Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 2 June 2022 [1]

Case C-147/21

Comité interprofessionnel des huiles essentielles françaises (CIHEF),
Florame,
Hyteck Aroma-Zone,
Laboratoires Gilbert,
Laboratoire Léa Nature,
Laboratoires Oméga Pharma France,
Pierre Fabre Médicament,
Pranarom France,
Puressentiel France
v
Ministre de la Transition écologique,
Premier ministre

(Request for a preliminary ruling from the Conseil d'État (Council of State, France))

(Reference for a preliminary ruling – Approximation of legislation – Biocidal products – Objective to protect health and the environment – Possibility for the Member States to adopt restrictive measures on commercial practices and advertisement)

I. Introduction

1. To enhance the protection of public health and the environment, the French regulator decided that rodenticides and insecticides, two categories of biocidal products, cannot be the object of certain commercial practices, such as discounts, price reductions and rebates. It also restricted advertisement for the same categories of products as well as for certain disinfectants.

2. In the main proceedings, several companies seek the annulment of those rules and contest their compatibility with, inter alia, Regulation (EU) No 528/2012. [2]

[1] Original language: English.

[2] Regulation 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) ('the BPR').

3. The Conseil d'État (Council of State, France) harbours doubts as to whether that act has achieved exhaustive harmonisation precluding the national rules at issue and, if not, under what conditions those rules may be adopted.

4. The present case thus concerns the scope of the autonomy that has been left to the Member States following the adoption of the BPR. On a subsidiary basis, this case essentially inquires into the conditions under which the Treaty provisions allow for national rules such as the ones at issue.

II. Legal framework

A. European Union law

5. Pursuant to its Article 1(1), the purpose of the BPR 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 this Regulation are underpinned by the precautionary principle, the aim of which is to safeguard the health of humans, the health of animals and the environment. Particular attention shall be paid to the protection of vulnerable groups.'

6. Pursuant to its Article 1(2), the BPR 'lays down rules for:

(a) the establishment at Union level of a list of active substances which may be used in biocidal products;

(b) the authorisation of biocidal products;

(c) the mutual recognition of authorisations within the Union;

(d) the making available on the market and the use of biocidal products within one or more Member State or the Union;

(e) the placing on the market of treated articles.'

7. Article 72 of the BPR is about advertisement. It states:

'1. Any advertisement for biocidal products shall, in addition to complying with Regulation (EC) No 1272/2008, [3] include the sentences "Use biocides safely. Always read the label and product information before use.". The sentences shall be clearly distinguishable and legible in relation to the whole advertisement.

2. Advertisers may replace the word "biocides" in the prescribed sentences with a clear reference to the product-type being advertised.

[3] Regulation of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (OJ 2008 L 353, p. 1) ('the CLP Regulation').

3. Advertisements for biocidal products shall not refer to the product in a manner which is misleading in respect of the risks from the product to human health, animal health or the environment or its efficacy. In any case, the advertising of a biocidal product shall not mention "low-risk biocidal product", "non-toxic", "harmless", "natural", "environmentally friendly", "animal friendly" or any similar indication.'

B. National law

8. In accordance with the new Article L. 522-18 of the Environmental Code: [4]

'In connection with the sale of biocidal products defined in Article L. 522-1, discounts, price reductions, rebates, the differentiation of general and special conditions of sale within the meaning of Article L. 441-1 of the Commercial Code, the gift of free units and any equivalent practices shall be prohibited. Any commercial practice designed to circumvent, directly or indirectly, this prohibition by means of the award of discounts, price reductions or rebates on a different range of products which is linked to the purchase of the said products shall be prohibited. A decree to be adopted after consultation of the Conseil d'État shall define the categories of products concerned by reference to the risks they pose to human health and the environment.'

9. In accordance with the new Article L. 522-5-3 of the Environmental Code: [5]

'All commercial advertising shall be prohibited for certain categories of biocidal products defined by [the BPR]. By way of derogation from the first paragraph of this article, advertising directed at professional users shall be authorised at the place where the products are distributed to such users and in publications addressed to such users. A decree to be adopted after consultation of the Conseil d'État shall define the categories of products concerned by reference to the risks they pose to human health and the environment, and the manner in which advertisements may be presented. Such advertisements shall clearly indicate the proper use and application of the products, so as to protect human and animal health and the environment, as well as the potential dangers to human and animal health and to the environment.'

10. Decree No 2019-642 of 26 June 2019, adopted under the new Article L. 522-18 of the Environmental Code, inserts into that code Article R. 522-16-1, which provides:

'The categories of products mentioned in Article L. 522-18, in relation to which certain commercial practices are prohibited, are the products of types 14 and 18 defined by [the BPR]. These provisions shall not apply to biocidal products eligible for the simplified authorisation procedure in accordance with Article 25 of that regulation.'

[4] Inserted by Article 76 of the loi n° 2018-938 du 30 octobre 2018 pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine, durable et accessible à tous (Law No 2018/938 of 30 October 2018 promoting equilibrium in commercial relationships in the agricultural and food sector and healthy, sustainable food accessible to all; 'Law of 30 October 2018').

[5] Inserted by Law of 30 October 2018.

11. Decree No 2019-643 of 26 June 2019, adopted under Article L. 522-5-3 of the Environmental Code, inserts into that code a new Article R. 522-16-2, which is worded as follows:

'I.- The categories of biocidal products mentioned in Article L. 522-5-3, for which commercial advertising directed at the general public is prohibited, are the following:

1° Products of types 14 and 18 defined by [the BPR];

2° Products of types 2 and 4 defined by that regulation and classified, in accordance with the provisions of [the CLP Regulation], as hazardous to the aquatic environment, category 1: acute category 1 (H400) and chronic category 1 (H410).

II.- For the products mentioned in paragraph I, all advertisements addressed to professionals shall comply with the provisions of Article 72 of [the BPR], mentioned in point 1 of paragraph I. In addition, all such advertisements shall bear clearly and visibly the following:

1° The following two sentences: "Before each use, check whether use of this product is absolutely necessary, especially in areas to which the general public has access. Whenever possible, use alternative methods and products which present the least risk to human and animal health and to the environment."

2° A statement of the biocidal product-type associated with the product, as defined in Annex V to [the BPR] mentioned previously.

III.- The provisions of this article shall not apply to biocidal products eligible for the simplified authorisation procedure in accordance with Article 25 of [the BPR].'

III. Facts, national proceedings and the questions referred

12. By two applications, the Comité interprofessionnel des huiles essentielles françaises (CIHEF) and the companies Florame, Hyteck Aroma-Zone, Laboratoires Gilbert, Laboratoire Léa Nature, Laboratoires Oméga Pharma France, Pierre Fabre Médicament, Pranarom France and Puressentiel France (together referred to as 'the applicants') asked the Conseil d'État (Council of State) to annul Decrees No 2019-642 of 26 June 2019 on prohibited commercial practices relating to certain categories of biocidal products ('the contested decree No 2019-642') and No 2019-643 of 26 June 2019 on commercial advertising for certain categories of biocidal products ('the contested decree No 2019-643') (together, 'the contested decrees').

13. According to the applicants, the contested decrees were adopted ultra vires. As such, they have asked the Conseil d'État (Council of State) to refer to the Court of Justice a question for a preliminary ruling concerning the exhaustive harmonisation brought about by the BPR. The applicants state that the prohibitions set out in the contested decrees breach Articles L. 522-18 and L. 522-5-3 of the Environmental Code because they are too general. The applicants also argue that the contested degrees introduce unjustified discrimination favouring products not concerned by the prohibitions at issue, infringe the right to property protected by Article 17 of the Charter of Fundamental Rights of the European Union and were adopted without regard to the provisions of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), signed in Rome on 4 November 1950. They

further argue that the contested decree No 2019-642 is contrary to Directive 2000/31/EC[6] in that it constitutes an unjustified and disproportionate interference with the freedom to provide services and that the contested decree No 2019-643 is unlawful because it constitutes an excessive interference with the right to freedom of expression guaranteed by Article 10 ECHR.

14. In its defence, the Ministre de la Transition écologique (Minister for Ecological Transition, France) claimed that both applications should be dismissed.

15. In its order for reference, the Conseil d'État (Council of State) explains the reasons for the dismissal of all pleas mentioned above, with the exception of the one based on the BPR which, according to that court, contains no provision either authorising or prohibiting Member States to adopt restrictive measures such as that contained in Articles L. 522-18 and L. 522-5-3 of the Environmental Code. The referring court is thus unsure whether such measures may be adopted without infringing that regulation.

16. In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice:

'Does [the BPR] preclude a Member State from adopting, in the interests of public health and the environment, restrictive rules relating to commercial practices and advertising such as those laid down in Articles L. 522-18 and L. 522-5-3 of the Environmental Code? If not, under what conditions may a Member State adopt such measures?'

17. Written observations were submitted by the applicants and the French, Italian and Netherlands Governments, as well as the European Commission. The applicants, the French Government and the Commission presented oral argument at the hearing which took place on 9 March 2022.

IV. Assessment

18. This case concerns the compatibility with EU law of French national rules[7] that, on the one hand, prohibit certain commercial practices in respect of two categories of biocidal products and, on the other hand, restrict advertisement concerning the same categories of biocidal products as well as two additional ones.

19. I shall start the analysis by considering the degree of harmonisation achieved by the BPR, given that this is the instrument of EU law that the referring court specifically inquires about. On a subsidiary basis, that court also inquires more generally about the conditions under which EU law allows for the adoption of national rules such as those at issue. In so far as it is necessary to do so, I will thus assess the rules at issue in the light of the relevant EU law which, in the present case,

[6] Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ 2000 L 178, p. 1) ('the Directive on electronic commerce').

[7] Although the questions referred inquire about Articles L. 522-18 and L. 522-5-3 of the Environmental Code only, the main proceedings concern the legality of the contested decrees that have inserted Articles R. 522-16-1 and R. 522-16-2 into the Environmental Code. It follows from the order for reference that Article R. 522-16-1 specifies Article L. 522-18, while Article R. 522-16-2 specifies Article L. 522-5-3. Those two sets of provisions thus form two regulatory ensembles that have been discussed as such by the parties. Therefore, I shall consider the questions referred as concerning not only the legislative provisions expressly mentioned but also Articles R. 522-16-1 and R. 522-16-2 of the Environmental Code.

are the provisions on the free movement of goods under Articles 34 and 36 TFEU.[8] Those provisions, however, become applicable only if the case in the main proceedings involves a cross-border element,[9] which it is for the referring court to ascertain.[10]

20. I shall conduct the two-part analysis referred to above, first, as regards the national prohibition of certain commercial practices (A) before turning, second, to the issue of advertisement (B).

A. The prohibition of the commercial practices at issue

21. Articles L. 522-18 and R. 522-16-1 of the Environmental Code prohibit discounts, price reductions, rebates, the differentiation of general and special conditions of sale, the gift of free units and any equivalent practices in the context of the sale of certain biocidal products that are defined, in Annex V to the BPR ('Annex V'), as product-types 14 and 18, except for those eligible for the simplified authorisation procedure under Article 25 of that regulation.

22. Product-type 14 concerns 'rodenticides' which are described in Annex V as 'products used for the control of mice, rats or other rodents, by means other than repulsion or attraction'. Product-type 18 concerns 'insecticides, acaricides and products to control other arthropods', described as 'products used for the control of arthropods (e.g. insects, arachnids and crustaceans), by means other than repulsion or attraction'. Product-types 14 and 18 both fall under the broader category entitled 'Main Group 3: Pest control'.

23. In the analysis that follows, I will conclude that the national prohibition at issue does not infringe the BPR (1). I will also conclude that the same prohibition does not infringe the Treaty provisions on the free movement of goods (2).

1. Scope of the harmonised rules

24. The BPR was adopted under Article 114 TFEU, the main legal basis for adopting EU law measures necessary for the establishment and functioning of the internal market.[11] Accordingly, that regulation harmonises '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', as stated in Article 1(1) thereof.[12] To that end, Article 1(2) lists the categories of rules provided for by that instrument. That list includes, under letter (d), rules relating to 'the making available on the market and the use of biocidal products within one or more Member States or the Union'.

8 As the Court has repeatedly held, 'where a matter has been the subject of exhaustive harmonisation within the European Union, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in the light of primary law'. Judgment of 24 February 2022, *Viva Telecom Bulgaria* (C-257/20, EU:C:2022:125, paragraph 45 and the case-law cited).

9 Judgment of 19 January 2017, *Queisser Pharma* (C-282/15, EU:C:2017:26, paragraph 39 and the case-law cited).

10 The order for reference reveals that arguments have been raised by the applicants in the main proceedings concerning the Directive on electronic commerce. I would limit myself to noting that, because that directive relies on the 'country of origin' principle, it is irrelevant in the present case given that all applicants appear to be French companies. See, to that effect, judgment of 11 September 2014, *Papasavvas* (C-291/13, EU:C:2014:2209, paragraphs 34 and 35).

11 See, for example, Opinion of Advocate General Wahl in *Marrakesh Treaty on access to published works* (3/15, EU:C:2016:657, point 71).

12 See also recital 3 of the BPR and judgment of 14 October 2021, *Biofa* (C-29/20, EU:C:2021:843, paragraph 35 and the case-law cited).

25. The case in the main proceedings concerns biocidal products and, arguably, the category of rules on 'the making available on the market and the use' is broad enough to include rules prohibiting certain pricing practices. Indeed, Article 3(1)(i) defines 'making available on the market' as 'any supply of a biocidal product … for distribution or use in the course of a commercial activity, whether in return for payment or free of charge'.

26. That being said, the assessment as to whether an instrument of EU law brings about the exhaustive harmonisation of a specific field must be carried out not by considering generally defined legal categories, but by examining the specific area at hand. [13]

27. That precise area corresponds in the present case to the prohibition of 'discounts, price reductions, rebates, the differentiation of general and special conditions of sale …, the gift of free units and any equivalent practices' in the context of the sale of certain biocidal products.

28. The relevant commercial practices being circumscribed in that way, I observe, together with the French and Netherlands Governments, as well as the Commission, that the BPR does not contain any provision that would expressly concern them.

29. As the Commission observes, the BPR is mainly concerned with the authorisation of biocidal products for making them available on the market and with their use. The provisions related to the use of biocidal products are rather limited and provide mainly that that use is conditioned by, and must comply with, the respective authorisation and labelling and packaging requirements. [14]

30. In that context, the provisions that materially come the closest to the issue at hand are to be found in Articles 69 and 72 of the BPR which contain, respectively, requirements for packaging and labelling, on the one hand, and advertisement, on the other hand. I note that none of those provisions is relevant for the prohibition of practices at issue. [15]

31. The applicants themselves conceded during the hearing that the BPR does not contain any provision on pricing practices. They maintained, however, that the national rules at issue perturb the harmonised framework made up of that regulation and of the CLP Regulation. They explained that the national rules on commercial practices introduce an additional regulatory layer with a new categorisation of products, which is unforeseeable for the producers because it presents no direct link with the risk associated with the given product. In that, the national rules at issue disturb, in the applicants' view, the free movement of biocidal products, thus frustrating the objective pursued by those regulations. Moreover, the applicants argue that the BPR limits the scope of the Member States' action to the information policy about the effects of the biocidal products, required by the third subparagraph of Article 17(5) of that regulation. In their view, such policy, however, does not encompass the prohibition at issue.

32. I note in that respect, and as regards the CLP Regulation, that that instrument harmonises, in essence, the criteria for the classification of substances and mixtures and lays down the rules on labelling and packaging for hazardous substances and mixtures. [16] In other words, it aims at

[13] See, to that effect, Opinions of Advocates General Bobek in *Lietuvos Respublikos Seimas* (C-2/18, EU:C:2019:180, points 27 to 29) and Mengozzi in *Monsanto Technology* (C-428/08, EU:C:2010:128, point 47).

[14] See Article 17(1) and (5), first subparagraph, or Article 22(1) of the BPR.

[15] Article 72 of the BPR will be discussed in Part B of the present Opinion since it is directly relevant for the national rule at issue concerned with advertising.

[16] See Article 1 of the CLP Regulation.

determining 'which properties of substances and mixtures should lead to a classification as hazardous, in order for the hazards of substances and mixtures to be properly identified and communicated'[17] and sets general packaging standards to ensure their safe supply.[18]

33. The BPR cross-refers to the CLP Regulation to use it as the point of reference in the context of the approval of active substances and the authorisation of biocidal products.[19] It also refers to it to define the requirements related to the labelling and packaging of biocidal products (Article 69 of the BPR) and to their advertisement (Article 72 of the BPR) because the CLP Regulation contains specific rules in both of those areas the application of which the BPR preserves.[20] While the CLP Regulation thus complements the BPR in those respects, and while the latter declares that it is more generally without prejudice to the former,[21] I note that the CLP Regulation introduces no additional rules relevant for the commercial practices at issue.

34. As regards the third subparagraph of Article 17(5) of the BPR, invoked also by the applicants, this provision requires the Member States to adopt 'measures to provide the public with appropriate information about the benefits and risks associated with biocidal products and ways of minimising their use'. The confirmation of the competence of the Member States that follows therefrom does not as such imply, however, that the scope of the Member States' action would be limited to such information policy.

35. Could it be argued nevertheless that, although the prohibition at issue concerns a nominally different matter from the information policy, it disturbs the regulatory balance struck by the EU legislature between, on the one hand, the pursuit to improve the internal market for biocidal products and, on the other hand, the protection of public health and the environment? In other words, could it be argued that the EU legislature intended that the only way in which the use of the biocidal products, subsequent to their placement on the market, could be considered would be through information policy conducted by the Member States based on Article 17(5), third subparagraph, of the BPR?

36. I do not think so. The provision related to the Member State competence vis-à-vis information policy matters complements, within the structure of Article 17 of the BPR, general rules on the possibility to place a product on the market and to use it. It is integrated into Article 17(5) thereof which states, in the first subparagraph, the obligation to use the biocidal products according to the authorisation as well as the labelling and packaging requirements. The second subparagraph explains that 'proper use' of biocidal products 'shall involve the rational application of a combination of physical, biological, chemical or other measures as appropriate, whereby the use of biocidal products is limited to the minimum necessary and appropriate precautionary steps are taken'. Then follows, in the third subparagraph, the obligation of the Member States to adopt measures to inform the public about the benefits and risks associated with the use of biocidal products and about ways of minimising their use.

37. The third subparagraph of Article 17(5) of the BPR thus approaches the issue of the use of biocidal products not from the perspective of their compliance with various regulatory requirements (addressed in Article 17(1) thereof), but rather from a broader perspective of their

17 Recital 10 of the CLP Regulation.

18 Recital 51 of the CLP Regulation.

19 See Article 3(f), Article 5(1) and (3), Article 10(1)(b) and Article 28(2)(a) of the BPR as regards the issue of active substances and Article 19(4)(b) thereof as regards the authorisation of biocidal products.

20 See Article 48 of the CLP Regulation on advertisement and its Titles III to V as regards labelling and packaging.

21 See Article 2(3)(m) of the BPR.

sustainable use, as seems to be confirmed in the Commission's Staff Working Document accompanying its report on the BPR's implementation.[22] That document from 2021 presents, under the chapter 'Sustainable use', measures undertaken by the Member States while acknowledging that Directive 2009/128/EC[23] does not apply to biocidal products and that 'the usefulness of such an extension will be considered in the context of a future evaluation of the BPR'.[24]

38. I note that the third subparagraph of Article 17(5) of the BPR corresponds, very broadly speaking, to Article 7, on 'Information and awareness-raising', of the Directive on the sustainable use of pesticides. However, that directive contains also rules on national action plans, training of professional users, distributors and advisors (including a certification system), requirements for sales and rules on specific practices.

39. Under those circumstances, and considering the very limited number and scope of the BPR provisions on the means to ensure the sustainable use of biocidal products once those products have been placed on the market, I find it difficult to conclude that the Member States' competence in this area has been pre-empted.

40. I therefore conclude that the BPR does not preclude the prohibition at issue. The latter nevertheless remains subject, as regards situations involving a cross-border element and considering the specifics of the present case,[25] to the Treaty provisions on the free movement of goods, to which I shall now turn.

2. Limits flowing from Articles 34 and 36 TFEU

41. In the present section, I will set out the reasons that lead me to conclude that the prohibition of the commercial practices at issue is not precluded by Article 34 TFEU (a). Should the Court conclude to the contrary, I will offer the reasons for which that prohibition is, in my view, in any case justified (b).

(a) The prohibition is not precluded by Article 34 TFEU

42. By prohibiting quantitative restrictions on imports between Member States and all measures having equivalent effect to such restrictions, Article 34 TFEU expresses a fundamental principle guaranteeing the free movement of goods within the European Union.[26]

43. According to the well-established formula, all measures of a Member State which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are considered to be measures having an effect equivalent to quantitative restrictions within the

22 Commission Staff Working Document Accompanying the document Report from the Commission to the European Parliament and the Council on the implementation of Regulation No 528/2012, SWD(2021) 128 final, pp. 59 to 61.

23 Directive of the European Parliament and of the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides (OJ 2009 L 309, p. 71; 'the Directive on the sustainable use of pesticides').

24 Commission Staff Working Document quoted in footnote 22 above, p. 59. Article 18 of the BPR envisages, 'if appropriate', the submission by the Commission of a proposal concerned with measures geared to the sustainable use of biocidal products.

25 See my comments in footnote 10, above.

26 See, for example, judgment of 15 July 2021, *DocMorris* (C-190/20, EU:C:2021:609, paragraph 33 and the case-law cited; 'the judgment in *DocMorris*').

meaning of that provision.[27] That formula has been adjusted in the line of case-law introduced with *Keck and Mithouard*. It follows from that case-law that a national measure is not caught by Article 34 TFEU when it constitutes a selling arrangement that applies 'to all relevant traders operating within the national territory' and when '[it affects] in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'.[28]

44. In the subsequent case-law, the Court made it clear that the concept of 'selling arrangement' applies to restrictions or prohibitions that do not concern the characteristics of the goods but that relate solely to the arrangements under which they may be marketed.[29]

45. I note that the prohibition at issue does not relate to the requirements applicable to biocidal products but prevents certain methods of promotion of their sale. For that reason, it should be considered, in my view, as relating to a 'selling arrangement' within the meaning of that case-law.

46. As regards the question of whether it respects the conditions set out in point 43 above, I note, first, that the prohibition expressed in Articles L. 522-18 and R. 522-16-1 of the Environmental Code applies to all relevant traders operating within the national territory, independently of their nationality. Therefore, it is not formally discriminatory.

47. Second, as for whether such a prohibition affects the marketing of insecticides and rodenticides from other Member States more than the domestic ones, the French Government argues that that is not the case. It explained at the hearing that the prohibition does not involve any supplementary costs for the operators established in other Member States wishing to offer their biocidal products in France. That government also added that the prohibition at issue does not concern all methods of marketing.

48. The Commission takes the opposite view and considers that the prohibition at issue limits one of the tools at the disposal of traders to make themselves known on the French market. It can thus affect to a greater extent the products from other Member States than the national ones.

49. The applicants took, at the hearing and in essence, the same position.[30]

50. I agree with the French Government.

51. Although the Commission is right in claiming that the possibility to compete through the products' prices is an important tool at the traders' disposal, it does not follow that any and each restriction in that respect will automatically be considered as falling within the scope of Article 34 TFEU. The case-law of the Court is, in that respect, nuanced.

[27] Judgment of 11 July 1974, *Dassonville* (8/74, EU:C:1974:82, paragraph 5). For a more recent statement see, for example, the judgment in *DocMorris*, paragraph 34.

[28] Judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905, paragraph 16; 'the judgment in *Keck and Mithouard*'). Although the status of that test has been discussed, its relevance has been confirmed, for example, in the judgment in *DocMorris*, paragraph 35. For discussion, see, for example, Schütze, R., 'Of types and tests: towards a unitary doctrinal framework for Article 34 TFEU?', *European Law Review*, Vol. 41(6), 2016, p. 826; Lianos, I., 'In Memoriam Keck: The Reformation of the EU Law on the Free Movement of Goods', *European Law Review*, Vol. 40(2), 2015, p. 225; and Purnhagen, K.P., 'Keck is dead, long live Keck? How the court of justice tries to avoid a Sunday Trading Saga 2.0', *Liber Amicorum L.W. Gormley*, 2019, p. 176.

[29] See, for example, judgments of 21 September 2016, *Etablissements Fr. Colruyt* (C-221/15, EU:C:2016:704, paragraph 37 and the case-law cited; 'the judgment in *Etablissements Fr. Colruyt*'); of 25 March 2004, *Karner* (C-71/02, EU:C:2004:181, paragraph 38 and the case-law cited; 'the judgment in *Karner*'); and of 2 December 2010, *Ker-Optika* (C-108/09, EU:C:2010:725, paragraph 45; 'the judgment in *Ker-Optika*').

[30] They did so on a subsidiary basis and in reply to the question put by the Court, their main argument being that the prohibition infringes the BPR.

52. The Court has considered rules that have excluded traders' freedom to influence the minimum prices [31] or to influence them at all [32] to be caught by the prohibition expressed in Article 34 TFEU. By contrast, in the judgment in *Etablissements Fr. Colruyt*, a case concerned with a rule prohibiting retailers from selling tobacco products at a retail price lower than the price indicated by the manufacturer or importer, the Court relied on the fact that the importers remained free to set that price to conclude that the legislation at issue escaped Article 34 TFEU. [33]

53. I am of the view that, similarly to what was held in that case, in the present case too it is of importance that traders remain free to set the prices. They can thus compete at that level, in that they can decide that the price of their products (without any promotion) is higher or lower.

54. Moreover, moving beyond the case-law concerned with the methods of pricing, in a line of case-law which includes the judgments in *Ker-Optika*, *Deutsche Parkinson Vereinigung* and *A*, the Court emphasised the problem of access to the market that the national measure at issue (in essence prohibiting some aspects of marketing on the internet) made particularly difficult, if not impossible. [34]

55. That, however, does not seem to be the case here.

56. The applicants stated at the hearing that they market biocidal products whose active substances are essential oils. They explained that those products offer an alternative to traditional biocidal products of chemical synthesis because they have a lower environmental impact. The applicants further explained that they are minority market actors that therefore depend on the commercial practices (and advertisement) that make it possible for them to gain visibility.

57. While I admit that it may be more difficult to introduce a product that is an alternative to a traditional one, it seems to be an inherent problem which foreign and domestic 'alternative' products both face. I am of the view that what matters in the present case is whether the prohibition at issue significantly hampers access for those arguably alternative foreign products to the French market.

58. I do not think that it does.

59. Of course, and as the French Government observed, it cannot be excluded that the national prohibition at issue restricts the volume of sales, in France, of products coming from other Member States, because it 'deprives traders of a method of sales promotion'. [35]

31 Judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraph 32).

32 Judgment of 19 October 2016, *Deutsche Parkinson Vereinigung* (C-148/15, EU:C:2016:776, paragraph 26; 'the judgment in *Deutsche Parkinson Vereinigung*').

33 The judgment in *Etablissements Fr. Colruyt*, paragraphs 38 to 40.

34 Respectively, the judgment in *Ker-Optika*, paragraph 54; the judgment in *Deutsche Parkinson Vereinigung*, paragraph 25; and the judgment of 1 October 2020, *A (Advertising and sale of medicinal products online*) (C-649/18, EU:C:2020:764, paragraph 76). In the latter judgment, the Court analysed the measure at issue under the Directive on electronic commerce. In contrast, Advocate General Saugmandsgaard Øe examined it in the light of Articles 34 and 36 TFEU; see his Opinion in *A (Advertising and sale of medicinal products online)* (C-649/18, EU:C:2020:134, points 44 to 49 and 69 et seq.) ('the Opinion in *A*'). See also judgment of 11 December 2003, *Deutscher Apothekerverband* (C-322/01, EU:C:2003:664, paragraphs 74 to 76).

35 As was held in respect of the prohibition of the resale at a loss in the judgment in *Keck and Mithouard*, paragraph 13.

60. Nevertheless, what I consider to be relevant at this juncture is that, while the prohibition at issue restricts some methods of sales promotion, traders are still free to set the 'full' price of insecticides and rodenticides, as I already noted, and remain free to market them at places they deem fit, whether it be online or in shops.

61. In other words, I perceive nothing in the legislation at issue that would allow for the conclusion that the prohibition of discounts, price reductions, rebates, the differentiation of general and special conditions of sale, the gift of free units and any equivalent practices deprives traders of a means of marketing that would essentially prevent them from the possibility to compete effectively with local products or that would make that competition particularly difficult for them, in a way that could be compared to the prohibition on sales via the internet or the imposition of fixed or minimum prices.

62. However, should the Court disagree with that analysis and conclude that the national prohibition at issue is caught by Article 34 TFEU, I offer the reasons below which, in my view, justify that prohibition.

(b) The prohibition at issue is in any case justified

63. According to settled case-law, an obstacle to the free movement of goods may be justified on one of the public interest grounds set out in Article 36 TFEU or an overriding reason in the public interest. [36]

64. The order for reference explains that the prohibition at issue aims at protecting public health and the environment. [37]

65. The first justification corresponds to health concerns acknowledged in Article 36 TFEU. As the Court has repeatedly held, 'the health and life of humans rank foremost among the assets and interests protected by the Treaty and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since that level may vary from one Member State to another, Member States should be allowed a measure of discretion.' [38]

66. As regards, second, the environment, its protection has been recognised in the case-law as an overriding reason in the public interest. [39]

67. I note that, to the extent that the prohibition at issue aims to limit the use of products that 'can pose risks to humans, animals and the environment due to their intrinsic properties and associated use patterns', [40] those objectives may justify the restriction on trade that that prohibition entails.

[36] The judgment in *Ker-Optika*, paragraph 57 and the case-law cited.

[37] I recall that Article L. 522-18 of the Environmental Code provides that 'a decree to be adopted after consultation of the Conseil d'État [Council of State] shall define the categories of products concerned by reference to the risks they pose to human health and the environment'.

[38] The judgment in *Deutsche Parkinson Vereinigung*, paragraph 30 and the case-law cited.

[39] See, for instance, judgment of 6 October 2015, *Capoda Import-Export* (C-354/14, EU:C:2015:658, paragraph 43 and the case-law cited).

[40] Recital 1 of the BPR.

68. For the restriction to be justified, it must, however, meet the proportionality test. That is, it has to be appropriate to achieve the pursued objectives and must not go beyond what is necessary in order to attain those objectives. In other words, there are no other measures less restrictive of the free movement of goods by means of which that objective could be achieved. [41]

69. As regards its appropriateness, the prohibition at issue arguably does not eliminate all the instances of unnecessary use of insecticides and rodenticides (simply because one cannot exclude unnecessary use of those products purchased at full price). However, it can be, in my view, reasonably expected that the unavailability of a financial advantage when purchasing them will decrease that risk to some extent because it discourages unnecessary purchases (which can then lead to unnecessary use).

70. As for the necessity, the Commission suggested at the hearing, in response to the question put to it by the Court, that less restrictive means could be employed through advertisement, or if sellers were to be required to provide information about the associated risks.

71. I am not convinced by those suggestions.

72. As regards the first option, in the relevant part of its pleadings the Commission opposes the compatibility with the BPR of the additional statement that the French regulator imposed as a mandatory part of all advertisement for those products. That additional statement, in essence, calls for consideration of the risks and is discussed in depth in Part B of Section IV of this Opinion. I agree with the Commission that that additional statement is incompatible with the exhaustive harmonisation that the BPR has achieved on that specific question. That being so, providing supplementary information about the risks of the advertised products, as a part of advertisement, cannot be considered to be a less restrictive alternative to the prohibition at issue.

73. As regards the second suggestion, I am of the view that for such communication of information by the seller to be meaningful and as effective as the absence of financial advantage, it would have to rely on a certain level of expertise, to be acquired presumably by means of training. That, together with otherwise unclear modalities of the considered scenario, makes it impossible, in my view, to hold that option for less onerous. [42]

74. The Commission itself conceded that those suggested alternatives may not be sufficient to achieve the stated objectives and may lead to contradictory messages. Indeed, I agree that a seller informing customers about the inherent risks of the products that it offers, while suggesting a substantial discount and providing several free samples of an insecticide, does not lend itself to a consistent approach.

75. Finally, it could be argued that a less onerous means to avoid unnecessary use of biocidal products could be achieved through an information campaign based on the Member States' competence reserved in the third subparagraph of Article 17(5) of the BPR. [43] In that respect, I admit that it is rather difficult for the Court to evaluate in abstract the potential substitutability of two different policies in terms of their effects. In my view, educational ambition, pursued by a public information campaign, needs, by its very nature, time to change minds and behaviour. In that respect, I can understand that it may not be deemed suitable to address a problem perceived

41 See, for example, the judgment in *Ker-Optika*, paragraph 65.

42 For comparison, see the rules on training of 'professional users, distributors and advisors' in Article 5 of the Directive on the sustainable use of pesticides.

43 See point 34 above.

as acute. Moreover, the perspective of an immediately available financial advantage may simply override the educational efforts and it is thus not unreasonable to consider that the suppression of that financial advantage is necessary so that the stated objective may be meaningfully pursued.

76. Moreover, it follows from Article R. 522-16-1 of the Environmental Code that the prohibition does not apply when the given insecticide or rodenticide is eligible for the simplified authorisation procedure under Article 25 of the BPR. That procedure concerns, generally, biocidal products presenting a low risk for health and the environment.[44] That shows, in my view, that the French regulator sought to avoid regulatory overreach that would affect products not considered particularly hazardous and that would thus be unnecessary.

77. In those circumstances, and should the Court conclude, contrary to my suggestion above, that the prohibition at issue is caught by Article 34 TFEU, I consider that it is justified by the objective of protecting health and the environment, is appropriate to attain those objectives, and does not go beyond what is necessary to achieve it.

B. The national rules on advertisement

78. Articles L. 522-5-3 and R. 522-16-2 of the Environmental Code prohibit advertisement for four categories of biocidal products when that advertisement is addressed to the general public. Advertisement for those products remains possible when it is addressed to professionals, at the place where the products are distributed to them and in publications addressed to them. However, the advertisement must then contain a specific statement that, in essence, calls for consideration of whether the use of those biocidal products is absolutely necessary.

79. Those rules concern product-types 14 and 18 (which also concern the prohibition of certain commercial practices discussed in Part A of Section IV of this Opinion) and product-types 2[45] and 4,[46] two subcategories of disinfectants, that are classified, in accordance with the CLP Regulation, as hazardous to the aquatic environment; category 1: acute category 1 (H400) and chronic category 1 (H410). It should be added that the national rules on advertisement do not apply when the product concerned is eligible for the simplified authorisation procedure under Article 25 of the BPR, which, as already stated, applies to products presenting a low risk for health and the environment.[47]

80. Similarly to what has been observed above,[48] the assessment of the rules at issue must start with the examination of the degree of harmonisation reached by the BPR and only then proceed, if necessary, with the examination of Articles 34 and 36 TFEU. To that end, I will first turn to the obligation to use, in advertisement addressed to professionals, a specific statement (1). I will then examine the prohibition of advertisement addressed to the general public (2).

[44] See recitals 29 and 30 of the BPR.

[45] As provided for in Annex V, this product-type concerns 'Disinfectants and algaecides not intended for direct application to humans or animals'.

[46] As provided for in Annex V, this product-type concerns 'Food and feed area'.

[47] See point 76 above and Article R. 522-16-2 (III) of the Environmental Code.

[48] See point 19 above.

1. The mandatory use of an additional statement

81. It follows from Paragraph II of Article R. 522-16-2 of the Environmental Code that advertisement addressed to professionals concerning rodenticides, insecticides and certain disinfectants must bear the following statement: 'Before each use, check whether use of this product is absolutely necessary, especially in areas to which the general public has access. Whenever possible, use alternative methods and products which present the least risk to human and animal health and to the environment'.

82. It also follows from that provision that that statement shall be used *in addition to* the one whose use is required by Article 72(1) of the BPR, according to which any advertisement for biocidal products shall include the sentences 'Use biocides safely. Always read the label and product information before use.'

83. The applicants argue, in essence, that the use of the additional statement infringes Article 72 of the BPR because that article brings about an exhaustive harmonisation of advertisement for biocidal products.

84. The Commission takes a similar position while the French, Italian and Netherlands Governments take the opposite view.

85. To determine whether the harmonisation achieved in the advertisement-related provisions of the BPR is exhaustive, regard must be had not only to the wording of those provisions but also to the context in which they occur and the objectives of the rules of which they form part. [49]

86. I would start by noting that Article 72 of the BPR is the only provision of the BPR related to advertisement and concerns a rather narrow aspect of the content of advertisement. However, the fact that the material scope of the rules on advertisement of the BPR is rather limited compared to (the exhaustive advertisement regime of) Directive 2001/83/EC, [50] referred to by the French Government to contrast that regulation with that directive, does not exclude their exhaustive nature per se. What matters, in my view, is not whether the scope of the rules under examination is (comparatively) narrow or broad, but rather the level of detail that those rules reach in respect of the specific (and potentially narrow) issue which they govern. [51]

87. Article 72 of the BPR concerns the statements that must be used or that are, on the contrary, prohibited in advertisement for biocidal products.

88. Its first paragraph, requiring the use of the two abovementioned sentences, mandates those to be 'clearly distinguishable and legible in relation to the whole advertisement'. Its second paragraph makes it possible to replace the word 'biocides' in those sentences 'with a clear reference to the product-type being advertised.'

[49] See, to that effect, for example, judgment of 16 July 2015, *UNIC and Uni.co.pel* (C-95/14, EU:C:2015:492, paragraph 35 and the case-law cited).

[50] Directive of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67). For the confirmation of the exhaustive nature of the rules on advertisement contained in that directive, see judgment of 8 November 2007, *Gintec* (C-374/05, EU:C:2007:654, paragraphs 33 and 34).

[51] See also point 26 above.

89. Its third paragraph prohibits advertisement which is 'misleading in respect of the risks from the product to human health, animal health or the environment or its efficacy' and also lists the expressions whose use is 'in any case' prohibited. [52]

90. In that light, the rules of Article 72 of the BPR appear to be rather detailed as regards the statements about the risks associated with the use of biocidal products. In that specific extent it appears comparable to, if not more detailed than, the exhaustive rules on advertisement of Directive 2001/83, [53] referred to by the French Government. Indeed, Article 87(3) of that directive provides that the advertising of a medicinal product is to encourage its rational use by presenting it objectively and without exaggerating its properties, and is not to be misleading. The rule in Article 72 of the BPR is similar but in fact more detailed in that it sets out a specific statement that must be integrated into the advertisement about the safe use of the product and directs the user to the label and the product information. It is also more detailed when it comes to indicating the statements that are prohibited on account of the fact that they may be misleading.

91. It is true that the additional statement required by the national rules at issue appears to follow the same objective as Article 72 of the BPR in that it protects public health and the environment. As such, there does not appear to be any conflict. That, however, does not affect my previous analysis because, when it comes to the issue of safety-related content of advertisement, Article 72 of the BPR shows that the EU legislature struck a specific balance between the different elements at stake which, in the present case, are the improvement of 'the functioning of the internal market', with the parallel pursuit of 'a high level of protection of both human and animal health and the environment'. [54] I consider that, by imposing an additional regulatory requirement, the national rules at issue disturb that balance.

92. In those circumstances, I am of the view that the area of advertisement, when it comes to statements related to the risks of the advertised biocidal products, has been pre-empted by the EU legislature.

2. Prohibition of advertisement addressed to the general public

(a) Scope of the harmonised rules

93. My conclusion as to the exhaustive harmonisation of rules laid down in Article 72 of the BPR does not mean, however, that all aspects of the advertisement for biocidal products have been harmonised by that instrument, including the question of whether the Member States retain competence to ban certain types of advertisement.

94. On that last aspect, the wording of that provision – setting out the mandatory and prohibited statements related to the safe use of, and risks presented by, the biocidal products – does not in my view allow for the conclusion that the Member States' competence to decide to prohibit advertisement has been pre-empted.

[52] Those expressions are 'low-risk biocidal product', 'non-toxic', 'harmless', 'natural', 'environmentally friendly', 'animal friendly' or any similar indication.

[53] See footnote 50 above.

[54] See Article 1(1) of the BPR.

95. It is true that one could argue that the existence of that specific provision on mandatory and prohibited statements in advertisement for biocidal products implies that the EU legislature intended for the advertisement for those products to be possible and that a national legislation prohibiting aspects of advertisement hampers the *effet utile* of Article 72 of the BPR as, where there is no advertisement, that provision becomes devoid of purpose.

96. As regards the normative context, I recall again that Article 72 of the BPR is the only provision of that regulation that addresses the matter. [55]

97. The inclusion of Article 72 alone within the BPR contrasts with the choice made in Directive 2001/83, Title VIII of which is expressly devoted to advertisement and contains several provisions (Articles 86 to 100) describing in detail situations in which the Member States shall or may prohibit the advertisement for medicinal products for human use, or when the advertisement may be authorised. [56]

98. To a lesser extent, the BPR's brevity on the matter differs also from Article 66 of Regulation (EC) No 1107/2009, [57] which provides for the possibility for the Member States to restrict advertisement in certain media, and includes rules on mandatory or prohibited elements of advertisement, such as the prohibition of 'visual representation of potentially dangerous practices, such as mixing or application without sufficient protective clothing, nor any use near food or use by or in the vicinity of children'.

99. In those circumstances, I am of the view that had the EU legislature intended to pre-empt the Member States' competence to ban certain kinds of advertisement, it would have devised more balanced rules. My view on that matter is further reinforced by the existence, in the BPR, of the derogatory rules concerning products that do not fulfil conditions for authorisation or that relate to the use of new active substances, [58] or by the attention that the EU legislature calls for as regards the protection of vulnerable groups, such as pregnant women and children. [59]

100. Thus, in the light of the foregoing, I conclude that the BPR does not preclude the prohibition at issue. Similarly to what has been observed above, [60] that prohibition must nevertheless comply with the limits that flow from Articles 34 and 36 TFEU.

(b) Limits flowing from Articles 34 and 36 TFEU

101. The prohibition of advertisement at issue must be, in my view, considered a 'selling arrangement'. Indeed, that prohibition does not concern the requirements applicable to the products at issue, and I note that the Court has repeatedly held that restrictions affecting traders' possibilities to advertise fall under that category. [61]

[55] Article 48 of the CLP Regulation, included in Title VII, 'Common and final provisions', provides, together with recital 67 thereof, for similarly concise rules on advertisement.

[56] See Articles 87(1) and 88(1), (2) and (3) of Directive 2001/83.

[57] Regulation 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 (OJ 2009 L 309, p. 1).

[58] See Article 55 of the BPR.

[59] Recital 3 of the BPR.

[60] See point 19 above.

[61] See, for example, the judgment in *DocMorris*, paragraph 37, and the judgment of 9 February 1995, *Leclerc-Siplec* (C-412/93, EU:C:1995:26, paragraph 22; 'the judgment in *Leclerc-Siplec*'). See also the Opinion in *A*, point 71.

102. By reference to the conditions outlined in the previous section, which must be satisfied in order for the prohibition at issue to escape the reach of Article 34 TFEU, [62] I note that it applies to all traders active in the relevant market without discrimination based on nationality.

103. The assessment of the question of whether it affects the products originating in other Member States to a greater extent than it does the domestic products appears to be more complex.

104. The Court has considered that national rules obliging traders to modify the form or content of an advertisement campaign are caught by Article 34 TFEU. [63]

105. The present case is, however, not concerned with a necessity to modify the content of a promotional campaign but rather with an outright impossibility to direct any campaign to the general public as regards the four categories of biocidal products.

106. Although the Court has repeatedly acknowledged that certain advertisement bans may limit the quantity of sales, it has also considered that several of them escaped the reach of Article 34 TFEU.

107. That was the case of national rules which, respectively, excluded the distribution sector from televised advertising, [64] prohibited pharmacists from advertising quasi-pharmaceutical products outside the pharmacy, [65] or prohibited a mail-order pharmacy from organising an advertising campaign in the form of a prize competition. [66]

108. It is true, however, that in the judgments in *De Agostini* and in *Gourmet International Products*, the Court held that it cannot be excluded that an outright ban might have a greater impact on products from other Member States. [67] The Court's reasoning seems to nevertheless suggest that the (possible) existence of a restriction caught by Article 34 TFEU stemmed from a specific difficulty that a trader faced in order to enter the national market. In the judgment in *De Agostini*, a case concerned with a ban on television advertising aimed at children less than 12 years of age and on misleading advertising, the qualification of that measure was left open, with the Court referring to De Agostini's statement about television advertising being 'the only effective form of promotion enabling it to penetrate the Swedish market'. [68]

109. Similarly, in the judgment in *Gourmet International Products*, the Court's conclusion that the Swedish ban on the advertisement for alcoholic beverages amounts to an obstacle on trade was tied to the statement that the consumption of those beverages 'is linked to traditional social practices and to local habits and customs'. [69] The fact that publications containing advertisements

[62] See point 42 et seq. above.

[63] Judgment of 12 December 1990, *SARPP* (C-241/89, EU:C:1990:459, paragraphs 29 and 30) (pre-dating *Keck and Mithouard*). See also judgment of 15 July 2004, *Douwe Egberts* (C-239/02, EU:C:2004:445, paragraph 52 and the case-law cited).

[64] The judgment in *Leclerc-Siplec*, paragraphs 20 to 24.

[65] Judgment of 15 December 1993, *Hünermund and Others* (C-292/92, EU:C:1993:932, paragraphs 22 to 24).

[66] The judgment in *DocMorris*, paragraphs 39 to 45. See also, in a different factual context, the judgment in *Karner*, paragraphs 42 and 43.

[67] Judgments of 9 July 1997, *De Agostini and TV-Shop* (C-34/95 to C-36/95, EU:C:1997:344, paragraph 42; 'the judgment in *De Agostini*'), and of 8 March 2001, *Gourmet International Products* (C-405/98, EU:C:2001:135, paragraph 19; 'the judgment in *Gourmet International Products*').

[68] The judgment in *De Agostini*, paragraphs 43 and 44.

[69] Judgment in *Gourmet International Products*, paragraph 21.

could be distributed at points of sale did not affect that conclusion because, in that case, 'the company wholly owned by the Swedish State which ha[d] a monopoly of retail sales in Sweden, in fact only distribute[d] its own magazine at those points of sale'.[70]

110. Finally, in the judgment in *Deutsche Parkinson Vereinigung*, the Court's conclusion as to the restrictive effects of a prohibition of sales by mail order was based on the finding that that method of sales constituted, for mail-order pharmacies, a more important means, *if not potentially the only means*, of accessing the national market concerned.[71]

111. The facts of the present case, as presented in the order for reference, do not attest to any such initial difficulty that the applicants would face when introducing on the French market products from other Member States.

112. Although the prohibition at issue is liable to affect the quantity of sales, I note that it does not prohibit all advertisement.

113. Advertisement to professional users remains possible, which means that traders have a marketing channel at their disposal.

114. It does not appear either, contrary to the facts of the judgment in *Gourmet International Products*, that any pre-existing pattern of the market, such as control by a monopolistic entity over distribution points, would render the possibility to reach the professional users illusory.

115. Finally, contrary to the facts of the case just cited, biocidal products do not appear akin to alcoholic beverages with which local users may have tied a specific traditional social bond.

116. In those circumstances, I conclude that the prohibition of the advertisement for the selected biocidal products addressed to the general public does not constitute a restriction on trade falling within the scope of Article 34 TFEU.

117. However, should the Court disagree with that analysis and conclude that the prohibition at issue amounts to a restriction on trade, I offer the reasons below which, in my view, justify it.

118. By reference to my analysis conducted in the previous part of the present Opinion,[72] I note that the prohibition at issue can be justified by the objective of protecting public health and the environment to the extent that it aims at limiting the use of products that 'can pose risks to humans, animals and the environment due to their intrinsic properties and associated use patterns'.[73] Moreover, the French Government referred to misuse of insecticides, especially in private residences, the danger of intoxication of other species caused by improper use of rodenticides, and the risks that pollution of waters, resulting from the use of the insecticides at issue, pose to certain species.

119. The prohibition of advertisement addressed to the general public also appears appropriate to attain the abovementioned objectives, since it may prevent promotional messages, which can trigger an increased use of the biocidal products of particular concern identified by the national regulator.

70 Ibid., paragraph 23.

71 Judgment in *Deutsche Parkinson Vereinigung*, paragraph 25.

72 See point 63 et seq. above.

73 Recital 1 of the BPR and point 67 above.

120. As regards its necessity, I observe that the prohibition at issue concerns only advertisement addressed to private users as opposed to professionals, which appears consistent with the objective to limit improper use of the products at issue.

121. As regards the possible alternatives discussed in points 70 to 75, they present, in my view, *mutatis mutandis* the same weak points also in the present context. Finally and similarly to what I observed in respect of the prohibition of discounts and the like, advertisement to the general public remains authorised for all products otherwise concerned by the prohibition when they present a low risk, that is to say, when they qualify for the simplified authorisation procedure under Article 25 of the BPR.[74] That shows, as already observed, that the national regulator sought to restrict the unnecessary reach of the prohibition at issue.

122. In those circumstances, and should the Court conclude, contrary to my suggestion above, that the prohibition at issue constitutes a restriction to trade caught by Article 34 TFEU, I consider that that prohibition is justified by the objective of protecting public health and the environment, is appropriate to attain that objective, and does not go beyond what is necessary to achieve it.

V. Conclusion

123. In the light of the foregoing, I suggest that the Court reply to the Conseil d'État (Council of State, France) as follows:

Neither 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 nor Article 34 TFEU preclude national provisions, such as those contained in Articles L. 522-18 and R. 522-16-1 of the Environmental Code, which prohibit, in connection with the sale of biocidal products of types 14 and 18 as defined in Annex V to Regulation No 528/2012, discounts, price reductions, rebates, the differentiation of general and special conditions of sale, the gift of free units and any equivalent practices.

Article 72 of Regulation No 528/2012 precludes national rules such as the one contained in Articles L. 522-5-3 and R. 522-16-2 of the Environmental Code, which requires the use of an additional statement in advertisement addressed to professional users for biocidal products of types 14 and 18, as defined in Annex V to Regulation No 528/2012, as well as types 2 and 4, as defined in that same annex and classified, in accordance with Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006, as hazardous to the aquatic environment, category 1: acute category 1 (H400) and chronic category 1 (H410).

Neither Regulation No 528/2012 nor Article 34 TFEU preclude Articles L. 522-5-3 and R. 522-16-2 of the Environmental Code, which prohibit advertisement for biocidal products, belonging to the same categories, addressed to the general public.

[74] See point 76 above.