

Brussels, 27 January 2023

Ms. Kyriakides
European Commissioner for Health and Consumer Policy
European Commission
B-1049 Brussels - Belgium

Dear Commissioner,

In a preliminary ruling (case C-162/21) recently published, the Court of Justice of the EU has clarified a certain number of boundaries, with regards to the use of article 53 of the pesticide regulation (EU) 1107/2009. The Court ruling imposes a series of changes both at Commission and at Member States levels.

The ruling

The following precisions from the Court will need to be taken into account both by your services and by Member States:

1. The Court has established that **EU-banned pesticides could not be subject to a derogation under article 53**. Point 50 of the ruling explains that by providing derogations to EU-banned pesticides, Member States give "priority to improving plant production over the prevention of risks to human and animal health and the environment", which is, as underlined by the Court, contrary to the regulation. During the hearing of the *Save Bees and Farmers* ECI in the European Parliament, your representative, Claire Bury, said that the ruling concerns seeds treated with 3 neonicotinoids⁶. We invite you to carry out a better reading of the ruling: it concerns all EU-banned pesticide substances, and not only the Belgian case on neonicotinoid-treated seeds that led to this ruling.
2. Furthermore, the Court detailed in point 53 that **the placing on the market of EU-banned pesticides in order to treat seeds is illegal**. The Court does not differentiate whether the treated seeds will then be used in the EU or in Third Countries. Therefore, article 53 cannot be used to enable the treatment of seeds with an EU-banned pesticide, including for export outside the EU.
3. The Court emphasizes that a derogation must be interpreted strictly (point 34).
4. The Court further reiterates in point 44, that IPM is mandatory, and that low-pesticide input pest management must be given priority.

EU Commission follow-up

The ruling of the Court obliges the European Commission and Member States to adapt to this clarification. PAN Europe considers that the European Commission should immediately carry out the following tasks:

1. **Modify the Guidance Document** on emergency authorisations¹. Indeed, in the 2021 updated version of the GD, and in complete opposition to the numerous complaints from our organisation and others, **your services have added a special paragraph regarding the possibility to give a derogation to EU-banned pesticides**. The GD should thus be adapted and clarify that no derogation under article 53 can be provided to EU-banned or EU-restricted pesticides.

2. The GD should explicit that **derogations are not allowed to treat seeds with an EU-banned pesticide**, no matter where the treated seeds will be marketed

3. The ruling reminds that **a strict interpretation of the possibility to provide a derogation** must be implemented, in the light of IPM. Therefore, in order to ensure the high level of protection of human and animal health as well as the environment, the European Commission must ensure that Member States carefully and thoroughly evaluate the necessity to provide such derogations. A series of reports by PAN Europe⁴ all point at the fact that Member States do not provide serious justifications for the provision of derogations, and that less toxic alternatives exist. In particular, our last report *Banned pesticides still in use in the EU* highlights how Member States regularly simply ignore the explanatory requirements laid down in the GD. Finally, we would also like to remind the Opinion of the Advocate General in this case², who insisted on the necessity for Member States to carry out a thorough analysis on the real need for a derogation, with data, including independent data. The European Commission must then make sure that all notifications for derogations explain how Member States have carried out a full agronomic assessment on the necessity, or not, to provide a derogation, with scientific evidence, list of non-chemical and chemical alternatives, etc. **If not, the Commission must sue these Member States that keep abusing the system and not respecting the law.**

4. **A series of Member States have already issued derogations for EU-banned pesticides for 2023**: CZ, SK, FI and BE have issued derogations for the use of neonicotinoids (either the use of treated seeds or the use of neonicotinoids for seed treatment). Another identified derogation, is a Belgian derogation for Indoxacarb³, for 2023. The Commission must now write to these Member States and **demand the cancellation of these derogations at once.**

¹https://food.ec.europa.eu/system/files/2021-03/pesticides_aas_guidance_wd_emergency_authorisations_article53_post-210301.pdf

²<https://curia.europa.eu/juris/document/document.jsf?text=&docid=265085&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=172>

³<https://fytoweb.be/fr/nouvelles/produit-base-dindoxacarbe-temporairement-autorise-contre-les-otiorhynques-en-plantes>

Maladministration in DG Sante Pesticide Unit:

First of all, we would like to stress that **this ruling is the consequence of a disastrous handling of this file by your services over the last 15 years**. PAN Europe has highlighted to your services through a series of reports⁴ and letters, as well as during numerous meetings with your current head of pesticide unit and his predecessor, the intolerable abuses by Member States. No concrete and useful steps have been taken by your services. Twice, DG Sante sent a mandate to EFSA to carry out an analysis of derogations for neonicotinoids, but the mandate asked the EFSA to carry out the assessment based on a flawed methodology, and without any agronomic in-house knowledge on alternatives to neonicotinoids⁵. Not surprisingly, the conclusions from EFSA did not bring any improvement to the situation. Furthermore, as mentioned in our last report, **more than 200 derogations have been provided to EU-banned pesticides in the EU over the last 4 years**. During that period, your services have failed to protect EU citizens and the environment and not reacted to abuses on derogations for extremely toxic pesticides such as bee-toxic neonicotinoids, 1,3-dichloropropene (never approved as extremely toxic), chloropicrin (a nerve gas from World War I) or mancozeb (classified "toxic to reproduction category 1").

The absence of reaction from your services to such abuses are in total contradiction with the words from Claire Bury, representing you during the *Save Bees and Farmers* hearing in the European Parliament, last 24 January ("We have always been very critical on emergency authorisations"⁶). The fact your services updated the GD in 2021, making it even more "derogations-friendly" than in the past is also contradicting Claire Bury's statement.

A change in the approach of the pesticide unit is urgently needed. The Court has reiterated that citizens' health and the environment have priority over the interests of the users of such products. The approach of your services over the last 15 years on this file and many others go against this ruling. The management of the complaints from civil society organisations on derogations (some even having been simply ignored by the Pesticide unit) show a lack of engagement of your staff in the correct implementation of the provisions of the law.

⁴[https://www.pan-europe.info/old/Resources/Reports/PAN%20Europe%20-%202012%20-%20Meet%20\(chemical\)%20agriculture%20-%20The%20120-day%20derogation.pdf](https://www.pan-europe.info/old/Resources/Reports/PAN%20Europe%20-%202012%20-%20Meet%20(chemical)%20agriculture%20-%20The%20120-day%20derogation.pdf)
[https://www.pan-europe.info/old/Resources/Reports/PAN%20Europe%20-%202011%20-%20Meet%20\(chemical\)%20agriculture,%20The%20world%20of%20backdoors,%20derogations,%20sneaky%20pathways%20and%20loopholes.pdf](https://www.pan-europe.info/old/Resources/Reports/PAN%20Europe%20-%202011%20-%20Meet%20(chemical)%20agriculture,%20The%20world%20of%20backdoors,%20derogations,%20sneaky%20pathways%20and%20loopholes.pdf)
<https://www.pan-europe.info/resources/reports/2023/01/banned-pesticides-still-use-eu>

⁵<https://www.pan-europe.info/press-releases/2018/06/efsa-shows-its-scientific-limits-providing-low-quality-assessment-national>
<https://www.pan-europe.info/press-releases/2021/11/neonicotinoids-efsa-gives-blank-cheque-member-states-keep-abusing-toxic>

⁶ https://multimedia.europarl.europa.eu/en/webstreaming/envi-agri_20230124-1430-COMMITTEE-ENVI-AGRI, 16h10

The handling of the Preliminary references by your services

Our action was giving the opportunity for DG Sante to solve a series of issues with regards to the abuses of derogations by Member States. By supporting a strict interpretation of the derogations system, your services could have ensured a drastic reduction in the overuse of article 53 by Member States, thanks to this legal procedure.

On the contrary, your services have promoted an implementation of article 53 that is opposed to a high level of protection of citizens' health and the environment. During this legal procedure, your services have defended the use of derogations for EU-banned products and they supported recurrent uses of derogations for common pests, despite of the fact article 53 mentions "special circumstances". Your services also promoted the preventative use of derogations given to toxic pesticides, even when there is no certainty on the presence of pests or not.

And worse: during the hearing, your lawyers even claimed that Member States systematically make a thorough assessment of the alternatives, which is false. **It is a shame that the Commission tries to defend this toxic system based on untrue information before the CJEU!**

This ruling is, unfortunately one more time, highlighting the bad management of pesticides by public authorities, both at EU- and at national level. The distrust by citizens on such management is a reason behind the success of the *Save Bees and Farmers* ECI. The ruling was received very positively by the health and environment protection movement. As you know, the *Save Bees and Farmers* ECI, supported by over 200 organisations throughout the EU, has asked to better protect citizens and the environment by reducing pesticides, and in priority the most hazardous ones. **Attempts by the Commission or Member States to not respect this ruling will inevitably lead to immediate legal actions** by our Members and ourself to make sure EU law is respected.

In conclusion, we kindly ask you for a swift implementation of the ruling, that the Commission finally makes sure Member States respect the law, and that the urgent change in approach by the Pesticide unit is ensured and followed closely by your cabinet.

Best regards,

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