



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

24 November 2022*

(Reference for a preliminary ruling – Procedure for the provision of information in the field of technical regulations and of rules on Information Society services – Directive (EU) 2015/1535 – Concept of ‘technical regulation’ – Article 1(1) – National legislation prohibiting individuals from using pesticides containing glyphosate on land in private use – Article 5(1) – Obligation on Member States to communicate to the European Commission any draft technical regulation)

In Case C-658/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Belgium), made by decision of 21 October 2021, received at the Court on 29 October 2021, in the proceedings

Belgisch-Luxemburgse vereniging van de industrie van plantenbescherming VZW (Belplant), formerly Belgische Vereniging van de Industrie van Plantenbeschermingsmiddelen VZW (Phytofar),

v

Vlaams Gewest,

THE COURT (Eighth Chamber),

composed of N. Piçarra, acting as President of the Chamber, N. Jääskinen and M. Gavalec (Rapporteur), Judges,

Advocate General: A.M. Collins,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Belgisch-Luxemburgse vereniging van de industrie van plantenbescherming VZW (Belplant), formerly Belgische Vereniging van de Industrie van Plantenbeschermingsmiddelen VZW (Phytofar), by B. Deltour, advocaat,
- the Vlaams Gewest, by E. Cloots, T. Roes and J. Roets, advocaten,

* Language of the case: Dutch.

– the European Commission, by F. Castilla Contreras, M. Escobar Gómez and M. ter Haar, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(1) and Article 5(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1).
- 2 The request has been made in proceedings between Belgisch-Luxemburgse vereniging van de industrie van plantenbescherming VZW (Belplant) (Belgian-Luxembourgish Association of the Crop Protection Industry ASBL), formerly Belgische Vereniging van de Industrie van Plantenbeschermingsmiddelen VZW (Phytofar) (Belgian Association of the Crop Protection Industry ASBL) ('Belplant'), and the Vlaams Gewest (Flemish Region, Belgium) concerning the validity of a decision of the Flemish Government prohibiting individuals from using pesticides containing glyphosate on land in private use in the Flemish Region.

Legal context

European Union law

- 3 Recitals 2, 3, 7 and 11 of Directive 2015/1535 state:
 - '(2) The internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. Therefore, the prohibition of quantitative restrictions on the movement of goods and of measures having an equivalent effect is one of the basic principles of the Union.
 - (3) In order to promote the smooth functioning of the internal market, as much transparency as possible should be ensured as regards national initiatives for the establishment of technical regulations.
- ...
- (7) The aim of the internal market is to create an environment that is conducive to the competitiveness of undertakings. Increased provision of information is one way of helping undertakings to make more of the advantages inherent in this market. It is therefore necessary to enable economic operators to give their assessment of the impact of the national technical regulations proposed by other Member States, by providing for the regular publication of the titles of notified drafts and by means of the provisions relating to the confidentiality of such drafts.
- ...

(11) Requirements, other than technical specifications, referring to the life cycle of a product after it has been placed on the market are liable to affect the free movement of that product or to create obstacles to the proper functioning of the internal market.’

4 Article 1(1)(b) to (f) of that directive provides:

‘For the purposes of this Directive, the following definitions apply:

...

(b) “service” means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

...

(c) “technical specification” means a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures.

The term “technical specification” also covers production methods and processes used in respect of agricultural products, as referred to in the second subparagraph of Article 38(1) of the Treaty on the Functioning of the European Union (TFEU), products intended for human and animal consumption, and medicinal products as defined in Article 1 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 well as production methods and processes relating to other products, where these have an effect on their characteristics;

(d) “other requirements” means a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing;

(e) “rule on services” means a requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point (b), in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

...

(f) “technical regulation” means technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 7, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

...’

5 Article 5(1) of that directive provides:

‘Subject to Article 7, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard is to suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where those grounds have not already been made clear in the draft.

Where appropriate, and unless it has already been sent with a prior communication, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned to the Commission, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

...

Where, in particular, the draft technical regulation seeks to limit the marketing or use of a chemical substance, preparation or product on grounds of public health or of the protection of consumers or the environment, Member States shall also forward either a summary or the references of all relevant data relating to the substance, preparation or product concerned and to known and available substitutes, where such information may be available, and communicate the anticipated effects of the measure on public health and the protection of the consumer and the environment, together with an analysis of the risk carried out as appropriate in accordance with the principles provided for in the relevant part of Section II.3 of Annex XV to Regulation (EC) No 1907/2006 of the European Parliament and of the Council [of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1)].

...’

Belgian law

The Decree of 8 February 2013

6 Article 6 of the decreet houdende duurzaam gebruik van pesticiden in het Vlaamse Gewest (Decree on the sustainable use of pesticides in the Flemish Region) of 8 February 2013 (*Belgisch Staatsblad*, 22 March 2013, p. 11685), in the version applicable at the material time, provides:

‘The use of pesticides may be regulated by a prohibition or restriction on use. To that end, a distinction can be drawn according to the type of active substance, the land in specific areas, the activity or the target group.

The Flemish Government shall lay down more detailed rules to that end.’

The Decision of 15 March 2013

- 7 The Flemish Government implemented the Decree of 8 February 2013 on the sustainable use of pesticides in the Flemish Region by means of the besluit houdende nadere regels inzake duurzaam gebruik van pesticiden in het Vlaamse Gewest voor niet-land- en tuinbouwactiviteiten en de opmaak van het Vlaams Actieplan Duurzaam Pesticidengebruik (Decision laying down detailed rules on the sustainable use of pesticides in the Flemish Region for non-agricultural and non-horticultural activities and the establishment of the Flemish Action Plan for the Sustainable Use of Pesticides) of 15 March 2013 (*Belgisch Staatsblad*, 18 April 2013, p. 23751; ‘the Decision of 15 March 2013’).

The Decision of 14 July 2017

- 8 The preamble to the Vlaamse Regering tot wijziging van het besluit van de Vlaamse Regering van 15 maart 2013 houdende nadere regels inzake duurzaam gebruik van pesticiden in het Vlaamse Gewest voor niet-land- en tuinbouwactiviteiten en de opmaak van het Vlaams Actieplan Duurzaam Pesticidengebruik (Decision of the Flemish Government amending the Decision of the Flemish Government of 15 March 2013 laying down detailed rules on the sustainable use of pesticides in the Flemish Region for non-agricultural and non-horticultural activities and drawing up the Flemish Action Plan for the Sustainable Use of Pesticides) of 14 July 2017 (*Belgisch Staatsblad*, 18 July 2017, p. 73320; ‘the Decision of 14 July 2017’), provides:

‘...

Considering that scientific research does not provide a definitive answer as to whether the use of pesticides containing glyphosate is harmful to both public health and the environment; that research into the carcinogenic or toxic effects of the use of pesticides containing glyphosate has been shown to be influenced by the undertakings concerned; that it is therefore appropriate, on the basis of the precautionary principle, immediately to prohibit the use of pesticides containing glyphosate on land in private use by users who do not have a phytosanitary licence; that the absence of a legal basis for such a prohibition has been established; that on 28 June 2017 the Vlaams Parlement (Flemish Parliament) approved, as a matter of urgency, the draft decree containing various provisions relating to the environment, nature and agriculture in order expressly to provide for the legal basis for that prohibition; that the Flemish Government has approved and promulgated on 30 June 2017 the [decreet houdende diverse bepalingen inzake omgeving, natuur en landbouw (Decree laying down various provisions relating to the environment, nature and agriculture)]; that in the absence of urgent action, such a prohibition is likely to take effect only after the users concerned have already applied pesticides containing glyphosate on the land concerned;

...

Considering that in the absence of any scientific consensus on the effects of glyphosate and glyphosate-based herbicides on human health, the environment and nature, the precautionary principle must be observed;

...’

9 Article 2 of the Decision of 14 July 2017 inserted into the Decision of 15 March 2013 an Article 3/1, worded as follows:

‘Chapter 4/1 shall apply to areas used by individuals.’

10 Chapter 4/1, entitled ‘Use of pesticides containing glyphosate’, was added to the Decision of 15 March 2013 by Article 5 of the Decision of 14 July 2017. That chapter consists solely of Article 8/1, which is worded as follows:

‘Only professional users who have a P1, P2 or P3 phytosanitary licence shall be authorised to use glyphosate-based pesticides.

For the purposes of the first subparagraph, “professional user” means any person who, in the agricultural sector or another sector, uses products in the course of his or her professional activities, including persons who handle application devices, technicians, employers and self-employed workers.

...’

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

11 Belplant brought an action before the referring court, the Raad van State (Council of State, Belgium), seeking annulment of the Decision of 14 July 2017.

12 That court notes that, in support of its action, Belplant raises, inter alia, a plea alleging infringement of Article 5(1) of Directive 2015/1535, read in conjunction with the principle of sincere cooperation laid down in Article 4(3) TFEU.

13 That court states that, by that plea, Belplant claims that the Decision of 14 July 2017 should have been communicated to the Commission, in accordance with Article 5(1) of that directive, given that it lays down a prohibition on the use, on land in private use, of pesticides containing glyphosate by users who do not have an authorisation issued by the competent regional authority called a ‘phytosanitary licence’.

14 According to Belplant, that prohibition constitutes a technical regulation, and more specifically an ‘other requirement’ within the meaning of Article 1(1)(d) and (f) of Directive 2015/1535. Belplant argues that such a regulation is subject to the obligation of prior communication to the Commission laid down in Article 5(1) of that directive, so that, since the Flemish Government did not fulfil that obligation, the provision of the Decision of 14 July 2017 containing the technical regulation concerned is invalid and, accordingly, inapplicable.

15 The referring court states, in that regard, that a pesticide containing glyphosate is no different depending on whether it is applied by an ordinary user or by a professional user who has a phytosanitary licence. It considers, therefore, that the measure introduced by the Decision of 14 July 2017 consists in imposing a prohibition on users who do not have a phytosanitary licence from using pesticides containing glyphosate on land in private use.

16 The referring court therefore raises the question whether that measure should in fact have been communicated to the Commission as a technical regulation, as maintained by Belplant.

- 17 In those circumstances, the Raad van State (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 5(1) of Directive [2015/1535] be interpreted as meaning that a prohibition on the use of pesticides containing glyphosate on land in private use by users who do not have a phytosanitary licence is deemed to concern a technical regulation which must be communicated to the European Commission in accordance with the provisions of that article?’

Consideration of the question referred

- 18 By its question, the referring court asks, in essence, whether Article 1(1) of Directive 2015/1535, read in conjunction with Article 5 thereof, must be interpreted as meaning that national legislation which prohibits persons who do not have a national authorisation intended for professionals from using pesticides containing glyphosate on land in private use constitutes a ‘technical regulation’, within the meaning of the first of those provisions, which must be communicated to the Commission under the second provision.
- 19 As a preliminary point, with regard to the argument put forward by the Flemish Region in its written observations that the measure introduced by the Decision of 14 July 2017 does not fall within the scope of Directive 2015/1535, in so far as that decision regulates the activities of economic operators and not the characteristics of a product, it is true that provisions of national law which merely lay down conditions governing the establishment or provision of services by undertakings, such as provisions making the exercise of a business activity subject to prior authorisation, do not constitute ‘technical regulations’ within the meaning of Article 1(1) of Directive 2015/1535 (see, to that effect, judgment of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 30 and the case-law cited).
- 20 However, the measure introduced by the Decision of 14 July 2017 must be examined not in the light of the obligation for professional users to have a phytosanitary licence, but in the light of the prohibition that it imposes on users who do not have such a licence from using pesticides containing glyphosate on land in private use.
- 21 Such a prohibition, laid down by national legislation, is capable of falling within the scope of Directive 2015/1535.
- 22 Article 1(1)(f) of Directive 2015/1535 distinguishes four categories of measures which may be regarded as ‘technical regulations’ within the meaning of that directive: (i) ‘technical specifications’; (ii) ‘other requirements’; (iii) ‘rules on services’; and (iv) ‘laws, regulations or administrative provisions of Member States ... prohibiting the manufacture, importation, marketing or use of a product’. The first three categories of measures are defined in points (c) to (e) of that Article 1(1) respectively.
- 23 In order to answer the question referred, the Court must examine whether the prohibition, laid down by national legislation such as the Decision of 14 July 2017, on the use of pesticides containing glyphosate on land in private use by persons who do not have a national authorisation intended for professionals – in this case a phytosanitary licence – falls within one of those four categories of technical regulations.

- 24 It must be stated, in the first place, that in order for a national measure to fall within the first category of technical regulations, referred to in Article 1(1)(c) of Directive 2015/1535, namely within the concept of ‘technical specification’, that measure must necessarily refer to the product or its packaging as such and thus lay down one of the characteristics required of a product (judgment of 8 October 2020, *Admiral Sportwetten and Others*, C-711/19, EU:C:2020:812, paragraph 26 and the case-law cited).
- 25 In the present case, it is common ground that the measure introduced by the Decision of 14 July 2017 does not refer to pesticides containing glyphosate or their packaging as such, so that that measure does not lay down one of the characteristics required of those products.
- 26 Accordingly, that measure does not constitute a technical regulation in the form of a ‘technical specification’, within the meaning of Article 1(1)(c) of Directive 2015/1535.
- 27 In the second place, as regards the category of technical regulations consisting of ‘rules on services’, it is sufficient to note that the measure introduced by the Decision of 14 July 2017 cannot fall within that category, since it is clear from the definitions set out in Article 1(1)(b) and (e) of Directive 2015/1535 that the concept of ‘rule on services’ designates a requirement relating to Information Society services, that is to say, services provided at a distance, by electronic means and at the individual request of a recipient.
- 28 That measure does not concern such Information Society services, but specific products and their use.
- 29 In the third place, it must be ascertained whether the measure introduced by the Decision of 14 July 2017 may fall within the category of technical regulations consisting of ‘laws, regulations or administrative provisions of Member States ... prohibiting the manufacture, importation, marketing or use of a product’ within the meaning of Article 1(1)(f) of Directive 2015/1535.
- 30 In that regard, it should be noted, first, that it is common ground that the measure introduced by the Decision of 14 July 2017 does not prohibit the manufacture, importation or marketing of pesticides containing glyphosate.
- 31 Second, regarding prohibitions on use, it must be recalled that the Court has previously held that those prohibitions include measures the scope of which goes well beyond a limitation to certain possible uses of the product in question and are thus not confined to a mere restriction of its use (judgment of 8 October 2020, *Admiral Sportwetten and Others*, C-711/19, EU:C:2020:812, paragraph 36 and the case-law cited).
- 32 That category of technical regulations is particularly intended to cover national measures which leave no room for any use that could reasonably be made of the product concerned other than a purely marginal one (judgment of 28 May 2020, *ECO-WIND Construction*, C-727/17, EU:C:2020:393, paragraph 46 and the case-law cited).
- 33 It follows, as the Flemish Region points out in its written observations, that only an almost absolute prohibition on the normal use of a product is capable of falling within that category, which excludes the mere imposition of conditions or restrictions on the use of that product, such as, in the present case, the prohibition on private users not from buying pesticides containing glyphosate, but from making use of such products themselves, which forces those users to make use, for that purpose, of the services of professionals who have a phytosanitary licence.

- 34 Consequently, the measure introduced by the Decision of 14 July 2017 cannot fall within the category of ‘laws, regulations or administrative provisions of Member States ... prohibiting the manufacture, importation, marketing or use of a product’ within the meaning of Article 1(1)(f) of Directive 2015/1535.
- 35 In the fourth and last place, as regards the category of technical regulations consisting of ‘other requirements’, defined in Article 1(1)(d) of Directive 2015/1535, that category covers a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing.
- 36 In the present case, it is apparent, first of all, from the preamble to the Decision of 14 July 2017 that the prohibition laid down by it is imposed in order to protect human health and the environment.
- 37 Next, that prohibition concerns the life cycle of pesticides containing glyphosate after they have been placed on the market, by laying down a condition relating to the use of those products, in that, on land in private use, only professionals who have a phytosanitary licence are authorised to use them.
- 38 Lastly, it must be observed that such a prohibition is liable to influence the marketing of the products concerned.
- 39 That measure results in the disappearance of a category of potential purchasers of pesticides containing glyphosate, namely individuals who wish to use such pesticides themselves, without making use of the services of professionals who have the required phytosanitary licence. Such a restriction on the possibility of using pesticides containing glyphosate thus affects their marketing (see, by analogy, judgment of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 26 and the case-law cited).
- 40 However, as the Commission states in its written observations, in order for the measure introduced by the Decision of 14 July 2017 to be classified as a ‘technical regulation’, falling within the category of ‘other requirements’ within the meaning of Article 1(1)(d) and (f) of Directive 2015/1535, the marketing of pesticides containing glyphosate must be ‘significantly’ influenced by that measure.
- 41 It is for the referring court to determine whether that is the case here.
- 42 In making that assessment, the referring court may take into account, inter alia, the overall volume of sales of pesticides containing glyphosate in the territory of the Flemish Region and the change in the purchasing habits of each category of purchaser, on the basis of the frequency of their purchases and the quantity of product purchased, as well as the change in the places of purchase and distribution channels. In that context, that court may take into consideration the extent to which, on the one hand, demand from professional users replaces that of individuals who make use of the services of professional users and, on the other hand, individual users now obtain glyphosate-free pesticides instead of those containing that substance.

- 43 If the referring court were to find that the measure introduced by the Decision of 14 July 2017 has the effect of significantly influencing the marketing of the products concerned, it would follow that, prior to the adoption of that decision, the Flemish Government was required to comply with the obligation to communicate draft technical regulations laid down in Article 5(1) of Directive 2015/1535.
- 44 It should be added that the fourth subparagraph of Article 5(1) of that directive provides that, where, in particular, the draft technical regulation seeks to limit the marketing or use of a chemical substance, preparation or product on grounds of public health or of the protection of consumers or the environment, Member States are also to forward to the Commission either a summary or the references of all relevant data relating to the substance, preparation or product concerned and to known and available substitutes, where such information may be available, and communicate the anticipated effects of the measure on public health and the protection of the consumer and the environment, together with an analysis of the risk carried out as appropriate in accordance with the principles provided for in the relevant part of Section II.3 of Annex XV to Regulation No 1907/2006.
- 45 In the light of all the foregoing considerations, the answer to the question referred is that Article 1(1) of Directive 2015/1535, read in conjunction with Article 5 thereof, must be interpreted as meaning that national legislation which prohibits persons who do not have a national authorisation intended for professionals from using pesticides containing glyphosate on land in private use is capable of constituting a ‘technical regulation’, within the meaning of Article 1(1)(d) and (f) of that directive, which must be communicated to the Commission under Article 5 of that directive, in so far as the application of that national legislation may significantly influence the marketing of the products concerned, which is a matter for the referring court to determine.

Costs

- 46 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 (Eighth Chamber) hereby rules:

Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, read in conjunction with Article 5 thereof

must be interpreted as meaning that national legislation which prohibits persons who do not have a national authorisation intended for professionals from using pesticides containing glyphosate on land in private use is capable of constituting a ‘technical regulation’, within the meaning of Article 1(1)(d) and (f) of that directive, which must be communicated to the European Commission under Article 5 of that directive, in so far as the application of that national legislation may significantly influence the marketing of the products concerned, which is a matter for the referring court to determine.

[Signatures]