Case C-514/19

Request for a preliminary ruling

Date lodged:

8 July 2019

Referring court:

Conseil d'État (France)

Date of the decision to refer:

28 June 2019

Applicant:

Union des industries de la protection des plantes

Defendants:

Premier ministre

Ministre de la transition écologique et solidaire

Ministre des Solidarités et de la Santé

Ministre de l'Agriculture et de l'Alimentation

Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail

Interveners:

Association Générations futures

Union nationale de l'apiculture française (UNAF)

Syndicat national de l'apiculture

CONSEIL D'ÉTAT

...

... **FRENCH REPUBLIC**

IN THE NAME OF THE FRENCH PEOPLE

UNION DES INDUSTRIES DE LA
PROTECTION DES PLANTES

…

Hearing of 29 May 2019

Decision of 28 June 2019

Having regard to the following procedure:

By an application and four further pleadings, registered on 1 October 2018, 12 and 13 March and 24 May 2019 ..., the Union des industries de la protection des plantes (Crop Protection Association) requests that the Conseil d'État (Council of State):

(1) annul, on the ground of misuse of powers, Decree No 2018-675 of 30 July 2018 on the definition of active substances of the neonicotinoid family present in plant protection products;

(2) … [request relating to costs]

It maintains that:

by providing for the general and absolute prohibition of the use of plant protection products containing one of the five neonicotinoids listed by the contested decree, Article L. 253-8 of the Rural and Maritime Fishing Code (code rural et de la pêche maritime) and the contested decree, adopted on the basis thereof, infringe Articles 4 to 20 of Regulation No 1107/2009 of 21 October 2009 and **[Or. 2]** the respective regulations for approval of those substances, which confer on the European Commission alone the power to authorise, or not to authorise, the use of such products;

– by providing for the general and absolute prohibition of the use of plant protection products containing one of the five neonicotinoids listed by the contested decree, Article L. 253-8 of the Rural and Maritime Fishing Code and the contested decree, adopted on the basis thereof, infringe Articles 36, 50 and 44 of Regulation No [1107]/2009;

– the contested decree infringes Articles 69 and 70 of Regulation No 1107/2009 on provisional and protective emergency measures which Member States may take in order to prohibit or restrict the use of an active substance or plant protection product;

– by prohibiting the use of seeds treated with plant protection products containing one of the five substances referred to by the contested decree, that decree

infringes Article 49 of Regulation No 1107/2009, since plant protection products containing thiacloprid are authorised in at least one Member State of the European Union.

... The ministre de la transition écologique et solidaire (Minister for Ecological and Inclusive Transition) contends that the application should be dismissed. He maintains that the pleas in law put forward by the applicant association are unfounded.

… [Point of procedure]

… In response to three measures of inquiry, the Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail (French Agency for Food, Environmental and Occupational Health Safety) submitted observations …

… The Association générations futures (Association for the Protection of Future Generations)[, intervening in the proceedings,] asks the Conseil d'État (Council of State) to reject the application of the Union des industries de la protection des plantes on the same grounds as those set out by the Ministre de la transition écologique et solidaire.

… The Union nationale de l'apiculture française (National Union of French Beekeepers)[, intervening in the proceedings,] asks the Conseil d'État to reject the application of the Union des industries de la protection des plantes on the same grounds as those set out by the Ministre de la transition écologique et solidaire.

… The Syndicat national de l'apiculture (National Union of Beekeeping)[, intervening in the proceedings,] asks the Conseil d'État to reject the application of the Union des industries de la protection des plantes on the same grounds as those set out by the Ministre de la transition écologique et solidaire. It maintains, furthermore, that the prohibition is justified on the basis of the emergency measures provided for by Article 71 of the regulation. **[Or. 3]**

…[procedural detail]

Having regard to:

– the Treaty on the Functioning of the European Union, in particular Article 267 thereof;

– Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009;

– Regulation (EU) No 485/2013 of the European Parliament and of the Council of 24 May 2013;

– Commission Regulation (EU) 2015/408 of 11 March 2015;

– Implementing Regulation (EU) 2018/113 of 24 January 2018;

– Implementing Regulation (EU) 2018/524 of 2 March 2018;

– Implementing Regulation (EU) 2018/783 of 29 May 2018;

– Implementing Regulation (EU) 2018/784 of 29 May 2018;

– Regulation (EU) 2018/785 of the European Parliament and of the Council of 29 May 2018;

– Directive (EU) 2015/1535 of 9 September 2015;

– The code de la santé publique (Public Health Code);

– The code rural et de la pêche maritime (Rural and Maritime Fishing Code);

– Law No 2016-1087 of 8 August 2016;

– the code de justice administrative (Code of Administrative Justice);

… [procedural details]

Regard being had to the following: **[Or. 4]**

1 Under Article L. 253-8(II) of the code rural et de la pêche maritime, in the version amended by Article 125 of the loi du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages (Law of 8 August 2016 for the reconquest of biodiversity, nature and landscapes), *'The use of plant protection products containing one or more of the active substances of the neonicotinoid family and seeds treated with those product shall be prohibited from 1 September 2018 ... Derogations from the prohibition referred to in the first and second subparagraphs of this paragraph II may be granted until 1 July 2020 by joint order of the ministers for agriculture, the environment and health. The order referred to in the first subparagraph of this paragraph II shall be adopted on the basis of an assessment made by the Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail which compares the benefits and risks associated with use of the plant protection products considered to be authorised in France with those associated with the use of substitute products or available alternative methods. That assessment shall relate to the effects on the environment, in particular on pollinators, on public health and on farming. It shall be made public under the conditions laid down in the last subparagraph of Article L. 1313-1 of the code de la santé publique*'. Adopted on the basis of Article L. 253-8 (II) of the aforementioned code rural et de la pêche maritime, Decree No 2018-675 inserted an Article D. 253-46-1 in the code rural et de la pêche maritime under which: 'the substances of the neonicotinoid family referred to in Article L. 253-8 are the following: Acetamiprid;/ Clothianidin; / Imidacloprid; / Thiacloprid; / Thiamethoxam'.

2 The Union des industries de la protection des plantes seeks the annulment of that decree on grounds of misuse of powers. It maintains inter alia ... that Article 253-8 (II) of the code rural et de la pêche maritime, for the application of which the contested decree was adopted, infringes the provisions of Regulation (EC) No 1107/2009 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.

3 … [details of the applications to intervene]

4 Under Article 4 of Regulation No 1107/2009: *'1. An active substance shall be approved in accordance with Annex II if it may be expected, in the light of current scientific and technical knowledge, that, taking into account the approval criteria set out in points 2 and 3 of that Annex, plant protection products containing that active substance meet the requirements provided for in paragraphs 2 and 3 …'* Under Article 6 of that regulation: *'Approval may be subject to conditions and restrictions including: … (h) designation of areas where the use of plant protection products, including soil treatment products, containing the active substance may not be authorised or where their use may be authorised under specific conditions; (i) the need to impose risk mitigation measures and monitoring after use; (j) any other particular conditions that result from the evaluation of information made available in the context of this Regulation.'* Under Article 13 of Regulation No 1107/2009: *'[1.] Within six months of receiving the conclusion from the Authority, the Commission shall present a report, referred to as "the review report", and a draft Regulation to the Committee referred to in Article 79(1), taking into account the draft* **[Or. 5]** *assessment report by the rapporteur Member State and the conclusion of the Authority... 2. On the basis of the review report, other factors legitimate to the matter under consideration and the precautionary principle where the conditions laid down in Article 7(1) of Regulation (EC) No 178/2002 are relevant, a Regulation shall be adopted in accordance with the regulatory procedure referred to in Article 79(3), providing that: (a) an active substance is approved, subject to conditions and restrictions, as referred to in Article 6, where appropriate; (b) an active substance is not approved: or (c) the conditions of the approval are amended. ... 4. Approved active substances shall be included in the Regulation referred to in Article 78(3) containing the list of active substances already approved. ...'* Under Article 21 of that regulation: *'1. The Commission may review the approval of an active substance at any time. It shall take into account the request of a Member State to review, in the light of new scientific and technical knowledge and monitoring data, the approval of an active substance, including where, after the review of the authorisations pursuant to Article 44(1), there are indications that the achievement of the objectives established in accordance with Article 4(1)(a)(iv) and (b)(i) and Article 7(2) and (3) of Directive 2000/60/EC is compromised. Where, in the light of new scientific and technical knowledge it considers that there are indications that the substance no longer satisfies the approval criteria provided for in Article 4, or further information required in accordance with article 6(f) has not been provided, it shall inform the Member States, the Authority*

and the producer of the active substance, setting a period for the producer to submit its comments'.

5 Under Article 69 in Chapter IX of Regulation No 1107/2009, which deals with emergency measures: '*Where it is clear that an approved active substance, safener, synergist or co-formulant or a plant protection product which has been authorised in accordance with this Regulation is likely to constitute a serious risk to human or animal health or the environment, and that such risk cannot be contained satisfactorily by means of measures taken by the Member State(s) concerned, measures to restrict or prohibit the use and/or sale of that substance or product shall be taken immediately in accordance with the regulatory procedure referred to in Article 79(3), either at the own initiative of the Commission or at the request of a Member State. ....*' Under Article 70 of the regulation: '*By way of derogation from Article 69, the Commission may in cases of extreme urgency provisionally adopt emergency measures after consulting the Member State or Member States concerned and informing the other Member States'.* Under Article 71 of the regulation: *' 1. Where a Member State officially informs the Commission of the need to take emergency measures, and no action has been taken in accordance with Article 69 or 70, the Member State may adopt interim protective measures. In this event, it shall immediately inform the other Member States and the Commission. 2. Within 30 working days, the Commission shall put the matter before the Committee referred to in Article 79(1) in accordance with the regulatory procedure referred to in Article 79(3) with a view to the extension, amendment or repeal of the national interim protective measure. 3. The Member State may maintain its national interim protective measures until Community measures have been adopted*'.

6 It is clear from those provisions that the procedure for approving an active substance is conducted at EU level and culminates in the adoption of an act of the European Commission providing for the approval, or otherwise, of the substance with, as appropriate, possible restrictions on its use. The European Commission may, however, re-examine the approval of an active substance at any time, **[Or. 6]** inter alia at the request of a Member State, in the light of new scientific and technical knowledge and monitoring data. Moreover, although the Member State may, in cases of urgency, adopt interim protective measures allowing for the use of an active substance to be restricted pursuant to Article 71 of Regulation No 1107/2009, this is on condition that it has previously informed the Commission of the need to adopt emergency measures and measures have not been taken by the Commission following that notification.

7 It is apparent from the documents in the file that the European Commission, in accordance with Regulation No 1107/2009, after restricting the use of clothianidin, imidacloprid and thiamethoxam by Regulation (EU) No 485/2013 of the European Parliament and of the Council of 24 May 2013, prohibited, by Implementing Regulations (EU) 2018/783, 2018/784 and 2018/785 of 29 May 2018, the use of those substances, from 19 December 2018, with the exception of treatments for crops staying within permanent greenhouses during their entire life-

cycle. Moreover, the approval of thiacloprid was extended by Implementing Regulations (EU) 2018/524 of 28 March 2018 and (EU) 2019/168 of 31 January 2019 until 30 April 2020, while the approval of acetamiprid was renewed by Implementing Regulation (EU) 2018/113 of 24 January 2018 for a period of 15 years. The contested decree prohibits the use of plant protection products containing one or more of the five active substances of the neonicotinoid family (Acetamiprid;/ Clothianidin; / Imidacloprid; / Thiacloprid; / Thiamethoxam) and of seeds treated with those products even though those five substances in the neonicotinoid family remain approved by the European Commission, with three of them subject to special restrictions on use.

8 Under Article 5 of Directive 2015/1535/EU 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: '*1. 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 shall 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, 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. ... 2. The Commission and the Member States may make comments to the Member State which has forwarded a draft technical regulation; that Member States shall take such comments into account as far as possible in the subsequent preparation of the technical regulation*'. Under Article 6 of the same directive: '*1. Member States shall postpone the adoption of a draft technical regulation for three months from the date of receipt by the Commission of the communication referred to in Article 5(1). ... 3.* **[Or. 7]** *With the exclusion of draft rules relating to services, Member States shall postpone the adoption of a draft technical regulation for 12 months from the date of receipt by the Commission of the communication referred to in Article 5(1) of this Directive, if, within three months of that date, the Commission announces its intention to propose or adopt a directive, regulation or decision on the matter in accordance with Article 288 TFEU. ... 7. Paragraphs 1 to 5 shall not apply in cases where: (a) for urgent reasons, occasioned by serious and unforeseeable circumstances relating to the protection of public health or safety, the protection of animals or the preservation of plants, and for rules on services, also for public policy, in particular the protection of minors, a Member*

State is obliged to prepare technical regulations in a very short space of time in order to enact and introduce them immediately without any consultations being possible ... '.

9 It is clear, first, from the provisions of Articles 5 and 6 of Directive 2015/1535, cited above, that, like the emergency procedure provided for in Articles 69 and 71 of Regulation No 1107/2009, the Member State must inform the European Commission and the other Member States of matters relating to the grounds of public health, protection of consumers or the environment which justify limiting the marketing or use of a substance, preparation or chemical product. In the absence of a request from the European Commission for the postponement of the adoption of the notified draft technical regulation, in particular where it gives notice of its intention to propose or adopt directive, regulation or decision in accordance with Article 6(3) [of Directive 2015/1535], the Member State may definitively adopt the draft three months after it has been notified.

10 It is also clear, from the provisions of Articles 69 and 71 of Regulation No 1107/2009, that if, following official notification from a Member State of the need to adopt emergency measures to prohibit the use of a product or an active substance, the European Commission does not take such measures, the Member State may adopt interim protective measures pending the adoption of Community measures.

11 It is apparent from the documents in the file that the French Government notified the European Commission on 2 February 2017 of the draft contested decree on the basis of the fourth [subparagraph] of Article 5[1] of Directive 2015/1535 of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and not on the basis of Regulation No 1107/2009 of 21 October 2009 concerning the placing of plant protection products on the market. In that notification, however, the French Government justified the prohibition of the use of plant protection products containing one or more of the substances of the neonicotinoid family and of seeds treated with those products, by referring to several scientific studies '*pointing to a significant impact of neonicotinoids on many environmental spheres, on non-target organisms such as bees, macro-invertebrates or birds*' and to a study by the European Food Safety Agency which '*identifies a risk to human health (impact on the development of the nervous system)*'. In its reply of 3 August 2017 to the notification of the draft, the Commission, which refers to Regulation No 1107/2009, states that it '*shares France's concerns relating to certain substances of the neonicotinoid family and to the risks which those substances present for bees' and points out that 'the EFSA has published findings concerning those three substances, drawing attention to other possible risks, thereby prompting the Commission to consider the need to implement further restrictions*'. **[Or. 8]**

12 The lawfulness of the contested decree therefore depends on whether … [wording of the first question]

13 … [wording of the second question]

14 … [wording of the third question]

15 These questions raise a difficult and serious problem of interpretation of EU law. It is necessary to refer them to the Court of Justice of the European Union and to stay the proceedings on the application of the Union des industries de la protection des plantes.

THE CONSEIL D'ÉTAT DECIDES:

Article 1: … [decision on the interventions]

Article 2: The following questions are referred to the Court of Justice of the European Union:

1. Where a national measure designed to restrict the use of active substances has been formally notified to the Commission on the basis of Article 5 of Directive **[Or. 9]** 2015/1535/EU of 9 September 2015, together, however, with a presentation of the information which leads the Member State to take the view that the substance is likely to constitute a serious risk to human or animal health or to the environment and that that risk can be adequately controlled, as the legislation currently stands, only by measures taken by the Member State, a presentation sufficiently clear for the Commission not to make the mistake of thinking that that notification has been made on the basis of Regulation No 1107/2009 of 21 October 2009, can the European Commission regard that notification as having been submitted under the procedure laid down in Articles 69 and 71 of that regulation and adopt, as appropriate, additional measures of enquiry satisfying both the requirements of that legislation and the concerns expressed by that Member State?

2. If the answer to that question is in the affirmative, must Implementing Regulations 2018/783, 2018/784 and 2018/785 of 29 May 2018 prohibiting the use of the substances thiamethoxam, clothianidin and imidacloprid, from 19 December 2018, with the exception of treatments for crops staying within permanent greenhouses during their entire life-cycle, be regarded as measures taken in response to the application made by France on 2 February 2017 for the general prohibition of the use of plant protection products containing one or more substances belonging to the neonicotinoid family and of seeds treated with those products?

3. If the answer to the previous question is in the affirmative, what can a Member State do if it has asked the Commission, pursuant to Article 69 of Regulation No 1107/2009, to take measures to restrict or prohibit the use of plant protection products containing one or more substances of the neonicotinoid family and of seeds treated with those products, and the Commission complies only in part with its request by not restricting the use

of all the substances belonging to the neonicotinoid family but by restricting the use of three of them?

Article 3: The proceedings are stayed …

Article 4: … [notification to the parties]

...