Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

27 April 2017 *

(Reference for a preliminary ruling — Registration, evaluation, authorisation and restriction of chemicals — Regulation (EC) No 1907/2006 (REACH Regulation) — General obligation to register and information requirements — Unregistered chemicals — Export of unregistered chemicals outside the territory of the European Union)

In Case C-535/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), made by decision of 10 September 2015, received at the Court on 14 October 2015, in the proceedings

Freie und Hansestadt Hamburg

v

Jost Pinckernelle,

intervening parties:

Vertreter des Bundesinteresses beim Bundesverwaltungsgericht,

THE COURT (Third Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, M. Vilaras, J. Malenovský, M. Safjan and D. Šváby, Judges,

Advocate General: E. Tanchev,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 28 September 2016,

after considering the observations submitted on behalf of:

— the Freie und Hansestadt Hamburg, by M. Vogelsang, Rechtsanwalt,

— Mr Pinckernelle, by A. Anisic, Rechtsanwältin,

— the German Government, by T. Henze and J. Möller and by K. Petersen, acting as Agents,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Russo, avvocato dello Stato,

* Language of the case: German.

— the European Commission, by T. Maxian Rusche and D. Kukovec, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 December 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5 of 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 and corrigendum OJ 2007 L 136, p. 3) ('the REACH Regulation').

2 The request has been made in proceedings between the Freie und Hansestadt Hamburg (Free and Hanseatic City of Hamburg, Germany; 'the City of Hamburg') and Jost Pinckernelle, concerning the export of chemicals outside the territory of the European Union which were imported into that territory without being registered in accordance with, in particular, Article 5 of the REACH Regulation.

Legal context

EU law

3 Recitals 1 to 3 and 7 of the REACH Regulation are worded as follows:

'(1) This Regulation should ensure a high level of protection of human health and the environment as well as the free movement of substances, on their own, in preparations and in articles, while enhancing competitiveness and innovation. …

(2) The efficient functioning of the internal market for substances can be achieved only if requirements for substances do not differ significantly from Member State to Member State.

(3) A high level of human health and environmental protection should be ensured in the approximation of legislation on substances, with the goal of achieving sustainable development. That legislation should be applied in a non-discriminatory manner whether substances are traded on the internal market or internationally in accordance with the Community's international commitments.

…

(7) To preserve the integrity of the internal market and to ensure a high level of protection for human health, especially the health of workers, and the environment, it is necessary to ensure that manufacturing of substances in the Community complies with Community law, even if those substances are exported.'

4 Article 1 of that regulation, entitled ‘Aim and scope’ provides, in paragraph 1:

‘The purpose of this Regulation is to ensure a high level of protection of human health and the environment, including the promotion of alternative methods for assessment of hazards of substances, as well as the free circulation of substances on the internal market while enhancing competitiveness and innovation.’

5 Article 2 of that regulation, entitled ‘Application’, provides, in paragraph 7(c)(i):

‘The following shall be exempted from Titles II, V and VI:

…

(c) substances on their own or in preparations, registered in accordance with Title II, exported from the Community by an actor in the supply chain and re-imported into the Community by the same or another actor in the same supply chain who shows that:
(i) the substance being re-imported is the same as the exported substance;

…’

6 Article 3 of the REACH Regulation, entitled ‘Definitions’, is worded as follows:

‘For the purposes of this Regulation:

…

9. manufacturer: means any natural or legal person established within the Community who manufactures a substance within the Community;

10. import: means the physical introduction into the customs territory of the Community;

11. importer: means any natural or legal person established within the Community who is responsible for import;

12. placing on the market: means supplying or making available, whether in return for payment or free of charge, to a third party. Import shall be deemed to be placing on the market;

…

21. notified substance: means a substance for which a notification has been submitted and which could be placed on the market in accordance with [Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (English special edition: Series I Volume 1967 P. 234-256)].’

7 Article 5 of that regulation, entitled ‘No data, no market’, states:

‘Subject to Articles 6, 7, 21 and 23, substances on their own, in preparations or in articles shall not be manufactured in the Community or placed on the market unless they have been registered in accordance with the relevant provisions of this Title where this is required.’

8 Article 6 of that regulation, entitled ‘General obligation to register substances on their own or in mixtures’, states, in paragraph 1:

‘Save where this Regulation provides otherwise, any manufacturer or importer of a substance, either on its own or in one or more preparation(s), in quantities of one tonne or more per year shall submit a registration to the [European Chemicals Agency (‘the Agency’)].’

9 Article 7 of the REACH Regulation, entitled ‘Registration and notification of substances in articles’ provides, in paragraph 1:

‘Any producer or importer of articles shall submit a registration to the Agency for any substance contained in those articles, if both the following conditions are met:

(a) the substance is present in those articles in quantities totalling over one tonne per producer or importer per year;

(b) the substance is intended to be released under normal or reasonably foreseeable conditions of use.

A submission for registration shall be accompanied by the fee required in accordance with Title IX.’

10 Article 21 of that regulation, entitled ‘Manufacturing and import of substances’, provides, in paragraph 1:

‘A registrant may start or continue the manufacture or import of a substance or production or import of an article, if there is no indication to the contrary from the Agency in accordance with Article 20(2) within the three weeks after the submission date, without prejudice to Article 27(8).

In the case of registrations of phase-in substances, such a registrant may continue the manufacture or import of the substance or production or import of an article, if there is no indication to the contrary from the Agency in accordance with Article 20(2) within the three weeks after the submission date or, if submitted within the two-month period before the relevant deadline of Article 23, if there is no indication to the contrary from the Agency in accordance with Article 20(2) within the three months from that deadline, without prejudice to Article 27(8).

In the case of an update of a registration according to Article 22 a registrant may continue the manufacture or import of the substance, or the production or import of the article, if there is no indication to the contrary from the Agency in accordance with Article 20(2) within the three weeks after the update date, without prejudice to Article 27(8).’

11 Article 23 of that regulation, entitled ‘Specific provisions for phase-in substances’, is worded as follows:

‘1. Article 5, Article 6, Article 7(1), Article 17, Article 18 and Article 21 shall not apply until 1 December 2010 to the following substances:

(a) phase-in substances classified as carcinogenic, mutagenic or toxic to reproduction, … and manufactured in the Community or imported, in quantities reaching one tonne or more per year per manufacturer or per importer, at least once after 1 June 2007;

(b) phase-in substances classified as very toxic to aquatic organisms which may cause long-term adverse effects in the aquatic environment … and manufactured in the Community or imported in quantities reaching 100 tonnes or more per year per manufacturer or per importer, at least once after 1 June 2007;

(c) phase-in substances manufactured in the Community or imported, in quantities reaching 1 000 tonnes or more per year per manufacturer or per importer, at least once after 1 June 2007.

2. Article 5, Article 6, Article 7(1), Article 17, Article 18 and Article 21 shall not apply until 1 June 2013 to phase-in substances manufactured in the Community or imported, in quantities reaching 100 tonnes or more per year per manufacturer or per importer, at least once after 1 June 2007.

3. … until 1 June 2018 …

4. Without prejudice to paragraphs 1 to 3, a registration can be submitted at any time before the relevant deadline.

5. This Article shall also apply to substances registered under Article 7 adapted as necessary.'

12 Article 28 of the REACH Regulation, entitled 'Duty to pre-register for phase-in substances', states:

'1. In order to benefit from the transitional regime provided for in Article 23 each potential registrant of a phase-in substance in quantities of one tonne or more per year, including without limitation intermediates, shall submit all the following information to the Agency:

…

2. The information referred to in paragraph 1 shall be submitted within a time period starting on 1 June 2008 and ending on 1 December 2008.

3. Registrants who do not submit the information required under paragraph 1 shall not be able to rely on Article 23.

…'

13 Article 31 of that regulation, entitled 'Requirements for Safety Data Sheets', provides, in paragraph 5:

'The safety data sheet shall be supplied in an official language of the Member State(s) where the substance or preparation is placed on the market, unless the Member State(s) concerned provide otherwise.'

14 Article 112 of that regulation, entitled 'Scope', which is in Title XI of that regulation, entitled 'Classification and labelling inventory', states:

'This Title shall apply to:

…

(b) substances within the scope of Article 1 of Directive 67/548/EEC, which meet the criteria for classification as dangerous in accordance with that Directive, and which are placed on the market either on their own, or in a preparation above the concentration limits specified in Directive 1999/45/EC, where relevant, which results in the classification of the preparation as dangerous.'

15 Article 126 of the REACH Regulation, entitled 'Penalties for non-compliance', states:

'The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. …'

16 Article 129 of that regulation, entitled ‘Safeguard clause’, provides, in paragraphs 2 and 3:

‘2. The Commission shall take a decision in accordance with the procedure referred to in Article 133(3) within 60 days of receipt of the information from the Member State. This decision shall either:

(a) authorise the provisional measure for a time period defined in the decision; or

(b) require the Member State to revoke the provisional measure.

3. If, in the case of a decision as referred to in paragraph 2(a), the provisional measure taken by the Member State consists in a restriction on the placing on the market or use of a substance, the Member State concerned shall initiate a Community restrictions procedure by submitting to the Agency a dossier, in accordance with Annex XV, within three months of the date of the Commission decision.’

17 Annex XV to the REACH Regulation states that it lays down general principles for preparing dossiers to propose and justify, inter alia, restrictions of the manufacture, placing on the market or use of a substance within the Community.

German law

18 The Gesetz zum Schutz vor gefährlichen Stoffen (Chemikaliengesetz; ChemG) (Law on protection from dangerous substances), as amended by the Notice of 28 August 2013 (BGBl I, pp. 3498, 3991), states in Paragraph 27b, entitled ‘Infringements of [the REACH Regulation]’, that ‘a person is liable to punishment of up to two years’ imprisonment or a fine if he infringes [the REACH Regulation]’.

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

19 Mr Pinckernelle trades in chemical substances.

20 After 1 December 2008, he imported at least 19.4 tonnes of nicotine sulphate from China without the required pre-registration under Article 28 of the REACH Regulation.

21 Since Mr Pinckernelle had not registered that product under Article 6 of that regulation, the City of Hamburg decided that the applicant was not authorised to use the substance or to place it on the market until authorisation for the purpose for which it was being used was obtained.

22 Mr Pinckernelle requested authorisation to export that product to Russia, which was refused by the City of Hamburg in light of the fact that that product was in Hamburg unlawfully. The City of Hamburg also rejected Mr Pinckernelle’s objection to that refusal.

23 Consequently, Mr Pinckernelle brought an action before the Verwaltungsgericht Hamburg (Administrative Court, Hamburg, Germany) against the rejection of his complaint, which that court did not uphold.

24 On appeal by Mr Pinckernelle, the Oberverwaltungsgericht (Higher Administrative Court, Germany) set aside the judgment of the Verwaltungsgericht Hamburg (Administrative Court, Hamburg) on 25 February 2014 and ordered the City of Hamburg to authorise Mr Pinckernelle to carry out the requested export of the nicotine sulphate.

25 The Oberverwaltungsgericht (Higher Administrative Court) stated, in the reasons for its judgment, that, in any case, the intended export of a substance imported in violation of Article 5 of the REACH Regulation could not then constitute a fresh breach of Article 3(12), read in conjunction with Article 5 of that regulation if, as in the present case, the substance at issue was not available on the European market due to the prohibition on its marketing.

26 The City of Hamburg brought an appeal against that judgment before the Bundesverwaltungsgericht (Federal Administrative Court, Germany). It argues that Article 5 of the REACH Regulation precludes chemical substances located in the European Union from being exported to non-Member States, so long as and in so far as such substances have not been registered in accordance with that regulation.

27 Separately from those administrative proceedings, Mr Pinckernelle, in the context of criminal proceedings in Germany, was sentenced to a period of imprisonment of 18 months, suspended on probation for a period of 3 years, and subject to a fine of EUR 340 000 on the basis that, inter alia, he had imported chemicals in violation of Article 5 of the REACH Regulation.

28 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 5 of [the REACH Regulation] to be interpreted as meaning that, subject to Articles 6, 7, 21 and 23 of the REACH Regulation, substances may not be exported out of the European Union unless they have been registered in accordance with the relevant provisions of Title II of the REACH Regulation where this is required?’

Consideration of the question referred

29 By its question, the referring court asks, in essence, whether Article 5 of the REACH Regulation is to be interpreted as meaning that substances which have not be registered at the time of their import into the territory of the European Union in accordance with that regulation can be exported outside that territory.

30 The answer to that question depends on the scope of the obligation to register provided for under that provision.

31 In that regard, in accordance with the settled case-law of the Court, for the purpose of interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 17 March 2016, *Liffers*, C-99/15, EU:C:2016:173, paragraph 14 and the case-law cited).

32 As regards the wording of Article 5 of the REACH Regulation, it should be noted that in the Bulgarian, Estonian, Greek, English, French, Italian, Dutch, Polish, Portuguese and Finnish language versions of that provision, the expression ‘in the Community’ is explicitly linked to the manufacture of substances. In contrast, in the Czech, Danish, Latvian, Hungarian, Romanian, Slovak, Slovenian and Swedish language versions of Article 5, the expression ‘in the Community’ relates to both the manufacture and the placing on the market of the substances. Lastly, the Spanish, German and Lithuanian language versions of that article are ambiguous on this point.

33 Thus, while the interpretation of Article 5 of the REACH Regulation according to which the expression ‘in the Community’ relates to both the manufacture and the placing on the market of the substances is not excluded as regards all of the linguistic versions of that provision, the interpretation that the expression refers exclusively to the manufacture of those substances is contrary to the wording of that provision in the Czech, Danish, Latvian, Hungarian, Romanian, Slovak, Slovenian and Swedish language versions.

34 With regard to the context in which the provision at issue features, it should be recalled that Article 3(12) of the REACH Regulation defines 'placing on the market' as being the supplying or making available, whether in return for payment or free of charge, to a third party, and import is to be deemed to be placing on the market. In contrast, that provision does not state that the export of a product may be deemed to be a placing on the market.

35 In so far as Article 3(12) of the REACH Regulation defines the concept of 'placing on the market' for the purposes of that regulation, that concept must be understood uniformly within the context of that regulation.

36 In that regard, reference should be made to Article 3(21) of the REACH Regulation under which a 'notified substance' means a substance for which a notification has been submitted and which could be placed on the market in accordance with Directive 67/548. That directive provides in Article 1(1) and (3), first, that its purpose is to approximate the laws, regulations and administrative provisions of the Member States on the classification, packaging and labelling of dangerous substances which are placed on the market in the Member States of the Community and, second, that it does not apply to dangerous substances exported to third countries. It follows that the 'placing on the market' to which Article 3(21) of the REACH Regulation refers relates to only the internal market and excludes exports outside that market.

37 Article 31(5) of the REACH Regulation states that 'the safety data sheet shall be supplied in an official language of the Member State(s) where the substance or preparation is placed on the market, unless the Member State(s) concerned provide otherwise'. Thus, that provision also refers to 'placing on the market' as relating only to the internal market.

38 The same is true for Article 112(b) of the REACH Regulation, pursuant to which Title XI of that regulation is, under certain conditions, applicable to 'substances within the scope of Article 1 of Directive 67/548/EEC', namely dangerous substances which are 'placed on the market in the Member States of the Community', excluding those which are 'exported to third countries'.

39 Pursuant to Article 129(3) of the REACH Regulation, if, in the case of a Commission decision authorising provisional measures for a defined period of time, the provisional measure taken by the Member State consists of a restriction on the placing on the market or use of a substance, the Member State concerned is to initiate a Community restrictions procedure by submitting to the Agency a dossier, in accordance with Annex XV to that regulation, within three months of the date of the Commission decision. Annex XV lays down general principles for preparing dossiers to propose and justify in particular the restrictions on the manufacture, placing on the market or use of a substance within the Community. It is therefore apparent that the expression 'placing on the market' in Article 129(3) of the REACH Regulation relates only to the internal market and does not cover exports to third countries.

40 On that latter point, it should be noted that, within the framework of the REACH Regulation, substances which leave Community territory are not referred to as being 'placed on the market', but rather as being 'exported'. Article 2(7)(c)(i) of that regulation states that 'the following shall be exempted from Titles II, V and VI: substances on their own or in preparations, registered in accordance with Title II, exported from the Community by an actor in the supply chain and re-imported into the Community by the same or another actor in the same supply chain who shows that … the substance being re-imported is the same as the exported substance'.

41 It follows from the foregoing that the export of a substance to a third country cannot be considered as the 'placing on the market' of that substance within the meaning of Article 3(12) and Article 5 of the REACH Regulation.

42 In that regard, it must be observed that the objectives of the REACH Regulation do not preclude such an interpretation of those provisions. That regulation is explicitly based on Article 95 EC, now Article 114 TFEU, the provisions of which apply for the achievement of the objectives set out in Article 14 EC, now Article 26 TFEU, namely to establish and ensure the functioning of the internal market which comprises an area without internal frontiers in which, inter alia, the free movement of goods is ensured.

43 In that context, recital 1 to the REACH regulation indicates that the latter should ensure, in particular, the free movement of goods. In that regard, the Court has specified that the REACH Regulation concerns the internal market (see, to that effect, judgment of 17 March 2016, *Canadian Oil Company Sweden and Rantén*, C-472/14, EU:C:2016:171, paragraph 32). Recital 2 of that regulation states that the efficient functioning of the internal market for substances can be achieved only if requirements for substances do not differ significantly from Member State to Member State. According to recital 7 of that regulation, to preserve the integrity of the internal market and to ensure a high level of protection for human health, especially the heath of workers, and the environment, it is necessary to ensure that manufacturing of substances in the Community complies with Community law, even if those substances are exported.

44 It follows from all those considerations that the market referred to in the REACH Regulation is the internal market and that therefore the expression 'placing on the market' relates to the internal market. Such an interpretation is not contradicted by any element of that regulation, especially since, when dealing with the release of substances outside the internal market, that regulation refers to the concept of export.

45 The City of Hamburg and the German Government have submitted that the interpretation of the words 'placed on the market' in Article 5 of the REACH Regulation as meaning that they relate only to the internal market and not to the export to third countries of chemicals which were unregistered when imported into the European Union could create the risk of rogue importers wilfully breaching EU chemical registration requirements in the knowledge that they can simply export those substances.

46 In that regard, it must be recalled that, in accordance with Article 126 of the REACH Regulation, Member States are to lay down the provisions on penalties applicable for infringement of the provisions of that regulation, Article 5 of which requires registration of substances, in particular when they are imported, and are to take all measures necessary to ensure that they are implemented. Moreover, the penalties provided for must be effective, proportionate and dissuasive.

47 In the present case, it must be pointed out that, as was noted in paragraph 18 above, under German law a person is liable to punishment of up to two years' imprisonment or a fine if he infringes the REACH Regulation.

48 Lastly, as is apparent from the file available to the Court and in particular from the order for reference, the competent authorities may make use of provisions of national administrative law to require, as a mandatory rule thereof, where relevant, compliance with the obligation to register a substance which has been imported, such as that which stems, inter alia, from Article 5 of the REACH Regulation.

49 In light of all the foregoing conclusions, the answer to the question referred for a preliminary ruling is that Article 5 of the REACH Regulation, read in conjunction with Article 3(12) of that regulation, must be interpreted as meaning that substances which have not be registered at the time of their import into the territory of the European Union in accordance with that regulation may be exported outside that territory.

Costs

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

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

Article 5 of 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, read in conjunction with Article 3(12) of that regulation, must be interpreted as meaning that substances which have not be registered at the time of their import into the territory of the European Union in accordance with that regulation may be exported outside that territory.

[Signatures]