.

It argues that the general labelling requirements laid down in this provision also apply directly to parallel importers, and that the provision of Paragraph 49(4) of the PflSchG is disapplied in the event of conflict with Regulation (EU) No 547/2011, which takes priority under EU law.

It claims that the information on the authorisation holder and the batch number serve to protect users and the environment so that, in the event of an emergency, the authorisation holder can identify application mistakes or defective batches as quickly as possible, and that the authorisation holder alone has the product expertise needed to provide information to avert danger under such circumstances.

It considers that this understanding is also in keeping with the Commission Guidance document concerning the parallel trade of plant protection products adduced as Annex K12, which lays down different rules for repackaging only (and not for relabelling as in this case).

3. In that regard, the defendant concurs with the Regional Court and contends that the wording of paragraph 1(f) of Annex I to Regulation (EU) No 547/2011

does not contain clear and precise requirements in terms of the batch number. It argues that, on the contrary, it is not clear from the wording whether 'batch number' refers solely to the batch number originally assigned by the manufacturer or, moreover, what is meant by the term 'formulation', which simply means a mixture consisting of an active substance and excipients; that the batches of any such formulation are also clearly identifiable from the way in which they are handled by the defendant; that, Paragraph 49 of the PflSchG does not infringe EU law in that respect; and

that it is not necessary to leave the batch number in case of emergency, as the first aid measures needed in an emergency are listed on the label affixed by the defendant and, moreover, the parallel trader can be contacted for information. It also notes that the safety data sheet for each plant protection product is kept by and can be retrieved from the person placing the chemical on the market at any time; that, in addition, an obligation to stipulate the original batch number would give rise to the risk of market foreclosure, as it would be possible to identify the Member State in which the imported product had been sold to the defendant; and that, if it is not removed, there is a risk of exposing the applicant's customer and defendant's supplier in that country to reprisals on the part of the Syngenta group, which might even refuse to do business with it.

IV.

It would appear that the national courts of the Federal Republic of Germany have yet to establish any case-law on the questions of interpretation raised in the present case.

There is doubt as to the interpretation to be given to paragraph 1(b) and (f) of Annex I to Regulation (EU) No 547/2011, as it does not include any separate rules for the specific case of labelling of plant protection products imported in parallel. Whereas the wording of the above provisions, as interpreted by the applicant, might suggest that the label on imported products should include information on both the authorisation holder in the Member State of origin and the original batch number, the spirit and purpose of the legislation might also support a broader interpretation for the parallel trade, as argued by the defendant. In light of that, it would appear necessary to obtain a preliminary ruling from the Court of Justice of the European Union pursuant to point (b) of the first paragraph and the third paragraph of Article 267 TFEU.

[…] [Names of the judges involved in the deliberations]