

Adres : Bezuidenhoutseweg 105-113
2594 AC Den Haag
Telefoon : +31(0)70-3382700
E-mail : secretariaat@lto.nl
KvK : 40413400
Rekening : NL32 RABO 0357606760

**To the attention of the European Commission
Directorate General GROWTH
Unit B2 "Regulatory barriers"
grow-dir2015-1535-central@ec.europa.eu**

Date : 13 – 03- 2020
Ref. : AvD
Subject : Contribution of LTO Nederland, on the draft Order relating to prior information to be issued to purchasers of plants likely to affect human health (Notification 2019/638/F)

Information : Anneke van Dijk, +31 6 11 36 56 28

Dear Sir, Madam,

On 13 December 2019, the French authorities notified a draft Order relating to prior information to be issued to purchasers of plants likely to affect human health¹, to the services of the European Commission within the framework of Directive (EU) 2015/1535².

LTO Nederland, the Dutch Organisation for Agriculture and Horticulture, welcomes the opportunity to share its views regarding this draft order. LTO Nederland, fully supports the objective to reduce any potential risks linked to plant species likely to harm human health. However, as it stands, we consider that this draft order would have potential impact on the free movement of plants in the internal market, whilst not achieving its main purpose of protecting the human health.

Potential impact on free movement of plants in the internal market

The draft Order imposes distributors and sellers to make available to buyers, prior to the conclusion of a contract of sale, certain information on health risks linked to certain plant species, as listed in its Annex. Any plant purchaser, being a natural or legal person, acquiring a listed plant from a seller or distributor, even within the context of contracts of supply of services, shall be informed about the risks through an "accompanying document" easily accessible before the sale.

Being imposed to French but also to European distributors and sellers, this obligation is very likely to have an impact on the smooth functioning of the internal market.

One shall recall that the French market (sales to consumers, to professionals other than those of the agricultural sector as well as to French public collectivities) is highly dependent on the importations of plants from other Member States: nowadays, 60% of the plants (any plants, excluding cut flowers) are mainly imported in France from other Member States of the EU³.

In practice:

- Although the "accompanying document" is broadly defined⁴, such prior information obligation will oblige European distributors and sellers to adapt the labelling, general

¹ Projet d'arrêté relatif à l'information préalable devant être délivrée aux acquéreurs de végétaux susceptibles de porter atteinte à la santé humaine (NOR : AFSP1623107A).

² 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 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.

³ Estimation made based on customs and sector's data.

⁴ Article 1, paragraph 4: "accompanying document: a label, a sign, a brochure, a display, a descriptive medium for the product, a quote, general conditions of sale or any other medium of information bearing the information aimed at plant purchasers and provided by the distributor or the seller".

presentation of their products or their general conditions of sale for the marketing of their products – which are legally commercialized in their own country – for the sole French market.

- In addition, if the aim is to efficiently inform purchasers on potential risks of a specific plant, European distributors and sellers will face concrete difficulties in implementing the requirements of Article 2 (II) of the draft Order:

Under this provision, for retail sales, “the accompanying document shall be placed in the immediate vicinity of the plants concerned”. For distance contracts of sale, “the information listed in the annex shall appear on the same information medium as that presenting the plant offered for sale, close to the information presenting this plant”.

These provisions, which are unclear, are likely to cause implementation difficulties, especially for Dutch and other European plant exporters to France, including the Dutch growers.

- It is not clear whether the seller and distributors shall make available the whole “information” of the Annex (all the lists), irrespective of the plant sold. If so, the objective to inform buyers will not be achieved as the information would be too confusing and not specific.
- European distributors and sellers may therefore have to select the specific information to be provided to the purchaser, for the specific plant sold, and adapt the presentation and labelling of the said plant for the French market only. To that aim, they will have to get acquainted to the information and lists of the draft Order, which are existing only in French language: this will undoubtedly lead to additional concrete difficulties to understand the relevant information to be provided to purchasers, depending on the plant species sold, being within the context of on-line and off-line contracts.

In such context, the draft Order may be considered as hindering, directly or indirectly, actually or potentially, intra-Community trade and should be considered as a measure having an effect equivalent to quantitative restrictions⁵, which is prohibited under the Treaty of functioning of the European Union⁶.

Indeed, according to the European Court of justice:

- The mere fact to be dissuaded to introduce or commercialized some products in another Member State may constitute for the importer an obstacle to the free movement of goods⁷.
- “In the absence of harmonization of national laws, Article 30 prohibits in particular obstacles to the free movement of goods that are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, such as those relating, for example, to their presentation, labelling and packaging, even if those rules apply without distinction to national products and to imported products alike”⁸.

In addition, for the professionals, such restrictive measure cannot not be justified by the objective of protection of human health.

⁵ Case 8/74.

⁶ Article 24 TFEU.

⁷ Case C-249/07.

⁸ C-3/99.

Obligation of prior information as stated in the draft Order is both inappropriate to ensure human health as well as disproportionate

According to the French authorities, the draft Order is based on Article L1338-3 of the Public Health Code and therefore aims at protecting the human health.

To be considered as justified by the objective of protection of health and life of humans, the measure shall be necessary, and no more than is necessary, to achieve the desired result (proportionality principle). If a measure is not appropriate (suitability test) to attain the objective or if the same objective can be achieved by less restrictive measures (necessity test), then the restrictive national measure will be found to be disproportionate and therefore unjustified.

We believe that the obligation of prior information as stated in the draft Order is both inappropriate to ensure human health as well as disproportionate.

- First, according to relevant data⁹, **symptomatic accidents linked to plants are very limited**: for instance, in France, only 5% of contacts with poison control centers are linked to plants (\pm 7000 individuals / year), of which 70% are asymptomatic, 30% are symptomatic (\pm 2000 individuals / year; 0.003% of the population) and only 0, 3% being described as serious (\pm 20 individuals / year; 0.00003% of the population). In addition, such serious cases have sometimes voluntary or addictive origins. A significant proportion of contacts is observed with children - more than three-quarters - in a domestic context, explained by the awakening to the world around them. It should be noted, however, that in general, cases involving children often turn out to be mild, more serious cases involving adults. Finally, the situations in which contacts with plants occur are varied: private spaces (interior and garden), public or natural spaces.

This shall be carefully considered in **assessing the suitability and proportionality** of the proposed measure. Indeed, to succeed on justifying a restrictive measure on the ground of protection of human health, France should first prove the existence of real health risks. However, whilst according to the French authorities the number of reports to poison control centers involving plants have increased since 1999 – which is mainly linked to more efficient reporting methods to these centers – it shall be underlined that the number of serious cases remains quite stable and low even according to their figures.

- Then, **most of the plants listed in the draft Order Annex can be found in the natural environment where most of the harmful contacts occur** : therefore, a prior obligation of information as the one proposed by the draft Order will **not be appropriate** to reduce potential risks to human health caused by these specific plant species.
- In addition, as regard the prior information **within the context of public procurement contracts**, such measure appears to be **unsuitable** to achieve the objective of protection human health:
Informing public authorities at the stage of the submission of the tender by the bidder is already too late. Public authorities shall be made aware of potential risks of certain plants through adequate communications means (ex. Guides of good practices, exchanges and knowledge improvements initiative involving the professionals of the sector), to be provided beforehand and at the latest at the time of drafting of the specifications of the call for tenders¹⁰.
- Such a prior information obligation is also **disproportionate as the human health could be insured by less restrictive and more efficient measures**: for instance, a close cooperation between professionals and public authorities could improve the awareness of such authorities as regard allergens plants used in cities and collective environment so as to reduce potential allergy risks.

⁹ Rodallec S., 2013. Risque d'intoxication par les plantes et pratique officinale. Thèse, Univ. Nantes.

¹⁰ Such measures were recommended by the French National Agency for Food Environmental and Occupational Health and Safety (ANSES) a long time ago « *Dans cet objectif, les collectivités territoriales doivent être informées des risques liés aux pollens allergisants et les professionnels de l'aménagement des espaces verts doivent être sensibilisés à cette problématique, par exemple, par la diffusion de guides, tels que « Végétation en ville », édité par le RNSA* ». Avis of the ANSES (2011-SA-0151).

Also, targeted information campaigns towards purchasers, by public authorities and/or the sector representatives, at national but also European level, would be much more efficient to reduce potential human health risks.

Finally, as a general comment, according to Val'hor, the French Interbranch Organization (IBO) of Horticulture, Floristry and Landscape would like to highlight that, although the French authorities present the draft as a result of a consultation procedure with French professional organizations, the sector has not been consulted prior to the establishment of the lists of plant species of the Annex of the draft Order and still has significant concerns about the mechanism as proposed.

Considering all the above-mentioned elements, European professionals sincerely hope that the present position will be duly taken into account by the European Commission in assessing the compatibility of the draft Order with the European legislation on the free movement of goods.

We like to emphasize that plants in huserooms, offices, gardens, public parcs en outdoors in villages, cities and at the countryside gives a lot of benefits to all of us. Cleaning the air, catching fine dust (micro dust), giving oxygen, a feeling of well-being, relaxation, and so on¹¹.

We remain at the European Commission entire disposal to provide any further information.

Yours faithfully,

LTO Nederland
Dutch Organisation for Agriculture and Horticulture

Ir. A. van Dijk
Policy advisor

¹¹ <https://www.thegreencity.eu/>