



French decree on the definition of neonicotinoid active substances in plant protection products

Notification number: 2017/39/F (France)

In the current document is presented the position of the European Seed Association regarding the French decree on the definition of neonicotinoid active substances in plant protection products.

ESA is of the opinion that the legal basis of the decree is not in line with Regulation (EC) No 1107/2009. A legal analysis is presented below:

♣ Violation of Article 21

The proposed French Ministerial Decree is based on Article 253-8 of the French Rural and Maritime Fishing Code, which was recently amended by Article 125, paragraph 1 of the French Biodiversity Law (Act No. 2016-1087 of August 8, 2016. Article 253-8, paragraph II of the Rural and Maritime Fishing Code states the following:

“L’utilisation de produits phytopharmaceutiques contenant une ou des substances actives de la famille des néonicotinoïdes et de semences traitées avec ces produits est interdite à compter du 1er septembre 2018. “

The proposed French Ministerial Decree then specifies that the neonicotinoid substances referred to in Article 253-8 of the Rural and Maritime Fishing Code are acetamiprid, clothianidin, dinotefuran, imidacloprid, nitenpyram, thiacloprid and thiamethoxam.

From a semantic point of view the provision in Article 253-8 of the Rural and Maritime Fishing Code is formulated as a ban on plant protection products, which is covered by Article 28 et seq. of Regulation (EC) 1107/2009 (hereinafter: the EU Regulation) and belongs to the competence of the Member States. However, it is directed to all plant protection products containing the mentioned substances, which in practice equals to a ban of the utilisation of all neonicotinoid substances listed on the proposed Ministerial Decree. According to Articles 13 and 21 of the EU Regulation the authorization and review of active substances belongs to the competence of the European Commission.

According to Article 21(1) of the EU Regulation, the Commission shall take into account the request of a Member State to review, in light of new scientific and technical knowledge and monitoring data, the approval of an active substance. The report of ANSES from January 7, 2016, indicates that *“despite considerable research efforts, there is still insufficient evidence of the impact of neonicotinoids on bees”*. ESA is of the opinion that this conclusion cannot be considered new and sufficient scientific knowledge to justify the review of the existing authorisations.

The proposed Ministerial Decree is therefore based on a legislative provision (Article 253-8 of the Rural and Maritime Fishing Code) which violates Article 21 of the EU Regulation.

♣ Violation of Article 49 (1)

- Article 253-8 of the Rural and Maritime Fishing Code (cited above), which constitutes the legal basis for the proposed French Ministerial Decree also provides that the use of seeds treated with the neonicotinoid substances listed in the Decree is prohibited.

This provision however clearly violates Article 49 (1) of the EU Regulation which foresees that “Member States shall not prohibit placing on the market and use of the seeds treated with plant protection products authorised for that use in at least one Member State.” (emphasis added) Prohibiting the use of seed treated with plant protection products that may be authorized in on several other Member States in practice goes against the basic principles of the Internal Market, namely the free movement of goods.

- Further on, the mentioned provision (Article 253-8 of the Rural and Maritime Fishing Code) also violates Article 49 (2) of the EU Regulation in two aspects. According to Article 49(2) it is only the European Commission that can take measures to restrict or prohibit the use of treated seeds; and Member States, in case they have substantial concerns that treated seeds are likely to constitute a serious risk to human or animal health or to the environment, should take measures to contain these risks. Measures by Member States however cannot amount to a prohibition of the use of treated seeds (see Article 49(1)).
- Such measures were not taken by the French Ministry despite that ANSES proposed some mitigation measures. Neither any other mitigation measures were considered. The seed industry has developed the European Seed Treatment Assurance (ESTA) scheme (hereinafter: the Scheme) which is compatible with the French scheme Plan Qualité Poussière (PQP) and the German scheme SeedGuard. The Scheme ensures that the certified companies reliably treat seeds with plant protection products, resulting in quality treated seeds and usage for and by the end-user: farmer, grower, plant raiser or contractor. In detail the Scheme:
 - provides a framework for good practices to prepare and apply seed treatments that include plant protection products
 - checks specific requirements for the seed and the seed companies
 - sets dust reference values for the different crops. Seeds that do not meet these values shall not be put on the market
 - requires proper training of the staff
 - is audited by external competent bodies

In March 2017, there are over 90 treatment sites ESTA certified in EU and non-EU countries and in some cases the certification covers up to 100% of the treatment sites. According to data that was produced by ESA members ESTA certified seed treatment sites produce better quality seed than non-certified sites. The data shows that in 2013 the EU market seed quality of treated oilseed rape seed was better than the assumed values in the January 2014 draft guidance on authorization of plant protection products for seed treatment. The data has been submitted to EFSA after the call for data for new scientific information as regards the risk to bees from clothianidin, imidacloprid and thiamethoxam.

♣ Violation of Article 71

- There has been no indication by France of the existence of an emergency situation, which also does not seem to be supported by the fact that the restriction, according to Article 253-8 of the Rural and Maritime Fishing Code, will come into force as of September 1, 2018, two years after the provision was adopted, with possible derogations for two additional years, until July 1, 2020.
- However, even if there was an emergency situation, according to Article 69 and 70 of the EU Regulation, it is the competence of the European Commission to adopt emergency measures, and that should happen only in case the measures taken by Member States to contain the risks that constitute the emergency have proven to be unsatisfactory (Article 69(1) of the EU Regulation). According to Article 71 of the EU Regulation, Member States may adopt interim protective measures only in case the Member State informed the Commission about the need to take measures and no action has been taken by the Commission according to Articles 69 and 70 of the EU Regulation. This procedure however has not been followed by France, therefore Article 71 cannot constitute a basis for Article 253-8 of the Rural and Maritime Fishing Code and the Ministerial Decree respectively.

Other points:

♣ Economic and environmental impact of the neonicotinoid restriction by the EU oilseed rape sector

The EC decision of 2013 to largely restrict the use of neonicotinoids resulted in severe economic losses for the European oilseed sector and had clear negative environmental impact according to research consultancy HFFA Research.

The study identifies and specifies major economic consequences of banning neonicotinoids in the EU by using the case study of oilseed rape production. The three main findings are:

- a negative yield impact of 4% resulting in 912,000 tons of missing harvest;
- an average of 6.3% of harvest quality losses;
- an average of 0.73 additional foliar applications per hectare of cultivated oilseed rape.

These three impacts can be translated into an overall economic cost to the European oilseed rape industry amounting to almost € 900 million per year.

But the ban also has significant environmental impacts, both within the EU and on a global scale:

- globally shifting oilseed rape production outside the EU triggered a conversion of more than 500.000 ha of grass land and natural habitats to arable land equalling the loss of over 300.000 ha of biodiversity-rich rainforest;



- in the EU, additional foliar insecticide applications added Greenhouse Gas (GHG) emissions of estimated 0.03 million tons CO₂ equivalents and 1.4 million m³ of additional water use annually.