Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

13 March 2014*

(Approximation of laws — Directive 2001/83/EC — Directive 2002/98/EC — Scope — Labile blood product — Plasma prepared by means of an industrial process — Simultaneous or exclusive application of the directives — Option for a Member State to provide for a more rigorous regime for plasma than for medicinal products)

In Case C-512/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (France), made by decision of 26 October 2012, received at the Court on 13 November 2012, in the proceedings

Octapharma France SAS

v

Agence nationale de sécurité du médicament et des produits de santé (ANSM),

Ministère des Affaires sociales et de la Santé,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet (Rapporteur), C.G. Fernlund, E. Levits and M. Berger, Judges,

Advocate General: N. Jääskinen,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 10 July 2013,

after considering the observations submitted on behalf of:

— Octapharma France SAS, by C. Smits, M. Anahory, F. Briard and F. Beauthier, avocats,

— the French Government, by G. de Bergues, D. Colas and S. Menez, acting as Agents,

— the European Commission, by O. Beynet, P. Mihaylova and M. Šimerdová, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 November 2013,

gives the following

* Language of the case: French.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 168 TFEU, of Article 2(2) of Directive 2001/83/EC 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), as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 136, p. 34), and of Article 4(2) of Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83 (OJ 2003 L 33, p. 30).

2 The request has been made in proceedings between Octapharma France SAS ('Octapharma') and the Agence nationale de sécurité du médicament et des produits de santé (ANSM) (National Agency for Medicinal Product and Health Product Safety), formerly Agence française de sécurité sanitaire des produits de santé (French Agency for Safety of Health Products) (Afssaps), ('the Agency') and the Ministère des Affaires sociales et de la Santé (Ministry of Social Affairs and Health) concerning the Agency's decision of 20 October 2010 setting out the list and fixing the characteristics of labile blood products ('the decision of 20 October 2010'), on the ground that the Agency placed on that list plasma prepared by means of an industrial process such as, inter alia, fresh frozen plasma, leucocyte-reduced, virus-inactivated by solvent-detergent ('plasma SD').

Legal context

European Union law

3 Article 168 TFEU provides:

'1. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Union action, which shall complement national policies, shall be directed towards improving public health, preventing illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health.

…

4. By way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k) the European Parliament and the Council … shall contribute to the achievement of the objectives referred to in this Article through adopting in order to meet common safety concerns:

(a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;

…

7. Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.'

4 Recital 7 in the preamble to Directive 2004/27 states:

'Particularly as a result of scientific and technical progress, the definitions and scope of Directive 2001/83/EC should be clarified in order to achieve high standards for the quality, safety and efficacy of medicinal products for human use. In order to take account both of the emergence of new therapies and of the growing number of so-called "borderline" products between the medicinal product sector and other sectors, the definition of "medicinal product" should be modified so as to avoid any doubt as to the applicable legislation when a product, whilst fully falling within the definition of a medicinal product, may also fall within the definition of other regulated products. …'.

5 Article 1 of Directive 2001/83, as amended by Directive 2004/27, provides:

'For the purposes of this Directive, the following terms shall bear the following meanings:

…

2. *Medicinal product:*

(a) Any substance or combination of substances presented as having properties for treating or preventing disease in human beings; or

(b) Any substance or combination of substances which may be used in or administered to human beings either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis.

3. *Substance:*

Any matter irrespective of origin which may be:

— human, e.g.

human blood and human blood products;

…

10. *Medicinal products derived from human blood or human plasma:*

Medicinal products based on blood constituents which are prepared industrially by public or private establishments, such medicinal products including, in particular, albumin, coagulating factors and immunoglobulins of human origin.

…'

6 Article 2 of Directive 2001/83, as amended by Directive 2004/27, provides:

‘1. This Directive shall apply to medicinal products for human use intended to be placed on the market in Member States and either prepared industrially or manufactured by a method involving an industrial process.

2. In cases of doubt, where, taking into account all its characteristics, a product may fall within the definition of a “medicinal product” and within the definition of a product covered by other Community legislation, the provisions of this Directive shall apply.

…’

7 Article 3 of Directive 2001/83, as amended by Directive 2004/27, provides:

‘This Directive shall not apply to:

…

6. Whole blood, plasma or blood cells of human origin, except for plasma which is prepared by a method involving an industrial process.’

8 Article 6(1) of Directive 2001/83, as amended by Directive 2004/27, provides as follows:

‘No medicinal product may be placed on the market of a Member State unless a marketing authorisation has been issued by the competent authorities of that Member State …

…’

9 Article 109 of Directive 2001/83, as amended by Directive 2002/98, provides:

‘For the collection and testing of human blood and human plasma, Directive 2002/98 … shall apply’.

10 Recitals 2, 3, and 5 in the preamble to Directive 2002/98 state:

‘(2) The availability of blood and blood components used for therapeutic purposes is dependent largely on Community citizens who are prepared to donate. In order to safeguard public health and to prevent the transmission of infectious diseases, all precautionary measures during their collection, processing, distribution and use need to be taken making appropriate use of scientific progress in the detection and inactivation and elimination of transfusion transmissible pathogenic agents.

(3) The quality, safety, and efficacy requirements of proprietary industrially-prepared medicinal products derived from human blood or plasma were ensured through Directive 2001/83 … . The specific exclusion of whole blood, plasma and blood cells of human origin from that Directive, however, has led to a situation whereby their quality and safety, in so far as they are intended for transfusion and not processed as such, are not subject to any binding Community legislation. It is essential, therefore, that, whatever the intended purpose, Community provisions should ensure that blood and its components are of comparable quality and safety throughout the blood transfusion chain in all Member States, bearing in mind the freedom of movement of citizens within Community territory. The establishment of high standards of quality and safety, therefore, will help to reassure the public that human blood and blood components which are derived from donations in another Member State nonetheless meet the same requirements as those in their own country.

…

(5) In order to ensure that there is an equivalent level of safety and quality of blood components, whatever their intended purpose, technical requirements for the collection and testing of all blood and blood components, including starting materials for medicinal products, should be established by this Directive. Directive 2001/83 … should be amended accordingly.'

11 Article 1 of Directive 2002/98 provides:

'This Directive lays down standards of quality and safety of human blood and of blood components, in order to ensure a high level of human health protection.'

12 Article 2(1) of Directive 2002/98 provides:

'This Directive shall apply to the collection and testing of human blood and blood components, whatever their intended purpose, and to their processing, storage, and distribution when intended for transfusion.'

13 Article 3 of Directive 2002/98 provides:

'For the purpose of this Directive:

(a) "blood" shall mean whole blood collected from a donor and processed either for transfusion or for further manufacturing;

(b) "blood component" shall mean a therapeutic constituent of blood (red cells, white cells, platelets, plasma) that can be prepared by various methods;

(c) "blood product" shall mean any therapeutic product derived from human blood or plasma;

…'

14 Article 4(2) of Directive 2002/98 provides:

'This Directive shall not prevent a Member State from maintaining or introducing in its territory more stringent protective measures which comply with the provisions of the Treaty.

In particular, a Member State may introduce requirements for voluntary and unpaid donations, which include the prohibition or restriction of imports of blood and blood components, to ensure a high level of health protection and to achieve the objective set out in Article 20(1), provided that the conditions of the Treaty are met.'

15 Article 5(1) of Directive 2002/98 provides:

'Member States shall ensure that activities relating to the collection and testing of human blood and blood components, whatever their intended purpose, and to their preparation, storage, and distribution when intended for transfusion, are undertaken only by the blood establishments which have been designated, authorised, accredited or licensed by the competent authority for that purpose.'

French law

16 Article L. 1221-8 of the Code de la santé publique ('the Public Health Code') provides:

'The following may be prepared from blood or its components:

1° labile blood products, including whole blood, plasma and blood cells of human origin. With the exception of labile blood products intended for biomedical research, only labile blood products for which the list and the characteristics are determined by decision of the [Agency], after consultation with the Établissement français du sang [the French Blood Agency], and published in the *Journal officiel de la République française* [(Official Journal of the French Republic)], may be distributed or delivered for therapeutic purposes.

…

3° stable products prepared industrially, which constitute medicinal products derived from blood and which are governed by the provisions of Book 1 of Part V;

…'

17 Article L. 1221-10 of the Public Health Code provides:

'Labile blood products intended for direct therapeutic use shall be stored, for the purpose of their distribution and their supply, in blood transfusion establishments. Health establishments may also store those products for the purpose of their distribution where they are authorised to that end by the administrative authorities after consultation with the French Blood Agency, under the conditions set out by decree, and with the healthcare cooperatives, referred to in Article L. 6133-1, authorised according to the same procedure and under the conditions set out by decree. …'

18 Article L. 1221-13 of the Public Health Code provides:

'Haemovigilance concerns all surveillance and incident evaluation procedures, as well as adverse effects in donors or recipients of labile blood products. It covers the whole transfusion chain, from the collection of labile blood products to the follow-up monitoring of recipients. Haemovigilance includes also the epidemiological follow-up monitoring of donors.

…'

19 Article L. 5121-3 of the Public Health Code provides:

'Stable products prepared from blood and its composites constitute medicinal products derived from blood and are subject to the provisions of this Title [which lays down, inter alia, the principle of marketing authorisations and the obligation that they be acquired], without prejudice to the special provisions which apply to them.'

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

20 By decision of 20 October 2010, taken on the basis of Article L. 1221-8 of the Public Health Code, plasma SD was classified as a labile blood product. All blood products intended for transfusion are classified as labile blood products.

21 On 30 May 2011, Octapharma, which manufactures and markets in several Member States a product called Octaplas, which is a plasma SD used for purposes of transfusion, brought an action for annulment before the Conseil d'État (French Council of State) against the decision of 20 October 2010 and the implicit decision of the Agency of 28 March 2011 dismissing its administrative appeal against that decision.

22 Octapharma contests that classification and claims that that product should be classified as a medicinal product.

23 Products coming within the category of 'labile blood products' are governed by the special regime set out in Article L. 1220-1 et seq. of the Public Health Code, which differs from that applicable to medicinal products. That regime confers on the French Blood Agency a monopoly on the collection of blood and on the preparation and distribution of labile blood products.

24 Consequently, the classification by the Agency of plasma SD as a labile blood product excludes Octapharma's products from the French market since the French Blood Agency alone is authorised to distribute labile blood products.

25 Octapharma takes the view that Directive 2001/83, as amended by Directive 2004/27, includes within its scope plasma which is prepared by a method involving an industrial process. Accordingly, that type of plasma, to which Octaplas corresponds, should be classified as a medicinal product derived from blood, within the meaning of the Public Health Code, and not as a labile blood product coming under the monopoly of the French Blood Agency. Both Article L. 1221-8 of the Public Health Code, which subjects every plasma type to the labile blood products regime without distinguishing plasmas which are prepared by a method involving an industrial process, and the decision of 20 October 2010 are, Octapharma contends, incompatible with the objectives of Directive 2001/83, as amended by Directive 2004/27.

26 The Agency submits that placing all products intended for transfusion within the labile blood products category, irrespective of their method of preparation, satisfies the objectives of Directive 2002/98, Article 2 of which provides that that directive applies to plasma intended for transfusion, including where its method of preparation involves an industrial process.

27 Taking the view that the resolution of the dispute before it depends on the interpretation of European Union law, the Conseil d'État decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is plasma from whole blood which is prepared by a method involving an industrial process and which is intended for transfusions capable of having the provisions of Directive [2001/83, as amended by Directive 2004/27] and those of [Directive 2002/98] applied to it simultaneously, as regards not only its collection and testing, but also its processing, storage and distribution; for that purpose may the rule laid down [in Article 2(2) of Directive 2001/83, as amended by Directive 2004/27] be interpreted as meaning that the Community legislation on medicinal products alone applies to a product which falls simultaneously within the scope of another piece of Community legislation only where that latter is less strict than the legislation on medicinal products?

(2) Must the provisions [of Article 4(2) of Directive 2002/98] be interpreted, where necessary in the light of Article 168 [TFEU], as allowing the maintenance or introduction of national provisions which, because they submit plasma which is prepared by a method involving an industrial process to a stricter regime than that to which medicinal products are subject, provide justification for setting aside the application of all or part of the provisions of Directive [2001/83, as amended by Directive 2004/27], in particular those which make the marketing of medicinal products subject to the sole condition of the prior grant of a marketing authorisation and, in the affirmative, under what conditions and to what extent?'

Consideration of the questions referred

The first question

28 By its first question the referring court asks, in essence, whether Directive 2001/83, as amended by Directive 2004/27, and Directive 2002/98 must be interpreted as meaning that plasma from whole blood which is prepared by a method involving an industrial process and which is intended for transfusions must be regarded as a medicinal product derived from blood coming within the scope of Directive 2001/83, as amended by Directive 2004/27, or as a labile blood product covered by Directive 2002/98, or even as a product capable of coming within the scope of both Directive 2001/83, as amended by Directive 2004/27, and Directive 2002/98 simultaneously. Where there is doubt as to the applicable directive, the referring court asks also whether the rule laid down in Article 2(2) of Directive 2001/83, as amended by Directive 2004/27, must be interpreted as meaning that it applies only where the provisions of other European Union legislation are less stringent than those concerning medicinal products.

29 It should be noted that Article 2(1) of Directive 2001/83, as amended by Directive 2004/27, provides, in essence, that Directive 2001/83 applies to medicinal products for human use intended to be placed on the market in Member States and which are prepared industrially.

30 The scope of Directive 2001/83, as amended by Directive 2004/27, is thus limited to products which are industrially produced medicinal products, to the exclusion of those which do not correspond to one or other of the definitions of medicinal products listed in Article 1(2)(a) and (b) of that directive.

31 Directive 2004/27, which amends Directive 2001/83, states, in recital 7 in its preamble, that 'the definitions and scope of Directive 2001/83/EC should be clarified in order to achieve high standards for the quality, safety and efficacy of medicinal products for human use' and that 'in order to take account both of the emergence of new therapies and of the growing number of so-called "borderline" products between the medicinal product sector and other sectors, the definition of "medicinal product" should be modified so as to avoid any doubt as to the applicable legislation when a product, whilst fully falling within the definition of a medicinal product, may also fall within the definition of other regulated products'.

32 In that regard, the scope of Directive 2001/83 was clarified by Directive 2004/27. Article 3(6) of Directive 2001/83, which originally provided that the directive did not apply to 'whole blood, plasma or blood cells of human origin', was supplemented by Article 1 of Directive 2004/27, which specified that that exclusion applied 'except for plasma which is prepared by a method involving an industrial process'.

33 Thus, plasma which is prepared by a method involving an industrial process comes within the material scope of Directive 2001/83, as amended by Directive 2004/27, regardless of whether or not it is intended for transfusions.

34 As regards the scope of Directive 2002/98, recital 5 in its preamble states that Directive 2001/83 should be amended in order to ensure that there is an equivalent level of safety and quality of blood components, whatever their intended purpose, by establishing technical requirements for the collection and testing of all blood and blood components, including starting materials for medicinal products.

35 In that regard, Article 31 of Directive 2002/98 amended Article 109 of Directive 2001/83, prior to the entry into force of Directive 2004/27, and provides that, with respect to their collection and testing, human blood and plasma are subject to the provisions of Directive 2002/98.

36 Accordingly, as the Advocate General noted at point 26 of his Opinion, Article 109 of Directive 2001/83, as amended by Directive 2002/98, provides that Directive 2002/98 applies to the collection and testing of human blood and human plasma, which encompasses plasma prepared by a method involving an industrial process, since the latter is either a blood component or a blood product as defined in Article 3(b) and (c) of Directive 2002/98.

37 It follows from all of the foregoing that plasma which is prepared industrially comes within the scope of Directive 2002/98 only with respect to its collection and its testing, since Directive 2001/83, as amended by Directive 2004/27, is applicable with respect to its processing, storage and distribution.

38 However, although plasma intended for transfusion which is prepared by a method involving an industrial process comes within the material scope of Directive 2001/83, as amended by Directive 2004/27, with respect to its processing, storage and distribution, the product in question, in order to be subject to the provisions of that directive, must none the less also satisfy the conditions laid down in Article 2 of that directive and be able to be regarded as a medicinal product for human use within the meaning of Article 1(2) of Directive 2001/83, as amended by Directive 2004/27.

39 Accordingly, in the present case, it will be for the referring court to determine whether plasma SD, and more particularly the product Octaplas, can be classified as a 'medicinal product' within the meaning of Article 1(2) of Directive 2001/83, as amended by Directive 2004/27. Such will be case, in particular, where the plasma at issue may be administered with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action.

40 Having regard to the foregoing considerations, the answer to the first part of the first question is that Directive 2001/83, as amended by Directive 2004/27, and Directive 2002/98 must be interpreted as meaning that plasma from whole blood which is prepared by a method involving an industrial process and which is intended for transfusions comes, in accordance with Article 109 of Directive 2001/83, within the scope of Directive 2002/98 with respect to its collection and testing, and within the scope of Directive 2001/83, as amended by Directive 2004/27, with respect to its processing, storage and distribution, on condition that it satisfies the definition of a medicinal product under Article 1(2) of the latter directive.

41 In the light of that answer, there is no need to reply to the second part of the first question.

The second question

42 By its second question, the referring court asks, in essence, whether Article 4(2) of Directive 2002/98, read in the light of Article 168 TFEU, must be interpreted as meaning that it allows the maintenance or introduction of national provisions which make industrially manufactured plasma subject to a more rigorous regime than that to which medicinal products are subject.

43 It should be recalled that, though their objective is the protection of human health, Directives 2001/83 and 2002/98 were not adopted on the basis of the same articles of the FEU Treaty. Thus, Directive 2001/83 is based on Article 114 TFEU, the object of which is the establishment and functioning of the internal market, whereas Directive 2002/98 is based on Article 168 TFEU, which provides for a high level of human health protection. Article 168(4)(a) TFEU does, it is true, provide that the Member States cannot be prevented from maintaining or introducing more stringent protective measures, a provision expressly reproduced in Article 4(2) of Directive 2002/98.

44 However, in cases where that directive is not applicable, it must be stated that the same possibility is not provided for by Directive 2001/83 or by Article 114 TFEU. It follows that the possibility for a Member State to maintain or introduce in its territory more stringent protective measures is available only in the areas which come within the scope of Directive 2002/98.

45 As has been established in paragraph 40 above, plasma which is prepared by a method involving an industrial process comes within the scope of Directive 2002/98 only with respect to its collection and testing, and within the scope of Directive 2001/83, as amended by Directive 2004/27, with respect to its processing, storage and distribution.

46 Consequently, the answer to the second question is that Article 4(2) of Directive 2002/98, read in the light of Article 168 TFEU, must be interpreted as meaning that it allows the maintenance or introduction of national provisions which make plasma which is prepared by a method involving an industrial process subject to a more rigorous regime than that to which medicinal products are subject solely with respect to its collection and testing.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004, and Directive 2002/98/EC of the European Parliament and of the Council of 27 January 2003 setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83 must be interpreted as meaning that plasma from whole blood which is prepared by a method involving an industrial process and which is intended for transfusions comes, in accordance with Article 109 of Directive 2001/83, within the scope of Directive 2002/98 with respect to its collection and testing, and within the scope of Directive 2001/83, as amended by Directive 2004/27, with respect to its processing, storage and distribution, on condition that it satisfies the definition of a medicinal product under Article 1(2) of the latter directive.**

2. **Article 4(2) of Directive 2002/98, read in the light of Article 168 TFEU, must be interpreted as meaning that it allows the maintenance or introduction of national provisions which make plasma which is prepared by a method involving an industrial process subject to a more rigorous regime than that to which medicinal products are subject solely with respect to its collection and testing.**

[Signatures]