JUDGMENT OF THE COURT (Second Chamber)

15 September 2005 *

In Joined Cases C-281/03 and C-282/03,

REFERENCES for a preliminary ruling under Article 234 EC from the College van Beroep voor het bedrijfsleven (Netherlands), made by decisions of 26 June 2003, received at the Court on 30 June 2003, in the proceedings

Cindu Chemicals BV (C-281/03),

Rütgers VFT AG,

Touwen & Co. BV,

Pearl Paint Holland BV,

Elf Atochem Nederland BV,

* Language of the case: Dutch.

Zijlstra & Co. Verf BV,

Chemische Producten Struyk & Co. BV,

Van Swaay Schijndel BV,

Houtbereiding G. Rozendaal BV,

Arch Timber Protection BV (C-282/03)

v

College voor de toelating van bestrijdingsmiddelen,

intervener:

Stichting Behoud Leefmilieu en Natuur Maas en Waal,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, J. Makarczyk, P. Kūris and G. Arestis (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 January 2005,

after considering the observations submitted on behalf of:

— Cindu Chemicals BV and Others, by N.S.J. Koeman, advocaat,

— Arch Timber Protection BV, by J.P.L. van Marissing and N.G. Engering, advocaten,

— College voor de toelating van bestrijdingsmiddelen, by R.J.M. van den Tweel, advocaat,

— Stichting Behoud Leefmilieu en Natuur Maas en Waal, by F.F. Scheffer, advocaat,

— the Netherlands Government, by H.G. Sevenster and J.G.M. van Bakel, acting as Agents,

— the Danish Government, by J. Molde, acting as Agent,

— the Commission of the European Communities, by F. Simonetti and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 March 2005,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1976 L 262, p. 201), as amended by European Parliament and Council Directive 94/60/EC of 20 December 1994 (OJ 1994 L 365, p. 1).

2 The references have been made in proceedings brought by, first, Cindu Chemicals BV, Rütgers VFT AG, Touwen & Co. BV, Pearl Paint Holland BV, Elf Atochem Nederland BV, Zijlstra & Co. Verf BV, Chemische Producten Struyk & Co. BV, Van Swaay Schijndel BV and Houtbereiding G. Rozendaal BV and, second, Arch Timber Protection BV against the College voor de toelating van bestrijdingsmiddelen (pesticides authorisation board) ('the CTB'), concerning decisions relating to authorisation for the marketing and use of dangerous substances.

Legal context

Community legislation

Directive 76/769

3 Directive 76/769, adopted on the basis of Article 100 of the EEC Treaty (which became Article 100 of the EC Treaty, now Article 94 EC) lays down rules restricting the marketing and use of certain dangerous substances and preparations. In accordance with the first five recitals in its preamble, that directive has several aims, namely the protection of the public, and in particular persons using those substances, the protection of the environment and the quality of human life, and the removal of barriers to trade resulting from national rules in the field which, since they differ as to the conditions governing the marketing and use of the substances, directly affect the establishment and functioning of the internal market.

4 Article 1 of Directive 76/769 states that, without prejudice to the application of other relevant Community provisions, the directive is concerned with restricting the marketing and use of the dangerous substances and preparations listed in Annex I. Article 2 of the directive provides that 'Member States shall take all necessary measures to ensure that the dangerous substances and preparations listed in the annex may only be placed on the market or used subject to the conditions specified therein'.

5 Annex I to Directive 76/769 lists the dangerous substances and preparations and the restrictions on their marketing or use. That annex has been amended several times, particularly in order to add other dangerous substances and preparations to it.

6 Council Directive 89/677/EEC of 21 December 1989 amending for the eighth time Directive 76/769 (OJ 1989 L 398, p. 19) added point 20, on arsenic compounds, to Annex I. In accordance with point 20(1)(b) arsenic compounds may not be used as substances and constituents of preparations intended for use in the preservation of wood. In that case, the ban does not, however, apply to solutions of inorganic salts of the CCA (copper-chromium-arsenic) type employed in industrial installations using vacuum or pressure to impregnate wood. In addition, Member States may authorise on their territory the use of preparations of the DFA (dinitrophenol-fluoride-arsenic) type for the retreatment in situ of wooden poles already in place and supporting overhead cables. Such preparations must be employed by professionals using vacuum or pressure. Finally, point 20(2) states that those compounds 'may not be used as substances and constituents of preparations intended for use in the treatment of industrial waters, irrespective of their use'.

7 Directive 94/60 added to point 32 of Annex 1 to Directive 76/769 substances and preparations containing creosote, creosote oil or coal-tar distillates. Point 32.1 of the annex provides that those substances may not be used for wood treatment if they

contain benzo-a-pyrene at a concentration of greater than 0.005% by mass and/or water-extractable phenols at a concentration of greater than 3% by mass. Furthermore, wood treated with such substances may not be placed on the market. By way of derogation, those substances may, in accordance with point 32.1(i), be used for wood treatment in industrial installations if they contain benzo-a-pyrene and water-extractable phenols within the limits stated above. Finally, under point 32.1(ii), wood treated in accordance with point 32.1(i) which is placed on the market for the first time is to be permitted for professional and industrial use only, such as in the railway sector.

Directive 98/8/EC

8 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) aims to establish (i) a framework of rules relating to the authorisation, and to the placing on the market for use, of biocidal products in the Member States and (ii) at Community level, a positive list of active substances which may be used in biocidal products.

9 It is stated in the 26th recital in the preamble to Directive 98/8 that 'since the full implementation of this directive, and especially the review programme, will not be achieved for several years, Directive 76/769/EEC provides a framework to complement the development of the positive list by limitations of the marketing and use of certain active substances and products or groups thereof'.

10 Article 2(1)(a) of Directive 98/8 defines biocidal products for the purposes of the directive as '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'. That provision also states that an exhaustive list of 23 product types with an indicative set of descriptions within each type is given in Annex V to the directive.

11 Article 5(1)(a) of Directive 98/8 provides that Member States are to authorise a biocidal product only if 'the active substance(s) included therein are listed in Annex I or IA and any requirements laid down in these annexes are fulfilled'.

12 Article 16(1) of the directive, laying down transitional measures, is worded as follows:

'By way of further derogating from Articles 3(1), 5(1), 8(2) and 8(4), and without prejudice to paragraphs 2 and 3, a Member State may, for a period of 10 years from [14 May 2000], continue to apply its current system or practice of placing biocidal products on the market. It may, in particular, according to its national rules, authorise the placing on the market in its territory of a biocidal product containing active substances not listed in Annex I or IA for that product type. Such active substances must be on the market [on 14 May 2000] as active substances of a biocidal product for purposes other than those defined in Article 2(2)(c) and (d).'

National legislation

13 The Netherlands Law on pesticides of 1962 (Bestrijdingsmiddelenwet 1962, Stb. 1962, No 288) ('the Law of 1962') provides for an authorisation scheme for the marketing and use of pesticides. Article 1b establishes the CTB, an independent administrative body, which is charged with determining, in accordance with the Law, applications for authorisation of pesticide products and, if necessary, specifying the period of validity of authorisations granted.

14 According to Article 2 of the Law of 1962, it is prohibited to supply, possess, stock or use in, or import into, the Kingdom of the Netherlands any pesticide not found to be authorised pursuant to that Law. Article 3 of the Law provides that a pesticide is to be authorised only if it meets the requirements laid down in that article and in Article 3a.

15 Under Article 4 of the Law of 1962, an application for pesticide authorisation or for renewal of a pesticide authorisation must comply with certain formal rules set out essentially in the regulation of 1995 on the authorisation of pesticide products (Regeling toelating bestrijdingsmiddelen 1995, Stcrt. 1995, No 41) and applications are examined only if supported by a complete dossier, in accordance with the criteria determined by that Law and pursuant to it.

16 Pursuant to Article 7 of the Law of 1962, the CTB is to revoke an authorisation as referred to in Article 4 of that Law if the requirements laid down by or pursuant to Articles 3 and 3a are not or are no longer complied with. However, under Article 8 of the Law, an interested party may lodge an appeal with the College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry) against such a decision.

17 Finally, the decree laying down environmental authorisation requirements for biocides (Besluit milieutoelatingseisen niet-landbouwbestrijdingsmiddelen, Stb. 1998, No 499), adopted in 1998 on the basis of Article 3a of the Law of 1962, requires that a risk assessment be carried out in respect of the active substance of a biocide in order to determine the measures necessary to protect the environment.

The main proceedings and the question submitted for preliminary ruling

18 The main proceedings forming the background to Case C-281/03 concern biocidal products, that is to say non-agricultural pesticides, containing coal-tar distillate (carbolineum and creosote) as an active substance which are used as wood preservatives. Coal-tar distillates are referred to in point 32 of Annex I to Directive 76/769, as amended by Directive 94/60 ('Directive 76/769').

19 In February 1996, the CTB notified the applicants in the main proceedings, which held authorisations for biocidal products containing coal-tar distillates, of its intention, first, to terminate after three years the authorisation of wood preservatives in cases where treated wood might come into direct contact with water (in particular groundwater) and, second, to renew authorisation of the other applications in a dry environment ('dry applications') for five years, subject to the condition that the authorisation holders provide it with further information. The applicants in the main proceedings subsequently submitted applications to the CTB for renewal of certain authorisations which were about to expire.

20 On 1 October 1999, the CTB decided to renew until 1 July 2001 the authorisations for 'dry' applications of wood preservatives based on carbolineum and creosote.

21 During the year 2000, the CTB informed the applicants in the main proceedings, first, that in evaluating the permissibility of those products consistency was to be sought with the evaluation carried out at Community level in the context of Directive 98/8 and, second, that in order to obtain renewal of authorisations relating to those substances beyond 1 July 2001 the undertakings concerned had to send it a complete dossier containing more precise information on both the effects of the products on the environment and human toxicology and the risks run by users of the substances.

22 On 27 July 2001, the CTB decided, with retroactive effect from 1 July 2001, to renew until 1 November 2001 the authorisations granted in respect of biocides based on coal-tar distillates.

23 On 25 October 2001, the CTB adopted decisions under the Law of 1962 to take no further action on the applications for renewal of the authorisations for certain wood preservatives based on carbolineum and creosote on the ground that the relevant dossiers were incomplete. By letter of 9 November 2001, the applicants in the main proceedings challenged those decisions before the CTB, principally relying on the plea that the application procedure for renewal of authorisations, laid down by that Law, infringes Directive 76/769.

24 By decision of 28 June 2002, the CTB dismissed as unfounded the objections lodged by the relevant applicants in the main proceedings against the decisions of 25 October 2001. On 7 August 2002, those applicants brought an action against that dismissal before the College van Beroep voor het bedrijfsleven, which brought the matter before the Court for a preliminary ruling.

25 The main proceedings which form the background to Case C-282/03 concern a biocidal product used for wood preservation, named 'Superwolmanzout-CO' and containing CCA compounds, for which the CTB had granted Arch Timber Protection BV an authorisation valid until 1 June 2005. Those compounds are referred to in point 20 of Annex I to Directive 76/769.

26 By decisions of 31 August and 14 September 2001, the CTB, on the basis of Article 7 of the Law of 1962, revoked from 14 March 2002 the authorisation granted to that company as regards Superwolmanzout-CO and rejected the application for renewal of the authorisation of that product, brought by the company in 1997. By letter of 11 October 2001, the latter contested those decisions before the CTB.

27 On 2 August 2002, the CTB dismissed as unfounded the objections lodged by Arch Timber Protection BV against the decisions of 31 August and 14 September 2001. On 6 August 2002, Arch Timber Protection BV brought an action against that dismissal before the College van Beroep voor het bedrijfsleven, which brought the matter before the Court for a preliminary ruling.

28 In the sets of proceedings before the national court, the applicants submit that, given that the products at issue satisfy the conditions for marketing and use laid down by Directive 76/769, that directive grants them the right to authorisation as regards those products. According to the national court, that line of argument raises the question whether the directive lays down exhaustive rules with regard to the substances covered by it or, on the contrary, whether it allows the Member States to lay down additional national conditions in the field, such as those provided for in the Law of 1962.

29 Being of the opinion that Directive 76/769 does not clearly answer the question whether the Member States are permitted, with regard to the placing on the market and use of the substances mentioned in Annex I to that directive, to impose requirements other than those prescribed by the directive, the College van Beroep voor het bedrijfsleven decided, in each of the present cases, to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Directive [76/769] permit a Member State to lay down additional conditions for the placing on the market and use of a biocidal product the active substance of which is included in Annex I thereto?'

30 By order of the President of the Court of 28 August 2003, Cases C-281/03 and C-282/03 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the question

31 It is common ground that the biocidal products at issue in the main proceedings fall within points 20 and 32 of Annex I to Directive 76/769.

32 However, the CTB, the Stichting Behoud Leefmilieu en Natuur Maas en Waal (Maas and Waal Foundation for Conservation of the Living Environment and Nature) ('the Foundation') and the Netherlands and Danish Governments submit that use of the biocidal products at issue in the main proceedings is regulated by Directive 98/8, which, being a lex specialis prevailing over Directive 76/769 whose interpretation is sought by the national court, allows the Member States to impose, in any event, more stringent requirements on the marketing and use of the products concerned.

33 Since Directive 76/769 contains provisions relating to the biocidal products at issue in the main proceedings, which fall within the definition in Article 2(1)(a) of Directive 98/8 and for which the latter indeed amounts to specific legislation, the Court has the task of ruling, first of all, on the relation between those two directives and, in particular, of establishing the effect, in the present case, that the second of those directives has on the application of the first.

34 In that regard, it should be recalled Article 5(1)(a) of Directive 98/8 provides that the Member States are to authorise a biocidal product only if the active substance(s) included therein are listed in Annex I or IA to that directive and any requirements laid down in those annexes are met.

35 However, as observed by the Advocate General in paragraph 62 of his Opinion, it is established that, at the material time, Annexes I and IA to Directive 98/8 had not yet been adopted. Consequently, the Member States could not in any way regulate the authorisation of the biocidal products in question on the basis of that directive since, at that time, the harmonisation provided for by the latter had not been completed (see, to that effect, Case C-443/02 *Schreiber* [2004] ECR I-7275, paragraph 20).

36 Furthermore, even though Article 16(1) of Directive 98/8 provides for a transitional period of 10 years during which the Member States may continue to apply their current systems for placing biocidal products on the market, the fact nevertheless remains that those States must also continue to comply with other Community provisions. In that regard, it is apparent from the 26th recital in the preamble to that directive that pending full implementation of the directive, envisaged to take several years, Directive 76/769 provides a framework to complement the development of a

positive list of active substances which may be used in biocidal products, by limiting the marketing and use of certain such substances and certain products. In addition, Article 1(3)(a) of Directive 98/8 provides that the latter is to apply 'without prejudice to relevant Community provisions or measures taken in accordance with them, in particular [to Directive 76/769]'.

37 Accordingly, during the transitional period, if a Member State wishes to regulate the marketing or use of products falling within the field of application of Directive 76/769, its national rules must be consistent with that directive.

38 It follows from all of the above that, contrary to the submissions of the CTB, the Foundation and the Netherlands and Danish Governments, Directive 98/8 cannot affect the application of Directive 76/769 in the present case.

39 It is thus necessary, as requested by the national court, to analyse the extent of the harmonisation achieved by Directive 76/769 in order to determine whether that directive permits a Member State to lay down additional conditions at national level, such as those prescribed by the Law of 1962, for the placing on the market and use of a biocidal product the active substance of which is included in Annex I to that directive.

40 According to the Foundation and the Netherlands and Danish Governments, that directive, which merely brings about minimum harmonisation, permits the Member States to lay down additional conditions.

41 As to those submissions, first, Directive 76/769 is based on Article 100 of the EEC Treaty, and the amendments subsequently made to it by Directives 89/677 and 94/60, inserting into Annex I points 20 and 32 concerning arsenic and creosote, have as their respective legal bases Article 100a of the EEC Treaty (which became Article 100a of the EC Treaty, now, after amendment, Article 95 EC) and Article 100a of the EC Treaty. Those articles seek to harmonise the laws of the Member States with a view to the establishment and functioning of the internal market.

42 Second, it is apparent from the fourth and fifth recitals in the preamble to Directive 76/769 that the latter amounts to a harmonisation measure intended to eliminate obstacles to trade resulting from the existence of divergent national rules in the field directly affecting the establishment and functioning of the internal market.

43 It thus follows from its legal basis as well as from its recitals that Directive 76/769 aims to eliminate obstacles to trade within the internal market in the substances at issue in the main proceedings.

44 As observed by the Advocate General in paragraph 37 of his Opinion, the objective of Directive 76/769 would not be attainable if the Member States were free to widen the obligations provided for therein. The provisions of that directive have exhaustive character and the retention or adoption by the Member States of measures other than those laid down by the directive is incompatible with its objective (see, to that effect, Case 148/78 *Ratti* [1979] ECR 1629, paragraphs 25 to 27, and Case 278/85 *Commission* v *Denmark* [1987] ECR 4069, paragraph 22).

45 Such an interpretation of Directive 76/769 is, furthermore, supported by Article 2 of that directive which states that 'Member States shall take all necessary measures to ensure that the dangerous substances and preparations listed in the annex may only be placed on the market or used subject to the conditions specified therein'. It thus

follows from the wording of that article that, where a substance or product is referred to in the annex to the directive, the only requirements which the Member States may impose on their marketing or their use are those laid down in the annex.

46 However, according to Article 1, Directive 76/769 is concerned with restricting the marketing and use of the dangerous substances and preparations which it refers to 'without prejudice to the application of other relevant Community provisions'. Consequently, where other Community provisions establishing specific requirements concerning the marketing and use of those substances and preparations are applicable, they have to be taken into account.

47 Finally, in the case of a directive based on Article 95 EC a Member State wishing nevertheless to maintain or introduce national provisions which are different from those envisaged by the harmonising directive and relate to, inter alia, the protection of the environment has the possibility under Article 95(4) or (5) EC of notifying the Commission of the European Communities of those provisions and the grounds for maintaining or introducing them.

48 As noted by the Advocate General in paragraph 76 of his Opinion, the Kingdom of the Netherlands has on two occasions successfully requested the Commission to adopt decisions under Article 95 EC on certain aspects of its legislation on creosote, although those aspects are extraneous to the national provisions at issue in the main proceedings.

49 Accordingly, the answer to the question referred must be that Directive 76/769 must be interpreted as not permitting a Member State to impose on the placing on the market and use of a biocidal product the active substance of which is included in Annex I thereto conditions other than those which the directive lays down, without prejudice to the application of other relevant Community provisions laying down specific conditions for that product.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Second Chamber) hereby rules:

Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, as amended by European Parliament and Council Directive 94/60/EC of 20 December 1994, must be interpreted as not permitting a Member State to impose on the placing on the market and use of a biocidal product the active substance of which is included in Annex I thereto conditions other than those which the directive lays down, without prejudice to the application of other relevant Community provisions laying down specific conditions for that product.

[Signatures]