Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 4 June 2020[1]

Case C-514/19

Union des industries de la protection des plantes
v
Premier ministre and Others

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

(Request for a preliminary ruling — Agriculture — Environment — Regulation (EU) No 1107/2009 — Placing of plant protection products on the market — Lawfulness of an emergency measure taken by a Member State — Neonicotinoids — Protection of bees — Notification of concerns — Directive (EU) 2015/1535 — Procedure for the provision of information in the field of technical regulations and of rules on Information Society services — Sincere cooperation — Protective measures taken by the Commission)

I. Introduction

1. Regulation (EC) No 1107/2009[2] harmonises the authorisation of active substances and plant protection products in the European Union. Nevertheless, Member States may take unilateral protective measures if they have previously raised concerns about an active substance with the Commission and the Commission does not adopt protective measures of its own.

2. In the present case, clarification is required as to when a communication to the Commission in this sense is to be regarded as an expression of concerns. In the present case, France sent a communication to the Commission in accordance with Directive (EU) 2015/1535,[3] but did not expressly invoke the safeguard clause of the Plant Protection Regulation. It will also be necessary to examine what requirements must be met by measures taken by the Commission in order to exclude protective measures taken by the Member States.

1 Original language: German.

2 Regulation of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1; 'the Plant Protection Regulation').

3 Directive 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; 'the Notification Directive').

II. Legal framework

A. EU law

1. Plant Protection Regulation

3. The Plant Protection Regulation was adopted on the basis of Article 37(2), Article 95 and Article 152(4)(b) EC. These are the legal bases for the common agricultural and fisheries policies (now Article 41 TFEU), the internal market (now Article 114 TFEU) and measures in the veterinary and phytosanitary fields which derogate from the common agricultural policy and have as their direct objective the protection of public health (now Article 168(4)(b) TFEU).

4. Article 114(10) TFEU provides that measures based on that article 'shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure'.

5. Pursuant to Articles 13 and 79 of the Plant Protection Regulation, *the Commission* decides on the approval of *active substances* together with a committee in which the Member States are represented.

6. Article 4 of the Plant Protection Regulation contains the approval criteria for active substances, which aim to ensure, in particular, that active substances that qualify for approval must not have any harmful effects on human health or any unacceptable effect on the environment.

7. Article 6 of the Plant Protection Regulation provides that the approval of active substances may be subject to conditions and restrictions. Article 14 et seq. of the Plant Protection Regulation governs the renewal of the approval of an active substance, and Article 21 governs the review of approval.

8. Pursuant to Article 28 et seq. of the Plant Protection Regulation, *Member States* are to authorise *plant protection products* on the basis of approved active substances for their respective national territories. Article 36(3) of the Plant Protection Regulation allows Member States to restrict the use of plant protection products or refuse authorisation in order to mitigate risk, in particular on the basis of concerns relating to human or animal health or the environment.

9. Article 49 of the Plant Protection Regulation contains special rules for the placing on the market of treated seeds. Pursuant to paragraph 1, Member States are not to prohibit placing on the market and use of seeds treated with plant protection products authorised for that use in at least one Member State. Where there are serious concerns, the Commission may establish derogations from this in a procedure in accordance with Article 69. Articles 70 and 71 also apply in addition to that provision, however.

10. Irrespective of that reference, Articles 69 to 71 of the Plant Protection Regulation allow emergency measures to be adopted by the Commission and the Member States.

11. Article 69 of the Plant Protection Regulation governs the adoption of emergency measures by the Commission:

'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. Before taking such measures the Commission shall examine the evidence and may request an opinion from the Authority. The Commission may set a time limit within which such an opinion shall be provided.'

12. Pursuant to Article 70 of the Plant Protection Regulation, the Commission may take emergency measures on an expedited basis in cases of extreme urgency.

13. Article 71 of the Plant Protection Regulation relates to the powers of the Member States to adopt emergency measures:

'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 the Community measures have been adopted.'

2. The Notification Directive

14. Article 5(1) of the Notification Directive contains the fundamental notification obligation for technical regulations:

'Subject to Article 7, Member States shall immediately communicate to the Commission any draft technical regulation …; 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. [4]

…'

4 Regulation 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).

15. Article 5(5) of the Notification Directive concerns the relationship with the communication of technical regulations under other Union acts:

'When draft technical regulations form part of measures which are required to be communicated to the Commission at the draft stage under another Union act, Member States may make a communication within the meaning of paragraph 1 under that other act, provided that they formally indicate that the said communication also constitutes a communication for the purposes of this Directive.

The absence of a reaction from the Commission under this Directive to a draft technical regulation shall not prejudice any decision which might be taken under other Union acts.'

16. Article 7(1) of the Notification Directive contains exceptions to the notification obligation:

'Articles 5 and 6 shall not apply to those laws, regulations and administrative provisions of the Member States or voluntary agreements by means of which Member States:

(a) …

(b) …

(c) make use of safeguard clauses provided for in binding Union acts;

(d) …'

B. French law

17. Article L. 253-8(II) of the Code rural et de la pêche maritime (Rural and Maritime Fishing Code), 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) prohibits the use of neonicotinoids:

'The use of plant protection products containing one or more of the active substances of the neonicotinoid family and seeds treated with those products 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.

…'

18. Adopted on the basis of Article L. 253-8(II) of the Rural and Maritime Fishing Code, Decree No 2018-675 of 30 July 2018 on the definition of active substances of the neonicotinoid family present in plant protection products ('the decree at issue') inserted an Article D. 253-46-1 in the Rural and Maritime Fishing Code, which stipulates the prohibited neonicotinoids:

'the substances of the neonicotinoid family referred to in Article L. 253-8 are the following: Acetamiprid; Clothianidin; Imidacloprid; Thiacloprid; Thiamethoxam'.

III. Facts and request for a preliminary ruling

19. Various active substances of the neonicotinoid family are used in plant protection. For that purpose, the Commission authorised the neonicotinoids acetamiprid, thiacloprid, clothianidin, thiamethoxam and imidacloprid between 2004 and 2008. At least two other neonicotinoids, dinotefuran and nitenpyram, are also used as plant protection products, but they have not yet been notified and authorised in the EU. [5]

20. Due to risks to bees, the Commission has already restricted the use of clothianidin, thiamethoxam and imidacloprid by Implementing Regulation (EU) No 485/2013 of 24 May 2013, [6] although certain uses in the field remained possible. [7]

21. In 2016, France adopted the aforementioned Law for the reconquest of biodiversity, nature and landscapes, thus prohibiting, as from 1 September 2018, the use of plant protection products containing one or more of the active substances of the neonicotinoid family and seeds treated with those products.

22. On 2 February 2017, the French Government sent the Commission a draft of the decree at issue, likewise referred to above, and did so on the basis of Article 5 of the Notification Directive, [8] but not on the basis of Article 71 of the Plant Protection Regulation. In that notification, the French Government justified the prohibition of the use of plant protection products containing one or more of the active 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 non-target organisms such as bees, macro-invertebrates or birds'. The French Government also referred to a study by the European Food Safety Agency (EFSA) which 'identifies a risk to human health (impact on the development of the nervous system)'.

23. In its reply of 3 August 2017, the Commission, which refers to the Plant Protection Regulation, 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'. It also 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'. The Commission referred to the review procedures being carried out at that time in relation to the approval of clothianidin, thiamethoxam and imidacloprid.

24. However, at the beginning of 2018, the Commission renewed the approval of the neonicotinoid acetamiprid for a period of 15 years pursuant to Article 20(1) of the Plant Protection Regulation. [9] In the recitals, the Commission stated that:

'(10) It has been established with respect to one or more representative uses of at least one plant protection product containing acetamiprid that the approval criteria provided for in Article 4 of [the Plant Protection Regulation] are satisfied. It is therefore appropriate to renew the approval of acetamiprid.

5 EU Pesticides database (https://ec.europa.eu/food/plant/pesticides/eu-pesticides-database/public/?event=homepage&language=EN, accessed on 27 May 2020).

6 Commission Implementing Regulation amending Implementing Regulation (EU) No 540/2011, as regards the conditions of approval of the active substances clothianidin, thiamethoxam and imidacloprid, and prohibiting the use and sale of seeds treated with plant protection products containing those active substances (OJ 2013 L 139, p. 12).

7 The adoption of that legislation was the subject of the judgment of the General Court of 17 May 2018, *Bayer CropScience and Others* v *Commission* (T-429/13 and T-451/13, EU:T:2018:280), and the pending appeal *Bayer CropScience and Bayer* v *Commission* (C-499/18 P, OJ 2018 C 381, p. 12).

8 Notification 2017/39/F (France).

9 Commission Implementing Regulation (EU) 2018/113 of 24 January 2018 renewing the approval of the active substance acetamiprid in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 (OJ 2018 L 20, p. 7).

(11) The risk assessment for the renewal of the approval of acetamiprid is based on a limited number of representative uses, which however do not restrict the uses for which plant protection products containing acetamiprid may be authorised. It is therefore appropriate to remove the restriction to use only as an insecticide.'

25. On the basis of an ongoing renewal procedure, the Commission then extended the approval of thiacloprid pursuant to Article 17(1) of the Plant Protection Regulation, initially by one year [10] and subsequently by a further year, [11] before recently deciding not to renew the approval. [12]

26. However, on 29 May 2018, the Commission prohibited, on the basis of Articles 21(3), 49(2) and 78(2) of the Plant Protection Regulation, the use of imidacloprid, [13] clothianidin [14] and thiamethoxam [15] with effect from 19 December 2018, with the exception of treatments for crops staying within permanent greenhouses during their entire life-cycle.

27. In recital 11 of each implementing regulation, the Commission stated that 'further risks to bees cannot be excluded without imposing further restrictions. Bearing in mind the need to ensure a level of safety and protection consistent with the high level of protection of animal health that is sought within the Union, it is appropriate to prohibit all outdoor uses'.

28. The approvals for clothianidin and thiamethoxam appear to have expired in the meantime. [16]

29. Nevertheless, France adopted the decree at issue on 30 July 2018, which provided for the prohibition, with effect from 1 September 2018, of any use on its territory of the five neonicotinoids approved in the EU at that time. The text of the decree can be retrieved from the Commission's database on the implementation of the Notification Directive under the date 31 August 2018. [17]

30. The Union des industries de la protection des plantes (Crop Protection Association) has opposed this measure before the Conseil d'État (Council of State, France). In particular, it takes the view that Article L. 253-8 of the Rural and Maritime Fishing Code, for the implementation of which the decree was adopted, infringed the provisions of the Plant Protection Regulation.

10 Commission Implementing Regulation (EU) 2018/524 of 28 March 2018 amending Implementing Regulation (EU) No 540/2011 as regards the extension of the approval periods of the active substances Bacillus subtilis (Cohn 1872) Strain QST 713, identical with strain AQ 713, clodinafop, clopyralid, cyprodinil, dichlorprop-P, fosetyl, mepanipyrim, metconazole, metrafenone, pirimicarb, Pseudomonas chlororaphis strain: MA 342, pyrimethanil, quinoxyfen, rimsulfuron, spinosad, thiacloprid, thiamethoxam, thiram, tolclofos-methyl, triclopyr, trinexapac, triticonazole and ziram (OJ 2018 L 88, p. 4).

11 Commission Implementing Regulation (EU) 2019/168 of 31 January 2019 amending Implementing Regulation (EU) No 540/2011 as regards the extension of the approval periods of the active substances abamectin, Bacillus subtilis (Cohn 1872) Strain QST 713, Bacillus thuringiensis subsp. Aizawai, Bacillus thuringiensis subsp. israeliensis, Bacillus thuringiensis subsp. kurstaki, Beauveria bassiana, benfluralin, clodinafop, clopyralid, Cydia pomonella Granulovirus (CpGV), cyprodinil, dichlorprop-P, epoxiconazole, fenpyroximate, fluazinam, flutolanil, fosetyl, Lecanicillium muscarium, mepanipyrim, mepiquat, Metarhizium anisopliae var. Anisopliae, metconazole, metrafenone, Phlebiopsis gigantea, pirimicarb, Pseudomonas chlororaphis strain: MA 342, pyrimethanil, Pythium oligandrum, rimsulfuron, spinosad, Streptomyces K61, thiacloprid, tolclofos-methyl, Trichoderma asperellum, Trichoderma atroviride, Trichoderma gamsii, Trichoderma harzianum, triclopyr, trinexapac, triticonazole, Verticillium albo-atrum and ziram (OJ 2019 L 33, p. 1).

12 Commission Implementing Regulation (EU) 2020/23 of 13 January 2020 concerning the non-renewal of the approval of the active substance thiacloprid, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 (OJ 2020 L 8, p. 8).

13 Commission Implementing Regulation (EU) 2018/783 of 29 May 2018 amending Implementing Regulation (EU) No 540/2011 as regards the conditions of approval of the active substance imidacloprid (OJ 2018 L 132, p. 31).

14 Commission Implementing Regulation (EU) 2018/784 of 29 May 2018 amending Implementing Regulation (EU) No 540/2011 as regards the conditions of approval of the active substance clothianidin (OJ 2018 L 132, p. 35).

15 Commission Implementing Regulation (EU) 2018/785 of 29 May 2018 amending Implementing Regulation (EU) No 540/2011 as regards the conditions of approval of the active substance thiamethoxam (OJ 2018 L 132, p. 40).

16 EU Pesticides database (https://ec.europa.eu/food/plant/pesticides/eu-pesticides-database/public/?event=homepage&language=EN, accessed on 27 May 2020).

17 https://ec.europa.eu/growth/tools-databases/tris/en/index.cfm/search/?trisaction=search.detail&year= 2017&num= 39&fLang=FR&dNum= 1.

31. The Conseil d'État (Council of State) has referred to the Court of Justice the following questions arising from that procedure:

'(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 [the Notification Directive], 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 [the Plant Protection Regulation], 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 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 [the Plant Protection Regulation], 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?'

32. The Union des industries de la protection des plantes ('the UIPP'), the Union nationale de l'apiculture française (National Union of French Beekeepers), the Syndicat national de l'apiculture (National Union of Beekeeping), the French Republic and the European Commission submitted written observations on these questions. The Court of Justice has decided that a hearing is not necessary, as it has been sufficiently informed by those submissions.

IV. Legal assessment

33. Before being able to consider the legal classification of the French communication of 2 February 2017 and the significance of the various Commission measures from the beginning of 2018, it is first necessary to interpret the request for a preliminary ruling from the Conseil d'État (Council of State).

A. Interpretation and admissibility of the request for a preliminary ruling

34. The first two questions concern obligations and measures of the Commission, while the third question concerns a Member State's options for taking action after the Commission has taken measures. Neither of these points form the subject matter of the procedure before the Conseil d'État (Council of State), however. Rather, it concerns the question of whether the comprehensive prohibitions imposed by France on plant protection products based on neonicotinoid and on seeds treated with those products are valid. It is therefore necessary to identify the substance of the questions that is relevant to the decision to be given in the proceedings before the Conseil d'État

(Council of State).[18] For this purpose, it is appropriate first to set out the regulatory framework arising from the Plant Protection Regulation. The UIPP's objections to the admissibility of the request for a preliminary ruling can then be examined.

1. The regulatory framework for protective measures taken by the Member States in relation to the use of plant protection products

35. Pursuant to Articles 13 and 79 of the Plant Protection Regulation, the Commission decides on the approval of active substances together with a committee in which the Member States are represented. When the prohibitions at issue were adopted, all five of the neonicotinoid active substances concerned were still approved, but the approval for three of them was subject to significant restrictions.

36. Since the Union did not base the Plant Protection Regulation on the environmental competence under Article 192 TFEU, France cannot justify the prohibitions at issue as more stringent protective measures pursuant to Article 193.

37. However, a plant protection product based on approved active substances still requires the authorisation of the Member State concerned in accordance with Article 28 et seq. of the Plant Protection Regulation before it can be placed on the market and used on its territory. In that context, Article 36(3) allows Member States to restrict the use of plant protection products or refuse authorisation on its territory in order to mitigate risk, in particular on the basis of concerns relating to human or animal health or the environment.

38. In so far as the French measure prohibits plant protection products containing neonicotinoid, it could prima facie constitute a measure within the meaning of Article 36(3) of the Plant Protection Regulation. However, that provision does not allow Member States to prohibit the placing on the market of seeds treated with plant protection products authorised in other Member States. It also follows from the UIPP's submissions that the French authorising authority continues to adapt authorisations for neonicotinoid-based plant protection products in the light of the provisions of EU law and only additionally informs the undertakings concerned of the national prohibition on their use. The significance of this practice in the light of the primacy of EU law remains unclear.

39. This may be the reason why the questions put by the Conseil d'État (Council of State) concern only Article 71(1) of the Plant Protection Regulation. Pursuant to that provision, a Member State may adopt interim protective measures after it has officially informed the Commission of the need to take emergency measures, and the Commission has not adopted such measures itself on the basis of Article 69 or 70. In this event, it must immediately inform the other Member States and the Commission.

40. For such cases, Article 71(2) of the Plant Protection Regulation provides that, within 30 working days, the Commission is to put the matter before the competent regulatory committee with a view to the extension, amendment or repeal of the national interim protective measure.

41. Finally, Article 71(3) of the Plant Protection Regulation allows the Member State to maintain its national interim protective measures until the Union measures have been adopted.

18 See, for instance, judgment of 2 April 2020, *I.N.* (C-897/19 PPU, EU:C:2020:262, paragraph 43).

42. Article 71 of the Plant Protection Regulation therefore provides for several steps. If a Member State sees a need for action, it must first bring the matter before the Commission and give it the opportunity to remedy its concerns. It is only if the Commission does not act that it may adopt measures itself and inform the Commission and the other Member States of those measures. At the Commission's initiative, they should then reach a binding decision, jointly in a committee, as to whether the Member State's measures are justified. [19]

43. Moreover, the reference to measures under Article 69 of the Plant Protection Regulation in the first sentence of Article 71(1) shows that the need for the Member State to take emergency measures must be based on the condition for the application of the former provision. Pursuant to that provision, the Commission may take measures where it is clear that an approved active substance 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 (as a part of its/their authorisation of plant protection products). Consequently, the Member State, too, may adopt interim protective measures only if these requirements are met. [20] The request for a preliminary ruling does not address these conditions, however, but is confined to procedural matters. Nevertheless, the Conseil d'État (Council of State) may still have to examine the aforementioned substantive requirements for national measures after having received a response to its request. [21]

2. Interpretation of the questions put by the Conseil d'État (Council of State)

44. It is against that background that the Conseil d'État (Council of State) seeks to ascertain, by its first question, whether the French communication of the draft prohibition of neonicotinoids fulfils the procedural requirements for 'informing' laid down in the first sentence of Article 71(1) of the Plant Protection Regulation (see B).

45. The second question seeks to ascertain whether the Commission implementing regulations on the various neonicotinoids are Union measures within the meaning of the first sentence of Article 71(1), which preclude the introduction of the national protective measures communicated. Finally, the third question expands on the second question by asking whether *parts* of the national protective measures can continue to be valid if the Commission's measures remedy the Member State's concerns only in part by restricting the use of only three out of five active substances (regarding both questions, see C).

3. Admissibility of the request for a preliminary ruling

46. The UIPP has expressed doubts as to the admissibility of the request for a preliminary ruling, as the French legislation was not an interim protective measure, but had been established on a permanent basis. The legislation was clearly not urgent either, as the prohibition did not take effect until two years after the adoption of the law. The application of the first sentence of Article 71(1) of the Plant Protection Regulation could therefore be ruled out.

47. The crux of this argument is that the questions are manifestly hypothetical and therefore inadmissible since the qualification of the prohibition as an interim protective measure within the meaning of the first sentence of Article 71(1) of the Plant Protection Regulation is completely out of the question. This objection is not convincing, however.

19 See judgments of 8 September 2011, *Monsanto and Others* (C-58/10 to C-68/10, EU:C:2011:553, paragraph 80), and of 13 September 2017, *Fidenato and Others* (C-111/16, EU:C:2017:676, paragraph 41).

20 See, in this regard, judgments of 9 September 2003, *Monsanto Agricoltura Italia and Others* (C-236/01, EU:C:2003:431, paragraph 106 et seq.); of 8 September 2011, *Monsanto and Others* (C-58/10 to C-68/10, EU:C:2011:553, paragraph 76 and 77); and of 13 September 2017, *Fidenato and Others* (C-111/16, EU:C:2017:676, paragraphs 51 to 53).

21 See judgments of 8 September 2011, *Monsanto and Others* (C-58/10 to C-68/10, EU:C:2011:553, paragraph 79), and of 13 September 2017, *Fidenato and Others* (C-111/16, EU:C:2017:676, paragraph 38).

48. The concept of 'interim protective measure' within the meaning of the first sentence of Article 71(1) of the Plant Protection Regulation does not restrict the nature of the measure adopted. Rather, the interim nature of the national protective measure resides primarily in the fact that it is to be reviewed immediately by the Commission in accordance with Article 71(2) and possibly replaced by a Union measure in accordance with Article 71(3).

49. Nor can it be gathered from the first sentence of Article 71(1) of the Plant Protection Regulation that this competence is not applicable because of delays in the adoption of protective measures. Although the French version in particular uses the term 'mesures d'urgence', and the German term 'Notfallmaßnahmen' or the English term 'emergency measures' also imply a certain degree of urgency, measures taken late are not impermissible simply because they should possibly have been taken earlier, even in cases where there is an urgent need for action.

50. The request for a preliminary ruling is therefore admissible.

B. Procedural requirements for a Member State having recourse to Article 71 of the Plant Protection Regulation

51. The first question seeks to ascertain whether France took the procedural steps required to have recourse to Article 71 of the Plant Protection Regulation, that is to say, in particular, whether France officially informed the Commission.

1. The concept of 'officially informing' pursuant to the first sentence of Article 71(1) of the Plant Protection Regulation

52. The first sentence of Article 71(1) of the Plant Protection Regulation first requires that a Member State officially inform the Commission of the need to take emergency measures. It is true that there are a number of arguments supporting the view that, in terms of its external form, the Member State's communication must refer to an emergency measure under that provision. However, it will be demonstrated in what follows that, taking account of the principle of sincere cooperation, the decisive factor is whether the parties concerned can assume that their communication partners will correctly understand the content of the respective communications.

53. Although France contacted the Commission by sending a draft of the prohibition measure on 2 February 2017, it sent its communication within the procedure under the Notification Directive.

54. The Commission takes the view that such a communication could be regarded as 'informing' within the meaning of Article 71(1) of the Plant Protection Regulation only if the Member State expressly referred to those provisions or at least attempted to show that the conditions for a European emergency measure were met. In addition, the communication had to contain the express threat that the Member State would take unilateral action if no European measure were taken. The French communication did not meet these conditions.

55. Although the Commission does not explain how it arrived at these stringent requirements, which go beyond mere notification, several indications pointing towards such requirements can be found in the regulatory regimes concerned.

56. First, the first sentence of Article 71(1) of the Plant Protection Regulation requires that the Commission be 'officially' informed.

57. Secondly, Article 7(1)(c) of the Notification Directive provides that the notification obligation under Article 5 does not apply to those laws, regulations and administrative provisions of the Member States that make use of safeguard clauses provided for in binding Union acts.

58. Although, unlike a number of comparable provisions, Article 71 of the Plant Protection Regulation is not entitled 'safeguard clause', its content corresponds to the definition of safeguard clauses in Article 114(10) TFEU. It can therefore also be regarded as a safeguard clause for the purposes of Article 7(1)(c) of the Notification Directive.

59. This provision could therefore be understood to mean that Member States cannot inform the Commission pursuant to the first sentence of Article 71(1) of the Plant Protection Regulation merely in the form of a communication under the Notification Directive.

60. Thirdly, pursuant to Article 5(5) of the Notification Directive, a communication under that directive may also be replaced by the transmission of a draft as part of a notification obligation under other Union legislation. Interpreted narrowly, a notification could therefore not replace the other communication, in this case 'informing' pursuant to the first sentence of Article 71(1) of the Plant Protection Regulation. Rather, it is only possible, contrariwise, for 'informing' under the regulation to replace notification under the directive.

61. Such a strict interpretation of the aforementioned provisions is ultimately supported in particular by the fact that unilateral protective measures under Article 71 of the Plant Protection Regulation harm the internal market. It is therefore necessary to avoid, to the greatest extent possible, misunderstandings when making use of safeguard clauses. As correctly stated by the UIPP, the Court therefore regularly emphasises that recourse to safeguard clauses presupposes compliance with the procedure laid down for that purpose.[22]

62. However, these considerations ultimately come to nothing.

63. The starting point for the interpretation of the element 'officially informs' must be that neither Article 71 nor the other provisions of the Plant Protection Regulation contain specific procedural rules for informing the Commission.

64. Rather, Article 71 of the Plant Protection Regulation is a concrete implementation of the principle of genuine cooperation, as laid down in Article 4(3) TEU, in the realisation of legitimate interests in connection with plant protection products.[23] Article 71 must therefore also be interpreted in the light of this principle.

65. The first sentence of Article 4(3) TEU expressly provides that pursuant to the principle of sincere cooperation, the European Union and the Member States are, *in full mutual respect*, to assist each other in carrying out tasks which flow from the Treaties. Although the Court often emphasises the Member States' duties of sincere cooperation,[24] they also apply to the Union institutions.[25]

22 See, for instance, judgments of 25 March 1999, *Commission* v *Italy* (C-112/97, EU:C:1999:168, paragraph 62); of 22 October 2002, *National Farmers' Union* (C-241/01, EU:C:2002:604, paragraph 60); of 10 March 2005, *Tempelman and van Schaijk* (C-96/03 and C-97/03, EU:C:2005:145, paragraph 50); of 17 April 2007, *AGM-COS.MET* (C-470/03, EU:C:2007:213, paragraphs 62 and 63); of 8 September 2011, *Monsanto and Others* (C-58/10 to C-68/10, EU:C:2011:553, paragraph 69); and of 13 September 2017, *Fidenato and Others* (C-111/16, EU:C:2017:676, paragraph 32).

23 See judgment of 8 January 2002, *van den Bor* (C-428/99, EU:C:2002:3, paragraph 47).

24 See, for instance, judgments of 16 June 2005, *Pupino* (C-105/03, EU:C:2005:386, paragraph 42), and of 31 October 2019, *Commission* v *Netherlands* (C-395/17, EU:C:2019:918, paragraph 102).

25 Order of 13 July 1990, *Zwartveld and Others* (C-2/88-IMM, EU:C:1990:315, paragraph 17), and judgments of 22 October 2002, *Roquette Frères* (C-94/00, EU:C:2002:603, paragraph 93); of 21 October 2008, *Marra* (C-200/07 and C-201/07, EU:C:2008:579, paragraph 41); and of 5 December 2017, *Germany* v *Council* (C-600/14, EU:C:2017:935, paragraph 106).

66. Therefore, on the one hand, Member States must sincerely cooperate with the Commission when having recourse to this procedure, but, on the other hand, the same applies to the Commission (and the other Member States). At the same time, this means that the formal requirements on both sides may extend only as far as is necessary for effective cooperation.

67. Therefore, the decisive factor for the application of Article 71 of the Plant Protection Regulation from a procedural perspective is not the external form of the communication, but the question of whether the parties concerned can assume that their communication partners will correctly understand the content thereof.

68. The provisions of the Notification Directive must also be interpreted accordingly. Based solely on the regulatory objective of that directive, they are not intended to lay down requirements for 'officially informing' in accordance with the first sentence of Article 71(1) of the Plant Protection Regulation. Rather, Article 7(1)(c) of the Notification Directive merely means that 'informing' within the meaning of the first sentence of Article 71(1) of the Plant Protection Regulation does not *have to* correspond to a communication pursuant to the directive. Nevertheless, a communication pursuant to the directive can constitute 'informing' pursuant to the regulation. Article 5(5) of the Notification Directive also confirms the interpretation in the light of the duty of sincere cooperation. That provision is primarily intended to clarify that multiple communications are superfluous as long as all parties concerned are aware of the functions served by a communication.

69. If any doubts arise in this regard, it is therefore the responsibility of all parties concerned to allay them by means of clarifications or inquiries.

70. It is true that the Commission and the other Member States therefore cannot rely on the fact that doubts may remain if they do not ask appropriate questions.

71. First and foremost, however, the Member State invoking Article 71(1) of the Plant Protection Regulation must step in and provide clarification if there is anything to indicate that the other parties concerned have failed to recognise its will to act or its reasons for acting. If it fails to provide such clarification in such a case, it has not officially informed the other parties concerned.

72. Consequently, the communication of a measure pursuant to Article 5 of the Notification Directive must be regarded as being equivalent to 'officially informing' pursuant to the first sentence of Article 71(1) of the Plant Protection Regulation if the Member State may assume that the Commission has understood it in that sense.

2. The circumstances of the present case

73. In order for the Court to be able to refine these criteria in relation to the present case, it would have been helpful if the Conseil d'État (Council of State), or at least France, and the Commission had provided more precise information on the communication between each other in the present procedure. Accordingly, it would have made sense to submit, in particular, the full text of France's communication of 2 February 2017 and the Commission's reply of 3 August 2017. It would also have been interesting to know whether France had made it clear in the procedures leading to the adoption of the Commission's regulations from 2018 that it considered the envisaged restrictions to be insufficient and would therefore be adopting more far-reaching restrictions.

74. As the Court does not have this information, the Conseil d'État (Council of State) must further clarify those questions and assess, in their light, whether France was able to interpret the Commission's conduct, in particular its reply of 3 August 2017, as meaning that it regarded France's communication as 'officially informing' within the meaning of the first sentence of Article 71(1) of the Plant Protection Regulation. If any doubts remained in this regard, France should have clarified them vis-à-vis the Commission before adopting measures under that provision on the basis of its communication.

75. However, the information that is available to the Court gives rise to the following considerations.

76. In so far as the request for a preliminary ruling describes the Commission's reply of 3 August 2017, it is clear that the Commission certainly understood France's concerns and attributed them to the Plant Protection Regulation. It also had to understand the communication of draft legislation that would give effect to an existing national prohibition on neonicotinoids to mean that France did in fact intend to adopt such legislation.

77. However, the available information does not provide any indication that the Commission assumed that Article 71 of the Plant Protection Regulation had been applied. In particular, there is no indication of a review of the French measures pursuant to Article 71(2), although it can be gathered from the entry in the database on the Notification Directive that the Commission was informed after the prohibition had been adopted, but possibly before it entered into force.

78. The argument put forward by the UIPP and the Commission, that France did not make the urgency of the measures clear to the Commission, may also be significant in this connection. If this is the case, the Commission would not have naturally interpreted France's communication as a means of informing it of the need to take emergency measures.

79. Furthermore, the Commission complains that, in its communication, France did not address the existing and forthcoming restrictions on the use of three neonicotinoids. Since, pursuant to the first sentence of Article 71(1) of the Plant Protection Regulation, the Member State must inform the Commission of the *need* to take emergency measures, one might expect that the Member State would explain why such measures of the Union are not sufficient.

80. However, it is also the case here that the requirements imposed on 'informing' must be appropriate. It should be sufficient for the Member State to set out the basis of its concerns and the more far-reaching protective measures sought. On the other hand, it is not necessary to provide a detailed analysis of any gaps in existing measures.

81. In particular, it is not necessary at this stage to provide comprehensive reasoning that would stand up to review pursuant to Article 71(2) of the Plant Protection Regulation. The reason for this is that the point at which the Commission is officially informed comes before the point at which the Member State's measures are precisely defined and reviewed, meaning there will still be an opportunity to finalise the reasons in the procedure before the competent committee.

82. However, it would be in the spirit of sincere cooperation if the Commission were already to express any doubts in its response to the Member State's notification. Such a response should generally lead to dialogue on the need for the desired protective measures, which, although not expressly provided for in Article 71 of the Plant Protection Regulation, can only be beneficial for a coordinated approach.

3. Communication of the French protective measures

83. It should also be noted that the second sentence of Article 71(1) of the Plant Protection Regulation also requires that the Member State immediately inform the other Member States and the Commission if it adopts measures. This communication is of central importance as it triggers the review of the measure pursuant to Article 71(2). It must therefore be considered to be a condition for the application of national protective measures. [26]

84. Since the request for a preliminary ruling does not contain any information in this regard, the Conseil d'État (Council of State) may have to check whether France has sufficiently informed the Commission and the Member States, within the framework of the Notification Directive, of the protective measures taken. [27]

4. Interim conclusion

85. In summary, the answer to the first question should be that the communication of a measure pursuant to Article 5 of the Notification Directive must be regarded as being equivalent to 'officially informing' pursuant to the first sentence of Article 71(1) of the Plant Protection Regulation if the Member State may assume that the Commission has understood it in that sense. The competent court must determine whether this is to be assumed in the main proceedings, taking full account of the communication between the Member State and the Commission.

C. The measures adopted by the Commission

86. The second and third questions seek to ascertain whether the Commission implementing regulations on the various neonicotinoids are Union measures within the meaning of the first sentence of Article 71(1) of the Plant Protection Regulation, which preclude the introduction of the national protective measures notified.

87. It is true that these questions are asked only in the event that it can be assumed that the Commission has been officially informed. However, as this is a matter still to be clarified by the Conseil d'État (Council of State), it seems appropriate to discuss it by way of precaution.

88. Pursuant to that provision, the Member State may take interim protective measures if the Commission has not taken action in accordance with Article 69 or 70.

89. It is common ground that the Commission has not adopted any measures on the basis of Article 69 or 70 of the Plant Protection Regulation. However, in the period between the French communication of 2 February 2017 and the adoption of the decree at issue on 30 July 2018, the Commission, on the basis of other provisions of the Plant Protection Regulation, significantly restricted the use of three neonicotinoids, approved one neonicotinoid for a further period of 15 years and provisionally renewed the approval of the remaining neonicotinoid for a period of one year. [28]

26 See, in particular, judgment of 8 September 2011, *Monsanto and Others* (C-58/10 to C-68/10, EU:C:2011:553, paragraphs 72 and 73), but also judgments of 8 January 2002, *van den Bor* (C-428/99, EU:C:2002:3, paragraphs 45 to 47); of 22 October 2002, *National Farmers' Union* (C-241/01, EU:C:2002:604, paragraph 60); of 10 March 2005, *Tempelman and van Schaijk* (C-96/03 and C-97/03, EU:C:2005:145, paragraph 50); and of 17 April 2007, *AGM-COS.MET* (C-470/03, EU:C:2007:213, paragraphs 62 and 63).

27 See above, point 29.

28 See above, point 24 et seq.

90. If the first sentence of Article 71(1) of the Plant Protection Regulation were to be interpreted narrowly, those measures would not be of any relevance to France's powers under that provision, since in that provision only emergency measures under Articles 69 and 70 are referred to as precluding protective measures of Member States.

91. However, on this point too, the first sentence of Article 71(1) of the Plant Protection Regulation must be interpreted in accordance with the principle of sincere cooperation. The harmonisation objective of the regulation must also be taken into account. Therefore, it is not the form of the Commission's action that is relevant, but only whether it adopts measures by which it takes account of the Member State's concerns. Long-term Union measures that relate to the risk in question therefore preclude national measures a fortiori.

92. In that light, the restrictions on the use of imidacloprid, clothianidin and thiamethoxam must be recognised as Commission measures within the meaning of the first sentence of Article 71(1) of the Plant Protection Regulation. The reason for this is that, pursuant to recital 11 of each of the three implementing regulations, the restrictions are based on concerns surrounding the safety of those active substances.

93. Consequently, even if the French communication of 2 February 2017 were to be recognised as 'informing' within the meaning of the first sentence of Article 71(1) of the Plant Protection Regulation, it could not justify a derogation from the aforementioned three measures subsequently adopted by the Commission.

94. If France takes the view that even those restrictions are not sufficient, that Member State must, by once again officially informing the Commission pursuant to the first sentence of Article 71(1) of the Plant Protection Regulation, trigger the procedure provided for in that provision a further time. This would give the Commission the opportunity to prevent the internal market from being harmed as a result of unilateral French measures, either by tightening up its own measures or by opposing the French position.

95. Considerations regarding the urgency of the French measures cannot be invoked against this requirement, as those measures were not adopted until July 2018, being two months after the adoption of the Commission's regulations. It would have been easy for France to officially inform the Commission during this period.

96. However, the final renewal of the approval of acetamiprid and the provisional renewal of the approval of thiacloprid show that the Commission did not adopt measures in relation to those active substances which are equivalent to measures under Articles 69 and 70 of the Plant Protection Regulation.

97. As regards thiacloprid, the provisional renewal of the approval makes no reference to the assessment of the risks associated with this active substance. This is also logical, as the renewal was granted on the basis of the ongoing renewal procedure in which those risks were examined.

98. Furthermore, according to recital 10 of Implementing Regulation 2018/113, the renewal of the approval of acetamiprid is based on the finding that the approval criteria provided for in Article 4 of the Plant Protection Regulation are met. The Commission therefore takes the view that that active substance does not have harmful effects on human health or any unacceptable adverse effect on the environment. However, that decision does not address the concerns of France.

99. The answer to the second and third questions must therefore be that unilateral measures taken by Member States pursuant to the first sentence of Article 71(1) of the Plant Protection Regulation are permissible only in so far as, after having been officially informed, the Commission does not adopt measures by which it addresses the Member State's concerns. If France's communication of

2 February 2017 is to be regarded as 'officially informing', the restrictions on the use of the active substances imidacloprid, clothianidin and thiamethoxam are to be regarded as such measures. However, the renewal of the approval of acetamiprid and the provisional renewal of the approval of thiacloprid do not have such an effect.

V. Conclusion

100. I therefore propose that the Court of Justice give the following ruling:

(1) The communication of a measure pursuant to Article 5 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 constitutes 'officially informing' pursuant to the first sentence of Article 71(1) 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 if the Member State can assume that the Commission has understood it in that sense. The competent court must determine whether this is to be assumed in the main proceedings, taking full account of the communication between the Member State and the Commission.

(2) Unilateral measures taken by Member States pursuant to the first sentence of Article 71(1) of Regulation No 1107/2009 are permissible only in so far as, after having been officially informed, the Commission does not adopt measures by which it addresses the Member State's concerns. If France's communication of 2 February 2017 is to be regarded as 'officially informing', the restrictions on the use of the active substances imidacloprid, clothianidin and thiamethoxam imposed by Commission Implementing Regulations (EU) 2018/783, 2018/784 and 2018/785 are to be regarded as such measures. However, the renewal of the approval of acetamiprid by Implementing Regulation (EU) 2018/113 and the provisional renewal of the approval of thiacloprid by Implementing Regulation (EU) 2018/524 do not have such an effect.