JUDGMENT OF THE COURT (Third Chamber)

1 March 2012 (*)

(Placing on the market of biocidal products – Directive 98/8/EC – Article 2(1)(a) – Concept of 'biocidal products'– Product causing flocculation of harmful organisms without destroying or deterring them or rendering them harmless)

In Case C-420/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Landgericht Hamburg (Germany), made by decision of 3 August 2010, received at the Court on 23 August 2010, in the proceedings

Söll GmbH

v

Tetra GmbH,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, G. Arestis, T. von Danwitz and D. Šváby (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 22 June 2011,

after considering the observations submitted on behalf of:

– Söll GmbH, by P. Süss and R. Schlötter, Rechtsanwälte,

– Tetra GmbH, by K. Albers, Rechtsanwalt,

– the Belgian Government, by T. Materne and M. Jacobs, acting as Agents,

– the European Commission, by G. Wilms and E. Manhaeve, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 October 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 2(1)(a) of 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).

2 The reference has been made in proceedings between Söll GmbH and Tetra GmbH concerning the marketing by the latter of the branded anti-algae product TetraPond AlgoRem, the active substance of which is aluminium chlorohydrate.

Legal context

European Union Law

Directive 98/8

3 Recital 4 in the preamble to Directive 98/8 states that:

> '… the Commission review showed differences in the regulatory situation in the Member States; … such differences may constitute barriers not only to trade in biocidal products but also to trade in products treated with them, thereby affecting the functioning of the internal market; … therefore, the Commission proposed the development of a framework of rules relating to the placing on the market for use of biocidal products, taking as a condition a high level of protection for humans, animals and the environment; …'

4 Article 2(1)(a) and (d) of that directive provides:

'For the purposes of this Directive the following definitions shall apply:

(a) *Biocidal products*

Active substances and preparations containing one or more active substances, put up in the form in which they are supplied to the user, intended to destroy, deter, render harmless, prevent the action of, or otherwise exert a controlling effect on any harmful organism by chemical or biological means.

An exhaustive list of 23 product types with an indicative set of descriptions within each type is given in Annex V;

…

(d) *Active substance*

A substance or micro-organism including a virus or a fungus having general or specific action on or against harmful organisms'.

5 Article 3(1) of Directive 98/8 is worded as follows:

'1. Member States shall prescribe that a biocidal product shall not be placed on the market and used in their territory unless it has been authorised in accordance with this Directive.'

6 Annex V to Directive 98/8, entitled ‘Biocidal product-types and their descriptions as referred to in Article 2(1)(a) of this Directive’ reads as follows:

‘These product-types exclude products where they are covered by the Directives mentioned in Article 1(2) of [Directive 98/8] for the purposes of these Directives and their subsequent modifications.

MAIN GROUP 1: Disinfectants and general biocidal products

…

Product-type 2: Private area and public health area disinfectants and other biocidal products

Products used for the disinfection of air, surfaces, materials, equipment and furniture which are not used for direct food or feed contact in private, public and industrial areas, including hospitals, as well as products used as algaecides.

Usage areas include, inter alia, swimming pools, aquariums, bathing and other waters; air-conditioning systems; walls and floors in health and other institutions; chemical toilets, waste water, hospital waste, soil or other substrates (in playgrounds).’

7 Pursuant to Article 16(2) of Directive 98/8, the Commission was required to implement a two-phase work programme for the systematic examination of all active substances of biocidal products already on the market on 14 May 2000 (‘existing active substances’).

8 The purpose of the first phase of that programme, implemented by Commission Regulation (EC) No 1896/2000 of 7 September 2000 on the first phase of the programme referred to in Article 16(2) of Directive 98/8 (OJ 2000 L 228, p. 6), was to identify existing active substances and to specify those which should be evaluated for possible inclusion in three annexes to Directive 98/8, namely Annex I, entitled ‘List of active substances with requirements agreed at Community level for inclusion in biocidal products’, Annex IA, entitled ‘List of active substances with requirements agreed at Community level for inclusion in low-risk biocidal products’, and Annex IB, entitled ‘List of basic substances with requirements agreed at Community level’. To this end, Regulation No 1896/2000 sets out the conditions pursuant to which producers, formulators, associations and Member States are to inform the Commission of their wish to have such existing active substances included in one of those annexes to Directive 98/8.

9 The second phase of that programme, implemented by Commission Regulation (EC) No 2032/2003 of 4 November 2003 on the second phase of the 10-year work programme referred to in Article 16(2) of Directive 98/8, and amending Regulation No 1896/2000 (OJ 2003 L 307, p. 1), subsequently replaced by Commission Regulation (EC) No 1451/2007 of 4 December 2007 on the second phase of the 10-year work programme referred to in Article 16(2) of Directive 98/8 (OJ 2007 L 325, p. 3), led to the inclusion, in Annex I to Regulation No 2032/2003, of the list of existing active substances requiring evaluation and to the progressive evaluation of those substances.

Regulation No 1896/2000

10 Paragraph 1 of Article 3 of Regulation No 1896/2000, entitled ‘Identification of existing active substances’, states:

‘Each producer of an existing active substance placed on the market for use in biocidal products shall identify that active substance by submitting to the Commission the information on the active substance referred to in Annex I to be received not later than 18 months after this Regulation enters into force. This requirement shall not apply to existing active substances which are no longer on the market after 13 May 2000 either as such or in biocidal products.

…’

11 Paragraph 1 of Article 4 of that regulation, entitled ‘Notification of existing active substances’, provides:

‘Producers, formulators and associations wishing to apply for the inclusion in Annex I or Annex IA to [Directive 98/8] of an existing active substance in one or more product types shall notify that active substance to the Commission by submitting the information referred to in Annex II to this Regulation to be received not later than 18 months after this Regulation enters into force.

…’

Regulation No 1451/2007

12 Paragraphs 1 and 2 of Article 3 of Regulation No 1451/2007, entitled ‘Existing active substances’, provide:

‘1. The list of active substances identified as available on the market before 14 May 2000 as active substances of biocidal products for purposes other than those referred to in Article 2(2)(c) and (d) of Directive [98/8] is set out in Annex I.

2. The exhaustive list of existing active substances to be examined under the review programme is set out in Annex II.’

13 Paragraph 1 of Article 4 of that regulation, entitled ‘Non-inclusion’, provides:

‘Without prejudice to Articles 5 and 6 of this Regulation and paragraph 2 of this Article, biocidal products containing active substances not listed in Annex II to this Regulation or in Annex I or IA to Directive [98/8] shall no longer be placed on the market.

In the case of an active substance listed in Annex II to this Regulation, the first subparagraph shall also apply to that substance in relation to any product type not listed in that Annex.’

National law

14 Directive 98/8 was transposed into German law by the Law on biocidal products (Biozidgesetz) of 20 June 2002 (BGBl. 2002 I, p. 2076), and implemented by the Law on chemical substances (Chemikaliengesetz) of 2 July 2008 (BGBl. 2008 I, p. 1146), as amended by the Law of 11 August 2010 (BGBl. 2010 I, p. 1163) (‘the ChemG’).

15 The definition of biocidal products contained in Article 2(1)(a) of Directive 98/8 was transposed into German law by Paragraph 3b(1)(1) of the ChemG.

16 The referring court finds that it must take the interpretation of Article 2(1)(a) of Directive 98/8 as a basis for the interpretation of Paragraph 3b(1)(1) of the ChemG.

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

17 The parties in the main proceedings are companies which are in competition in the marketing of anti-algae products for use in ponds, in particular artificially created garden ponds, biotopes and swimming ponds.

18 Tetra GmbH markets in Germany an anti-algae product containing aluminium chlorohydrate under the brand name TetraPond AlgoRem. That product, which is a soluble polycationic aluminium hydroxide, forms by hydrolysis, when poured into water, a precipitate composed of aluminium hydroxide, which is insoluble and thus chemically and biologically inert, which takes the form of a net making it possible to gather the suspended algae (flocculation) by a mechanical and physical process (flocculation capture).

19 According to the referring court, aluminium chlorohydrate has been identified as an 'existing active substance' within the meaning of Article 3 of Regulation No 1896/2000 and is included in Annex I to Regulation No 1451/2007. By contrast, as it was not notified in accordance with Article 4 of Regulation No 1896/2000, this active substance has not been included in Annex II to Regulation No 1451/2007 and has therefore lost its capacity to be marketed as an active biocidal product, in conformity with Article 4(1) of that regulation.

20 In the context of unfair-competition proceedings brought before the Landgericht Hamburg (Hamburg Regional Court), Söll GmbH claims that, pursuant to Article 4(1) of Regulation No 1451/2007, the product at issue cannot be placed on the market.

21 Tetra GmbH contends, on the contrary, that the product which it markets cannot be classified as a biocidal product within the meaning of Directive 98/8 in so far as, while it is true that, once the product is poured into the water of the pond, a chemical reaction known as hydrolysis occurs, that reaction does not, however, have any chemical effect on the algae, as it merely causes the algae to flocculate and does not destroy, deter or render the algae harmless, or otherwise exert a controlling effect on them. Rather, according to that company, the algae continue to survive in that condition and to photosynthesize normally. So long as they are not removed from the water mechanically, the algae remain preserved in the pond.

22 In the light of those factors, and while tending towards the interpretation proposed by the defendant in the main proceedings, the Landgericht Hamburg decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. For a product to be classified as a "biocidal product", within the meaning of Article 2(1)(a) of Directive 98/8/EC, must that product itself destroy, deter, render

harmless, prevent the action of, or otherwise exert a controlling effect on the harmful organism directly by chemical or biological means, or is it sufficient that the product should have an indirect effect on that harmful organism?

2. If, for a product to be classified as a "biocidal product" within the meaning of Article 2(1)(a) of Directive 98/8, the Court of Justice deems that an indirect chemical or biological effect on the harmful organism is sufficient, what is required of the product's indirect effect on the harmful organism in order to be able to classify such a product as a "biocidal product", within the meaning of Article 2(1)(a) of Directive 98/8, or is an indirect effect of any nature sufficient to establish a product's biocidal quality?'

Consideration of the questions referred

23 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether the concept of 'biocidal products' set out in Article 2(1)(a) of Directive 98/8 must be interpreted as including products containing active substances which, by reason of their specific mode of action, are intended to act, chemically or biologically, on the target harmful organisms only by indirect means and, where relevant, what is required of such an action.

24 It should be noted at the outset that the first subparagraph of Article 2(1)(a) of Directive 98/8 structures the definition of biocidal products around three cumulative elements. That provision first specifies that those products must contain an 'active substance' as defined in Article 2(1)(d). It then identifies the purposes of such products by referring to, inter alia, an exhaustive list, included in Annex V to Directive 98/8, of the different types of biocidal products. It states, finally, that the mode of action of those products must be either chemical or biological.

25 With regard, more specifically, to the second element of that definition, which forms the subject-matter of the present reference for a preliminary ruling, the first subparagraph of Article 2(1)(a) of Directive 98/8 stipulates that such products must be 'intended to destroy, deter, render harmless, prevent the action of, or otherwise exert a controlling effect on any harmful organism by chemical or biological means'. In that respect, it must be noted, as the Advocate General has observed in point 31 of his Opinion, that there is some discrepancy between the different language versions of that provision. Thus, some of those versions, including the German, French and Dutch versions, suggest that the biocidal products must be intended to have a direct effect on the target harmful organisms. By contrast, other versions, including the English, Spanish and Italian versions, refer, in broader terms, also to a controlling effect on those organisms by the biocidal products.

26 It is settled case-law that, in the case of divergence between the different language versions of a European Union text, the provision in question must be interpreted by reference to, inter alia, the purpose and general scheme of the rules of which it forms a part (see Case C-351/10 *Laki* [2011] ECR I-0000, paragraph 39 and the case-law cited).

27 In that regard, it is apparent from recital 4 in the preamble to Directive 98/8 that the regulatory framework governing the placing of biocidal products on the market takes 'as a condition a high level of protection for humans, animals and the environment'. Such a

level of protection could, however, be seriously jeopardised if classification as biocidal products were to be reserved solely for those products containing one or more active substances and having a direct chemical or biological effect on the target harmful organisms, and were thus to exclude those products which also contain one or more active substances but exert only an indirect chemical or biological effect on those organisms. It is the very presence of the active substance as such, in a product such as that at issue in the main proceedings, which is liable to present a risk for the environment, irrespective of whether that substance acts directly or indirectly on the target organisms.

28 Furthermore, it is apparent from the listing of the purposes of the biocidal products in the first subparagraph of Article 2(1)(a) of Directive 98/8 that the European Union legislature intended to cover all products containing one or more active substances and having a chemical or biological mode of action, so long as those products are intended to have an inhibiting effect on the target harmful organisms. The gradation in the description of the purposes of such products in that provision, from the destruction of the harmful organisms to their prevention, and, more importantly, the fact that that provision covers, lastly, products 'otherwise' exerting a controlling effect on those harmful organisms establish that the possibility of that product having the effect, even limited, of exerting greater control over the target harmful organisms or of facilitating their elimination is sufficient. Such an interpretation of the concept of 'biocidal products' also follows from the concept of 'active substance' as defined in Article 2(1)(d) of Directive 98/8.

29 With regard to an anti-algae product such as that at issue in the main proceedings, it must be noted, in the light of the information contained in the case-file, that, firstly, from the moment at which that product is poured into the water, a chemical action, namely hydrolysis, occurs. Secondly, this hydrolysis leads to the formation of a precipitate which is designed subsequently to gather the algae on the surface of the water by a mechanical and physical action, flocculation, which allows for their removal from the water. Thus, while it is true that the chemical action of the active substance at issue in the main proceedings does not combat the algae directly, the fact none the less remains that it contributes to the removal of the algae from the water.

30 In the light of the close connection between the chemical action and its effects of exerting greater control over the target harmful organisms, a product such as that at issue in the main proceedings must be regarded as being intended to act chemically on those organisms.

31 In view of the foregoing, the answer to the questions referred is that the concept of 'biocidal products' set out in Article 2(1)(a) of Directive 98/8 must be interpreted as including even products which act only by indirect means on the target harmful organisms, so long as they contain one or more active substances provoking a chemical or biological action which forms an integral part of a causal chain, the objective of which is to produce an inhibiting effect in relation to those organisms.

Costs

32 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:

The concept of 'biocidal products' set out in Article 2(1)(a) of 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 must be interpreted as including even products which act only by indirect means on the target harmful organisms, so long as they contain one or more active substances provoking a chemical or biological action which forms an integral part of a causal chain, the objective of which is to produce an inhibiting effect in relation to those organisms.

[Signatures]