

Case C-296/23

Request for a preliminary ruling

Date lodged:

10 May 2023

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

20 April 2023

Appellant on a point of law:

Zentrale zur Bekämpfung unlauteren Wettbewerbs e. V.

Respondent in the appeal on a point of law:

dm-drogerie markt GmbH + Co. KG

BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE, GERMANY)

ORDER

[...]

In the case of

Zentrale zur Bekämpfung unlauteren Wettbewerbs e. V., [...] Bad Homburg,

applicant and appellant on a point of law,

[...]

v

dm-drogerie markt GmbH + Co. KG, [...] Karlsruhe,

defendant and respondent in the appeal on a point of law,

[...]

Further to the hearing held on 23 February 2023 [...], the First Civil Chamber of the Federal Court of Justice

made the following order:

- I. The proceedings are stayed.
- II. The following question on the interpretation of the second sentence of Article 72(3) 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) is referred to the Court of Justice of the European Union for a preliminary ruling:

Is a ‘similar indication’ within the meaning of the second sentence of Article 72(3) of Regulation (EU) No 528/2012 only such an indication contained in an advertisement which, in the same manner as the terms expressly listed in that provision, downplays properties of the biocide as regards the risks from the product to human health, animal health or the environment or its efficacy by means of a blanket statement, or does a ‘similar indication’ include all terms which, in respect of the risks from the product to human health, animal health or the environment or its efficacy, downplay the risks in a manner comparable to the terms expressly listed but are not necessarily also general in nature like those terms?

Grounds:

- 1 The applicant is the Zentrale zur Bekämpfung unlauteren Wettbewerbs e. V. (Association for Protection against Unfair Competition; ‘the ZBUW’). The defendant is a drugstore chain operating nationwide.
- 2 The defendant offered for sale a disinfectant with the name ‘BioLYTHE’ in the packaging depicted below in its branches and – using an image of the product including the label and with further textual information including a ‘product description’ – on the internet. The product contains sodium hypochlorite (NaClO) in a concentration of 0.049% by weight. Sodium hypochlorite is an oxidising agent that breaks down or releases oxygen which affects the cell membranes of bacteria, viruses and fungi to the extent that they can no longer withstand the osmotic pressure.



- 3 The label shown in the following images, sections of which have been enlarged, contains, under the name of the product, the statement – which is also contained in the product description on the defendant’s website – ‘Ecological Universal Broad-Spectrum Disinfectant’ and, under the words ‘Skin, hand and surface disinfection’ and ‘Effective against SARS-Corona’ the indications ‘Skin friendly • Organic • Alcohol-free’.

BIO LYTHE
Ökologisches Universal-Breitband
Desinfektionsmittel
Fertigkonzentrat

Merkmale
• hochwirksam gegen 99,99% aller bekannten Bakterien, Viren, Pilze und Keime • vernichtet auch Viren (behüllt und unbehüllt) und Bakterien, die gegen andere Verfahren resistent sind
• pH-neutral • keine Resistenzbildung • neutralisiert Gerüche aller Art • ohne Aldehyde, Farb- oder Duftstoffe

Zusammensetzung kg/g
995 g demineralisiertes Wasser H₂O, 4,5 g NaCl elektrochemisch aktiviertes Salz, 0,49 g Natriumhypochlorit Na⁺OCl⁻, 0,008 g O₂ Sauerstoff, 0,004 g O₃ Ozon

aut-, Hände- und Oberflächendesinfektion
Wirksam gegen SARS-Corona
Hautfreundlich • Bio • ohne Alkohol
Made in Germany

- 4 The applicant considers that the advertising is unfair because, by such an advertisement, the defendant infringes the rules on market behaviour laid down in Regulation (EU) No 528/2012 concerning the making available on the market and use of biocidal products (Biocides Regulation). Following an unsuccessful warning letter, it requested that the court should:

order the defendant, on pain of punitive administrative measures to compel specific conduct, to refrain from designating or marketing, in the course of trade, disinfectants, in particular ‘BioLYTHE’, as an ‘ecological universal broad-spectrum disinfectant’ and/or ‘skin friendly’ and/or ‘organic’ in advertisements (including on the internet) or on the product label (in each case itself or through third parties).

- 5 It also requested the payment of a lump sum by way of reimbursement of the costs associated with the warning letter plus interest.
- 6 The Landgericht (Regional Court) upheld the action (LG Karlsruhe, judgment of 25 March 2021 – 14 O 61/20 *KfH*, juris). On appeal by the defendant, the appeal court, dismissing the further appeal, partially amended the judgment at first instance in so far as it dismissed the action for a cease and desist order with regard to the advertising claim ‘skin friendly’ (OLG Karlsruhe, GRUR 2022, 1620). By its appeal on a point of law, which was allowed by the appeal court to the extent of the partial dismissal of the action and which the defendant seeks to have

dismissed, the applicant continues to pursue its action for a cease and desist order with regard to the advertising claim ‘skin friendly’.

- 7 II. The success of the admissible appeal on a point of law depends on the interpretation to be given to the concept of ‘similar indication’ within the meaning of the second sentence of Article 72(3) of Regulation (EU) No 528/2012 concerning the making available on the market and use of biocidal products (Biocides Regulation) in respect of indications which are prohibited in an advertisement for biocidal products. This question is relevant to the decision, has not yet been interpreted by the Court of Justice of the European Union and the correct interpretation of EU law is not so obvious as to leave no scope for any reasonable doubt (see judgment of the Court of Justice of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, NJW 2021, 3303 (paragraph 32 et seq.). Before a ruling can be given on the appeal on a point of law, the proceedings must therefore be stayed and a preliminary ruling obtained 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.
- 8 1. The appeal court considered – in so far as it is relevant to the appeal on a point of law – that the application for a cease and desist order with regard to the designation of the disinfectant as ‘skin friendly’ was unfounded. In that regard, it held:
- 9 The applicant is entitled to bring an action under Paragraph 8(3)(2) of the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition; ‘the UWG’). The commercial practice complained of is not deemed to be inadmissible as an unfair practice on the grounds of an infringement of the first sentence of the first subparagraph of Article 69(2) of the Biocides Regulation since the defendant is not an addressee of that provision. Nor has the defendant infringed Article 72(3) of the Biocides Regulation by the disputed use of the designation ‘skin friendly’ for a disinfectant. The indication ‘skin friendly’ is not a ‘similar indication’ within the meaning of the second sentence of Article 72(3) of the Biocides Regulation, nor is it misleading within the meaning of the first sentence of Article 72(3) of the Biocides Regulation.
- 10 2. The applicant has standing to bring proceedings under Paragraph 8(3)(2) of the UWG in the version applicable until 30 November 2021 (see Paragraph 15a(1) of the UWG). The appeal court did not err in law in assuming that an infringement by the defendant of the first sentence of the first subparagraph of Article 69(2) of the Biocides Regulation is ruled out since the defendant is not an addressee of that provision, which is directed at authorisation holders within the meaning of Article 3(1)(p) of the Biocides Regulation. The applicant does not claim that the defendant falls within that scope.
- 11 3. The infringement of the second sentence of Article 72(3) of the Biocides Regulation asserted by the applicant constitutes a commercial practice which is unfair under Paragraph 3a of the UWG and inadmissible under Paragraph 3(1) of

the UWG, which may justify an order to cease and desist being obtained under the first sentence of Paragraph 8(1) of the UWG due to the risk of recurrence in the present case.

- 12 (a) Under the second sentence of Article 72(3) of the Biocides Regulation the advertising of a biocidal product must not in any case mention ‘low-risk biocidal product’, ‘non-toxic’, ‘harmless’, ‘natural’, ‘environmentally friendly’, ‘animal friendly’ or any similar indication.
- 13 (b) The second sentence of Article 72(3) of the Biocides Regulation is a rule designed to regulate market behaviour within the meaning of Paragraph 3a of the UWG. That provision is also intended to regulate the market behaviour of operators in the interests of consumers. In accordance with Article 1(1) thereof, the purpose of the Biocides 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 the 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 (second sentence of Article 1(1) of the Biocides Regulation). The second sentence of Article 72(3) of the Biocides Regulation contains rules on the advertising of biocidal products that are intended to prevent the risks from the product to human health, animal health or the environment or its efficacy being downplayed [...] [literature reference]. The second sentence of Article 72(3) of the Biocides Regulation thus also serves to protect the health of consumers.
- 14 (c) An infringement of the second sentence of Article 72(3) of the Biocides Regulation is likely to have a noticeable adverse effect on the interests of consumers within the meaning of Paragraph 3a of the UWG. According to the case-law of the Federal Court of Justice, infringements of rules on market behaviour aimed at protecting the health of consumers are in themselves likely to have a noticeable adverse effect on the interests of consumers within the meaning of Paragraph 3a of the UWG (see Federal Court of Justice (‘BGH’), decision of 24 March 2016 – I ZR 243/14, GRUR 2016, 833 (paragraph 11) = WRP 2016, 858 – *Organic Spices I*, with further references). The second sentence of Article 72(3) of the Biocides Regulation is such a rule on market behaviour which (also) serves to protect the health of consumers.
- 15 (d) The prosecution of an infringement of the second sentence of Article 72(3) of the Biocides Regulation as an unfair commercial practice is not precluded by the fact that Directive 2005/29/EC concerning unfair commercial practices fully harmonises the provisions of the Member States concerning unfair commercial practices by undertakings towards consumers (Article 3(1), Article 4 of Directive 2005/29/EC). According to Article 3(3) of that directive, it is without prejudice to EU or national rules relating to the health and safety aspects of products. The second sentence of Article 72(3) of the Biocides Regulation constitutes such a rule.

- 16 4. The appeal court rightly assumed, like the parties, that the disinfectants covered by the application were biocidal products within the meaning of Article 3(1)(a) of the Biocides Regulation, thus a substance or mixture with the intention of exerting a controlling effect on any harmful organism by any means other than mere physical or mechanical action. The contested indications also form part of the advertising regulated by Article 72 of the Biocides Regulation (see the legal definition of ‘advertisement’ in Article 3(1)(y) of the Biocides Regulation).
- 17 5. Furthermore, the appeal court correctly assumed, without being challenged on a point of law in the appeal on a point of law, that misleading information is not decisive for an infringement of the second sentence of Article 72(3) of the Biocides Regulation also with regard to the alternative ‘similar indication’.
- 18 (a) Article 72(3) of the Biocides Regulation transposes *mutatis mutandis* to advertising the requirements of the first sentence of the first subparagraph of Article 69(2) of the Biocides Regulation, also contained in the section ‘Information about biocidal products’, regarding labelling by the authorisation holder. Under the first sentence of the first subparagraph of Article 69(2) of the Biocides Regulation, authorisation holders are to 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. Article 72(3) of the Biocides Regulation contains comparable rules in respect of advertising and stipulates in the first sentence that advertisements for biocidal products must 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. Under the second sentence of Article 72(3) of the Biocides Regulation, which is at issue here, the advertising of a biocidal product must not mention ‘low-risk biocidal product’, ‘non-toxic’, ‘harmless’, ‘natural’, ‘environmentally friendly’, ‘animal friendly’ or any similar indication.
- 19 (b) Thus, both rules prohibit, first of all, a misleading representation on the label (first case in the first sentence of the first subparagraph of Article 69(2) of the Biocides Regulation) or in advertising (first sentence of Article 72(3) of the Biocides Regulation). In addition, both rules prohibit the indications which are listed in detail as well as ‘similar indications’ (in respect of labelling, second case in the first sentence of the first subparagraph of Article 69(2) of the Biocides Regulation; in respect of advertising, second sentence of Article 72(3) of the Biocides Regulation). That unconditional prohibition – ‘in any case, do not’ or ‘in any case ... shall not’ – of certain indications exists irrespective of whether they are misleading in accordance with the first case in the first sentence of the first subparagraph of Article 69(2) or the first sentence of Article 72(3) of the Biocides Regulation. In respect of the alternative ‘similar indications’ in both rules, which extends the unconditional prohibition to information which must be regarded as ‘similar indications’ in relation to the examples which precede it, no particular treatment applies.

- 20 6. The application for a cease and desist order regarding the designation of the disinfectant as ‘skin friendly’ is well founded only if that indication falls under the prohibition laid down in the second sentence of Article 72(3) of the Biocides Regulation as a ‘similar indication’. The outcome of the appeal on a point of law therefore depends on what is to be understood by ‘similar indication’.
- 21 (a) The appeal court took the view that ‘similar indications’ included not only indications which were identical in content to the indications listed individually in the provision. It held that the concept is intended to cover, in particular, indications which may be different in content, the indicative content of which is similar (only) in such a manner that, starting from the protective purpose of the prohibition, they are equivalent in terms of value in that their meaning shares the characteristic features which form the basis of the condemnation in the regulation in respect of the concepts expressly mentioned. The concepts listed in the regulation share the common feature of downplaying the properties of the biocide in respect of the risks from the product to human health, animal health or the environment or its efficacy by means of a blanket statement. Accordingly, indications as to the characteristics of the biocide in respect of the risks from the product to human health, animal health or the environment or its efficacy, which, by means of a blanket statement to downplay the risks, are equivalent to the indications listed as examples, are covered by the prohibition on the ground that they are ‘similar’. In order to establish that the content of the indication which characterises the prohibition is general in nature, it is not sufficient that the indication at issue can be linked to one of the indications listed as examples in such a manner that the latter term forms the generic term.
- 22 Accordingly, the indication ‘skin friendly’ does not fall within the scope of the second sentence of Article 72(3) of the Biocides Regulation as a ‘similar indication’, irrespective of whether the public expects a (direct) positive effect, merely that it is harmless or only a reduction in the potential for risk to the skin. The indication ‘skin friendly’ does not qualify the level of risk from the product or its effects and their potential to cause harm in a general manner (such as ‘low-risk biocidal product’, ‘harmless’, ‘non-toxic’) or at least specifically with regard to one of the subjects of protection (human health or animal health or the environment). Rather, it describes – albeit in very general terms – the effect of the product on a specific organ, namely human skin.
- 23 The Chamber considers this view to be correct.
- 24 (b) The question of what is to be understood by ‘similar indications’ cannot be answered solely on the basis of the wording of the second sentence of Article 72(3) of the Biocides Regulation. However, the Chamber is of the opinion that the appeal court correctly assumed that the concept concerns not only indications that are synonymous with the prohibited terms that are specifically cited. This is supported by the fact that the term ‘similar’ covers not only indications which are identical in content; on the contrary a mere ‘similarity’ with the indications specifically cited is sufficient.

- 25 (c) The purpose of the second sentence of Article 72(3) of the Biocides Regulation and how it fits in with the first sentence of Article 72(3) of the Biocides Regulation support the position taken by the appeal court.
- 26 (aa) It is apparent from recitals 1 and 3 of the Biocides Regulation that the EU legislature sought to strike a specific balance between the free movement of biocidal products and a high level of protection of both human and animal health and the environment. It follows from a literal interpretation of Article 72 of the Biocides Regulation, 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 (judgment of the Court of Justice of 19 January 2023, *CIHEF and Others*, C-147/21, GRUR 2023, 354 (paragraph 64 et seq.)).
- 27 (bb) In Article 72(3) of the Biocides Regulation, in addition to the prohibition of misleading statements in the first sentence, in the second sentence the EU legislature declared (only) individual indications to be inadmissible in any case. The Chamber therefore takes the view that the appeal court was correct in assuming that the regulation does not seek to prevent indications per se – regardless of their veracity which is to be assessed in the light of the prohibition of misleading information – which concern the presence and, as the case may be, the extent or absence of certain hazards, effects of the product on human or animal health or the environment or its efficacy. The rule in the second sentence of Article 72(3) of the Biocides Regulation also does not indicate that it is intended to exclude all, thus also substantiated specific information relating to the absence of risks or low risks, or even to the beneficial effects of the product in certain respects, from the permitted – in particular non-misleading – indications. Like the appeal court, the Chamber proceeds from the premiss that this supports an interpretation of the concept of ‘similar indications’ to the effect that all of the properties common to the terms given as examples in the list are relevant, thus not only their content which downplays the risks, but also their general nature.
- 28 (cc) In view of the comprehensive prohibition of misleading statements in the first sentence of Article 72(3) of the Biocides Regulation, which serves to protect health, such an interpretation is supported by the purpose of the Biocides Regulation, which is to strike a specific balance between the free movement of biocidal products – including their advertising – and a high level of protection of both human and animal health and the environment. With that purpose in mind, account should also be taken of the fact that blanket statements regularly have no or at best little informative value for consumers; however specific information may provide consumers with valuable and useful information. In the Chamber’s view, such an interest in informing consumers must be included in the balance sought by the Biocides Regulation between the free movement of biocidal products and a high level of protection of health and the environment.

- 29 (dd) That interpretation does not, in the Chamber’s opinion, result in the level of risk from biocidal products being downplayed, a less critical use of the product as a result and, in turn, a risk to human health, animal health or the environment.
- 30 (1) It is precisely because the information which, in the Chamber’s view, does not fall under ‘similar indications’, does not play down the risks from the biocidal product by means of a blanket statement, but relates (only) to specific aspects of the product and therefore does not negate potential harmful side effects, that there is no danger that, when faced with indications of that kind, the public will lose sight of the fundamental hazards of the biocidal product.
- 31 (2) According to the understanding of the public, as noted by the appeal court, the public distinguishes between the efficacy of a disinfectant in general and the individual effects of that product. The public infers from the attribute ‘skin friendly’ in connection with a disinfectant whose effect is intended to be directed against the integrity of certain organisms and which has not traditionally been used because its ingredients have a direct beneficial effect on health only a qualification of the harmful side effects. There is therefore also no risk that consumers will be less discerning in their use of a biocide because they are confronted with a specific (non-misleading) indication relating to the product.
- 32 That understanding of the public is supported by the labelling requirement laid down in the first sentence of Article 72(1) of the Biocides Regulation, according to which any advertisement for biocidal products must include the sentences
- ‘Use biocides safely. Always read the label and product information before use’.
- 33 In accordance with the second sentence of Article 72(1) of the Biocides Regulation, those sentences must be clearly distinguishable and legible in relation to the whole advertisement. The public is therefore, in any event, clearly made aware of the hazardous nature of the biocidal product.
- 34 (3) The interpretation of the second sentence of Article 72(3) of the Biocides Regulation advocated in the present case is further supported by the fact that the indications mentioned therein are subject to a total prohibition which is independent of the risk of misleading consumers. That partial total prohibition is accompanied by the prohibition of misleading statements laid down in the first sentence of Article 72(3) of the Biocides Regulation, in accordance with which advertisements for a biocidal product must not refer to it 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. From an overall perspective, the regulation of advertisements for biocidal products in Article 72(3) of the Biocides Regulation therefore also counteracts the danger, in the interpretation of the alternative ‘similar indications’ in the second sentence of Article 72(3) of the Biocides Regulation advocated by the Chamber, that the sale of biocidal products is promoted with advertising texts which push the inherent harmful nature of the

products into the background and focus only on the individual characteristics of the product.

- 35 7. The interpretation of the second sentence of Article 72(3) of the Biocides Regulation is material to the decision. The applicant cannot base its application for a cease and desist order, on the ground that the disinfectant is advertised using the designation ‘skin friendly’, on an infringement of the prohibition of misleading statements in the first sentence of Article 72(3) of the Biocides Regulation.
- 36 (a) The appeal court held that the average consumer, who is reasonably well informed and reasonably observant and circumspect, will understand the designation of the disinfectant as ‘skin friendly’ as meaning that its application to the skin takes care of the skin in some manner to an unspecified extent without necessarily avoiding all skin damage. In particular, the consumer does not infer from that designation that the product ingredients have a direct (beneficial) effect on skin health. In the absence of further details, the consumer will understand the word ‘friendly’ to mean only that the product takes into account the health or wellness of his skin, for example – relatively – more so than may be the case with functionally equivalent products. With regard to the indication for a disinfectant specifically, the public will infer from the attribute ‘skin friendly’ only a qualification of the harmful side effects. The applicant, who has the burden of proof in this respect, did not show that the actual circumstances deviated from that understanding of the public. Such an assessment is not vitiated by any error of law.
- 37 (b) The determination of public perception is subject only to a limited judicial review to determine whether the appeal court has exhausted the facts without committing a procedural error and whether the assessment is consistent with the rules of logic and general experience. Since this is not a finding of fact in the strict sense, but the application of specific empirical knowledge, an error of law may also consist in the fact that the established public perception is contrary to experience (BGH, judgment of 11 February 2021 – I ZR 126/19, GRUR 2021,746 (paragraph 43) WRP 2021,604 – *Dr. Z.*).
- 38 (c) The appeal court did not commit such errors of law. In particular, it rightly held that, in order to determine the content of the advertising message, it is the understanding of the recipient of the advertising, who is reasonably well informed and reasonably observant and circumspect, which is decisive (see BGH, judgment of 5 November 2020 – I ZR 204/19, GRUR 2021, 513 (paragraph 11) = WRP 2021, 327 – *Sinupret*). There is also nothing to show that the appeal court failed to meet the particularly strict requirements as regards the accuracy, precision and clarity of the advertising claim in the case of health-related advertising (see, in this regard, BGH, judgment of 6 February 2013 – I ZR 62/11, GRUR 2013, 649 (paragraph 15) = WRP 2013, 772 – *Basal insulin with weight advantage*, with further references). In particular, it carried out an overall

assessment in which it took into account the nature and importance of the product offered.

- 39 In so far as the appeal on a point of law, referring to the decision of the regional court, takes the view that the consumer concludes from the designation ‘skin friendly’ that the product has skin caring properties, or at least that it is a harmless product, and therefore it is misleading information which could result in a risk to health, it is merely attempting to substitute its own assessment for that of the court adjudicating on the substance, without demonstrating an error of law. Moreover, the appeal rightly pointed out that there would not be a case of misleading information if the indication ‘skin friendly’ were to be understood as meaning that the use of the disinfectant would not pose a risk to skin health. The applicant has not put forward any circumstances in which that finding is contrary to the reality in respect of the advertised product.

[...]

WORKING DOCUMENT