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► **To cite this version:**

Benoît Grimonprez, Jean Jacquez. Pesticide exit policies: what legal tools for financial support for farmers?. 2021. hal-03541111

**HAL Id: hal-03541111**

**<https://hal.science/hal-03541111>**

Preprint submitted on 24 Jan 2022

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## **Pesticide exit policies: what legal tools for financial support for farmers?**

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### **Summary**

*Pesticide restriction policies have considerable economic impacts on farms. As a result, producers will only be able to adapt to new ways of protecting crops and the new risks they entail if they are supported financially. This study explores the main legal levers, both public and private, that could support French agriculture in its quest to move away from pesticides.*

*We show that the transition of the French agricultural model towards the withdrawal of pesticides requires the mobilisation of a panoply of financial instruments to secure the income of producers. It turns out that the State, through its resources, has margins for manoeuvre essentially within the framework of the common agricultural policy, but largely refrains from using them. Outside this regime, public subsidies to companies in the sector remains limited because it is considered to distort competition.*

*The market must also play its role, even if it means publicly directing its course, by better remuneration for pesticide-free production, whether or not it is certified; this objective will only be attainable if agricultural imports are truly regulated on the basis of environmental criteria<sup>1</sup>.*

### **Introduction**

At the World Congress of the International Union for Conservation of Nature (IUCN), President Macron pledged to take "a strong initiative [...] to accelerate the phase-out of pesticides". This kind of political announcement, which is becoming more and more frequent at the French level, raises questions about the means of organising this transition to an agriculture without synthetic plant protection products<sup>2</sup>. One of the most important problem concerns the financial support to be put in place to accompany farmers in this change of production model.

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<sup>1</sup> This work was financed by the ANR (Agence Nationale de la Recherche) within the framework of the "Cultiver et Protéger Autrement" programme with the reference 20-PCPA-0005. The authors warmly thank the INRAE economists leading the FAST project for their careful review and valuable advice.

<sup>2</sup> B. Grimonprez, The normativity of alternatives to pesticides, *Droit de l'environnement* nov. 2021, p. 393.

According to Regulation (EC) n° 1107/2009<sup>3</sup>, pesticides are products composed of active substances, safeners, synergists or co-formulants approved at Community level and intended, in particular, to protect cultivated plants against all forms of pests. Numerous reports<sup>4</sup> cite the benefits of using such products: combating pests and climatic hazards, securing farmers' income, ensuring the health quality of products, lowering production costs and prices for consumers. They also point to their negative consequences on health and the environment.

Since the introduction of the Ecophyto plan (L. n° 2009-967, 3 august 2009, art. 31), the French public authorities have set themselves the objective of reducing pesticide consumption by 50%, a deadline that has now been pushed back to 2025, and which will probably not be met given the current sales figures<sup>5</sup>. In view of the poor results obtained, some organisations (such as the Confédération paysanne or France Nature Environnement) are campaigning for stricter regulations, or even a ban on these products in the name of the precautionary principle. This trajectory, in the more or less long term, raises the question of its potential consequences in terms of production losses and income for farmers. It is worth remembering that producers must, on a daily basis, control the pressure of bio-aggressors, which varies constantly with the climate. Without the use of synthetic pesticides, organic farming requires, as we know, "more complex protection techniques with only partial effects"<sup>6</sup>. Yields of organic crops are, moreover, on average 20% lower than those obtained from conventional cultivation<sup>7</sup>; hence the crucial issues surrounding financial support for these practices and the promotion of their products. Moreover, in the event of a simple national ban on certain substances, the distortions of competition that would inevitably affect French farmers must be taken into consideration, since agricultural products can circulate freely on European territory. There is a risk that French agriculture will be downgraded if the competitiveness of its agents is permanently affected. In short, is it possible to improve the environmental performance of farms without affecting their economic performance<sup>8</sup> ?

Often dealt with from agronomic and economic angles, the problem involves purely legal issues, since legal tools could be used to protect the farmer against the hazards resulting from a change in phytosanitary strategy. In this respect, the farmer's remuneration comes mainly from two sources: the price of the sale of his products and subsidies, in particular those granted by the common agricultural policy. In the event of a ban or severe restriction on the use of plant protection products, two levers can therefore be used to offset the new economic risks<sup>9</sup>: financial intervention by the public authorities (1) and market mechanisms (2).

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<sup>3</sup> Règl. (CE) n°1107/2009, 21 oct. 2009, art. 2, § 1.

<sup>4</sup> Ex. : C. GATIGNOL, J.-C. ETIENNE, *Pesticides et santé*, rapport de l'Office parlementaire d'évaluation des choix scientifiques et technologiques (OPECST), 29 avril 2010.

<sup>5</sup> Min. Agri., *Publication des données provisoires des ventes de produits phytopharmaceutiques en 2020*, 30 juill. 2021.

<sup>6</sup> H. GUYOMARD (dir), *Vers des agricultures à hautes performances, Volume 1, Analyse des performances de l'agriculture biologique*, INRA, 2013.

<sup>7</sup> L. C. Ponisio et al., *Diversification practices reduce organic to conventional yield gap*, 2015, Proceedings of the Royal Society B, 282 : 20141396.

<sup>8</sup> E. Midler et V. Hébraïl-Muet, *Performance économique et environnementale des exploitations de grandes cultures*, CEP, nov. 2021.

<sup>9</sup> Although it is an important lever, taxation will not be dealt with in this necessarily limited study.

## **1. Public financial support for farmers**

The first question is whether or not the state is obliged to support its agricultural producers when they are deprived of one of their working tools. Can cyclical support be organised and how ? Apart from this case, is it possible to structurally mobilise public subsidy to secure a more uncertain agricultural income.

### **1. 1. Short-term compensation for producers**

In the absence of structural measures, farmers may suffer economically from restrictions on crop protection methods. Their legitimate request for compensation can then be dealt with, on a case-by-case basis, with the State in an amicable manner. It is also possible to imagine a more contentious approach, involving a decision by an administrative judge condemning the public authority.

#### **1. 1. 1. The binding framework for spontaneous compensation**

Faced with a ban of which it is the author, the State may decide to compensate the economic agents affected. This procedure was implemented following the losses caused by the yellowing of beet. However, EU competition law may hinder this type of initiative.

Following the ban on neonicotinoids under the "biodiversity" law<sup>10</sup>, sugar beet growers found themselves, in the summer of 2020, at a loss when faced with an infestation of aphids carrying jaundice; production fell by around 50%. The reaction of the Ministry of Agriculture was twofold: on the one hand, to reintroduce, in a derogatory and temporary manner, the possibility of treating beet seeds<sup>11</sup>; on the other hand, to propose a compensation programme of 26 euros per tonne of sugar beet at 16° of sugar, within the limit of an envelope of 80 million euros. What may have been perceived as a regression in environmental protection has shown, in practice, that the banning of certain molecules could lead farmers and an entire industry into a dead end. The cause: a lack of sufficiently mature alternative practices, as noted in a 2017 opinion by the Anses: it wrote that "there are currently no non-chemical alternatives to combat aphids and flies that are sufficiently effective and operational"<sup>12</sup>. So is it enough for the state to hand out public money to offset the effects of its environmental policy to solve the problem? European competition law does not see it that way.

According to article 107 of the Treaty on the Functioning of the European Union (TFEU), subsidy granted by a Member State or through State resources is, in principle, incompatible with the internal market. It distorts or threatens to distort competition by favouring certain undertakings or products. By virtue of this principle, State subsidy must be notified to the European Commission<sup>13</sup>, which is likely to block its implementation if it considers that it goes beyond compensation for additional costs and loss of earnings. By way of exception, so-called de minimis grant, below a certain amount, is exempt from

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<sup>10</sup> L. n° 2016-1087, 8 août 2016, art. 125, mod. C. rur., art. L. 253-8.

<sup>11</sup> L. n° 2020-1578, 14 déc. 2020. V. B. Grimonprez et I. Bouchema, Reintroduction of neonicotinoids in the environment: is necessity the law?, *Droit de l'environnement*, 2021, p. 9.

<sup>12</sup> Anses, avis 8 mars 2017.

<sup>13</sup> TFUE, art. 108, § 3.

this restrictive procedure<sup>14</sup>. The ceiling to be observed is currently EUR 20 000 per single agricultural undertaking, over a period of three fiscal years, without being able to exceed the national ceiling of EUR 932 709 458 for France<sup>15</sup>.

The compensation programme for beet producers was thus obliged to fit into the European mould. However, as the Senate's Economic Affairs Committee pointed out, "because of the average surface area of French beet growers, the de minimis grant ceiling is too low, even for partial compensation"<sup>16</sup>. It would have been possible to circumvent the agricultural subsidy system by choosing to subsidize cooperatives, traders, processors and even distributors. Indeed, the de minimis grant ceilings for them are higher: 200,000 euros per company. However, this strategy at the level of the sector is ruled out because of the risk of cartel (TFEU, art. 101), which is more or less real for such decisions when they "involve the fixing of prices or quotas"<sup>17</sup>.

The State, like other public actors (local authorities, water agencies, etc.), even if it has the will to do so, is thus not free to deploy vast public compensation programmes for pesticide restriction measures. It remains to be seen whether farmers could force it to do so in court.

### **1. 1. 2. The exceptional route of contentious compensation**

Can the sovereign power of the State to legislate be a source of financial responsibility for it? Is it not the nature of the law to be imposed on all without any compensation being claimed from it? In spite of this, the administrative judge, in his founding decision "Société des produits laitiers La Fleurette", opened up the possibility of compensating for damage caused by the law, when it presents certain characteristics, in particular gravity and speciality<sup>18</sup>. The case law has also stated, this time in relation to regulatory measures taken in the general interest by the police authorities, that they may give rise to a right to compensation on the basis of equality before the public authorities for the benefit of persons who, as a result of their application, suffer abnormal and special damage.

In the case of a ban on a type of pesticide by law or an administrative measure to withdraw it from the market, the first difficulty would be to ensure that the condition of speciality is recognised, i.e. that the damage affects only a limited number of precisely identifiable persons. For the law, which provides in the most general way, impacts an indefinable quantity of actors, thus potentially the 340,000 conventional farmers deprived of all or part of the synthetic plant protection products.

The criterion of abnormality also poses a problem. In its jurisprudence, the Conseil d'Etat specifies that a loss only becomes abnormal when it exceeds the economic hazards commonly accepted that a prudent entrepreneur must integrate into his financial forecasts<sup>19</sup>. In this respect, the availability or non-availability of a crop protection product seems to be part of the normal vagaries of the business, especially in a context where

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<sup>14</sup> Règl. (UE) mod. n°1408/2013, 18 déc. 2013, art. 3.

<sup>15</sup> Règl. (UE) mod. n°1408/2013, 18 déc. 2013, art. 3 et annexe I.

<sup>16</sup> Rapport, 21 oct. 2020, p. 93.

<sup>17</sup> Règl. (UE) n° 1308/2013, 17 déc. 2013, art. 210, § 4, d).

<sup>18</sup> CE, ass., 14 janv. 1938, *SA des produits laitiers La Fleurette*, Lebon 25.

<sup>19</sup> CE 26 juill. 2007, n° 291874, Min. Écologie et Développement durable ; CE 1<sup>er</sup> févr. 2012, *Bizouerne*, req. n° 324205.

most synthetic pesticides are under scrutiny because of the risks they present and the policies put in place to abandon them. In other words, there is a very small chance that the judge will see an abnormally inflicted damage in these police measures.

In addition, the legislator may very well exclude any possibility of compensation in his text, and thus close the door to any action by farmers or their union representatives. In the event that the law itself organises compensation for its own consequences, the Council of State presumes that the legislator wishes to exclude any other form of compensation<sup>20</sup>. As a result, farmers would no longer be able to seek liability without fault on the part of the State and would have to make do with the subsidies budgeted and capped by the European *de minimis* regime.

Finally, we must consider the measures, which are increasingly numerous, aimed at restricting the use of pesticides in certain sensitive areas, either because of their ecological qualities or because of the populations living near them. Clearly, this is sometimes a type of easement imposed on the owner of land in the interest of protecting the environment and health in general (public law easement). Environmental charges are in fact measures aimed at limiting or prohibiting certain land uses that are likely to affect the convenience of the neighbourhood, public health, safety and sanitation, or the integrity of nature and landscapes. These are the restrictions attached to the status of such and such areas delimited by the administrative authority (drinking water catchment areas, national parks, nature reserves, biotope protection orders, etc.). This type of easement is, depending on the case, likely to give rise to a right to compensation in the event of direct, material and special prejudice suffered by the owners.

However, it also appears that certain product use regulations fall into the category of police measures. The famous "no-treatment zones", instituted to protect local residents, are not so much charges on real estate as rules aimed at regulating a risky economic activity<sup>21</sup>. This is proven by the fact that the conditions of use of pesticides (re-entry times, weather, distances) are also directly included in the marketing authorisations. The standards, in other words, apply to all users of the said product, so that only the compensation rules of the regulatory measures previously analysed can come into play. In the current state of jurisprudence, farmers can hardly obtain compensation for their loss before the judge.

Temporary compensation solutions are therefore dependent on the goodwill of the State or the hypothetical decisions of the administrative judge, with the very restrictive nature of these options. Public policies will avoid these pitfalls by seeking to mobilise, well upstream, the structural legal tools for supporting agricultural income.

## **1. 2. Structural support for producers**

Rather than seeking to neutralise the economic cost of restrictive measures, it is in the interest of public policies to support agricultural practices that do not use synthetic plant protection products. Because they follow a different logic, these financial incentives do not have the same scope and effects. The framework of the next CAP offers, more than

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<sup>20</sup> CE, 7 oct. 1966, *Asope*.

<sup>21</sup> B. Grimonprez et I. Bouchemma, « Pesticides and local residents: the impossible legal reconciliation ? », JCP éd. G. 2020, Etude 174.

before, the possibility for the States to target certain economic subsidies towards pesticide-saving practices. Unfortunately, for political reasons, these opportunities are not taken up at national level.

### **1.2.1 The possible targeting of support schemes towards forms of agriculture without plant protection products**

Often accused of being not green, the CAP, in its future version, proposes several levers to support pesticide reduction policies. These are subsidies schemes that can be individually subscribed to by the farmer pushed to change.

The first mechanism that can be mobilised by the Member States is the climate and environment programme (also known as the eco-scheme) which will be introduced for the first time in the 2023-2027 CAP. Each country's strategic plans (NSP) will define its content. Through this tool, France could therefore support farmers who commit to respecting environmentally beneficial agricultural practices that go beyond good agri-environmental conditions (GAEC) and the existing regulation on plant protection products (Prop. Reg., art. 28, § 5). These should be different commitments from those for which payments are already granted under agri-environmental measures and support for conversion to organic farming (Prop. Reg., art. 28 § 5, revising art. 65).

Article 86 of the proposed regulation requires that at least 25% of the annual national envelope for direct payments (i.e. 7,28 billion) be used for this programme (i.e. 1,82 billion). However, there is nothing to prevent this percentage from being higher. However, France, perceiving the restrictive effects of the eco-regime, and “in the interests of fairness in relation to the other Member States”, wishes to stick to the minimum share of 25% of the budget dedicated to this scheme<sup>22</sup>.

As for the criteria for this type of payment, the Ministry of Agriculture has opted for an "inclusive" eco-regime, accessible to all, based on two levels (a basic one and a higher one) and which includes three parallel access routes (practices, environmental certifications, and agro-ecological infrastructures). In view of the choices currently made, most conventional farmers should be able to claim the basic scheme (via crop diversity in particular) without changing their phytosanitary strategy. Another incongruity is that organic farmers will receive the same level of premium as farmers certified as having high environmental value (according to a renewed reference system)<sup>23</sup>, knowing that this latter label, unless it evolves profoundly, does not guarantee a substantial decrease in the use of synthetic products. The least that can be said is that the French-style eco-regime hardly encourages farmers to take the risk of doing without pesticides.

The CAP reform proposal provides for the maintenance of income support for certain crops. The conditions can now be established by the national strategic plans, allowing for the inclusion of sustainability criteria. France could therefore very well have reserved eligibility for hectares of plant production grown without synthetic products or with biopesticides. The latitude offered to Member States is almost total. Indeed, the Commission is only entitled to intervene to complete the regulation in order to avoid that

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<sup>22</sup> Min. Agri., *Construire une politique agricole commune au service de l'agriculture française*, dossier de presse, 21 mai 2021, p. 17.

<sup>23</sup> France's NSP CAP 2023-2027 proposal, p. 348.

the beneficiaries of coupled subsidies are exposed to structural market imbalances (Prop. Reg., art. 32).

The allocation for this type of support is limited to 13% (or even 15% if the amount of these 2 additional points concerns protein crops) of the annual amount of 7.28 billion euros allocated to France. So France could afford to allocate up to €1.09 billion per year in coupled subsidy. If this was the option chosen, it was done with the sole aim of increasing the quantity of plant proteins produced, regardless of the cultivation techniques used.

Agri-environmental and climate measures (MAEC) are payments financed by the 2nd pillar of the CAP (EAFRD) on the basis of commitments voluntarily entered into by farmers in favour of the environment (e.g. preservation of water quality, biodiversity, wetlands, etc.).

The current CAP reform maintains them (Prop. Reg., art. 65). In this respect, France is considering a renewed MAEC catalogue based on a more systemic approach (e.g. MAEC water, flat-rate MAEC transition of practices, etc.)<sup>24</sup>.

However, several congenital defects of the system persist and undermine its effectiveness. Already the overall envelope dedicated to these voluntary actions remains small. Normally, at least 30% of the EAFRD contribution to the strategic plan should be devoted to environmental actions. However, no maximum percentage is set. France could therefore go further than the strict minimum, but has refused to do so.

Secondly, the payments in question are always intended only to compensate for the additional costs associated with the adoption of a new practice and not to remunerate an environmental service rendered. Hence the low attractiveness of the sums proposed when the efforts required of producers are substantial.

Finally, most MAECs remain geographically and temporally limited. The contracting of measures will assume that the farm or the plots are, as at present, located in a territory covered by an agri-environmental and climate project (AECPC)<sup>25</sup>, i.e. an area at stake (e.g. catchment area, wetland, etc.) defined by the management authority. This criterion has the effect of excluding other farmers from the scheme. While it may be attractive, the short duration of the commitment (5 years) may also be problematic. There is a risk that the CEAP making the territory eligible for subsidy will not be renewed. Faced with individualised schemes that are currently rather lacklustre, the State could also consider turning to other solidarity measures also financed by the CAP.

### **1. 2. 2. Revitalising collective tools for managing health risks**

In the current European regulation on rural development, two types of health risk management mechanisms would be interesting for Member States to mobilise: subsidy for insurance premiums and subsidy for health or environmental mutual funds.

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<sup>24</sup> France's NSP CAP 2023-2027 proposal, p. 206.

<sup>25</sup> France – National Framework Programme, 5 juin 2015 (document cadre national pour le développement rural – DCN n° 2).



The CAP reform proposal maintains the existence of support for climatic multi-risk insurance premiums. The support will be conditional on the farmer's losses reaching at least 20% of his average annual production or income and will remain limited to 70% of eligible costs.

Would it be possible to extend the scheme to include compensation for losses caused by insects, diseases or weeds? Some trade union leaders are beginning to think about this and to propose it. To do this, the content of the standard insurance contract would have to be changed, which is currently limited to climatic hazards. But the obstacle seems to lie more in the criteria formulated at the European level: subsidized risk management tools must concern risks linked to agricultural activity over which farmers have no control. It is difficult to accept that the producer has no means of protecting himself against the damage usually caused by pests.

In addition, there are economic considerations. In the case of large-scale losses, the insurer would have to compensate almost all of its customers at the same time, which could jeopardise its business model. This situation occurred to some extent during the frost, hail and flood damage in the spring of 2016, when insurance companies found themselves in deficit. It would have happened again in 2020 if all the beet growers affected by jaundice had to be compensated. Most probably, insurers would refuse to cover such health risks if the State did not come up with a guarantee. Above all, it seems difficult to argue that there could be insurable risks in the case of crop damage that has become inherent to the farming system itself. On this point, the balance between insurable risks and those covered by a collective solidarity scheme (agricultural disasters) should be modified by the current reform of the agricultural insurance scheme.

On the other hand, mutual funds are an instrument recognised by the CAP of yesterday and tomorrow. It authorises states to organise and participate financially in these funds, up to a maximum aid rate of 70% of eligible costs. In France, the Fonds national agricole de mutualisation du risque sanitaire et environnemental (FMSE) currently compensates economic losses caused by environmental incidents (C. rur., art. R. 361-52) and by regulated plant pests (C. rur., art. R. 361-51 and L. 201-1) . However, European law (Prop. Reg., art. 38) does not oppose a broader use of the instrument, since it cites "losses caused by an animal or plant disease, by a pest or by a measure adopted in accordance with Directive 2000/29/EC to eradicate or contain a plant pathology or pest infestation or by an environmental incident". Thus, within the limits of the public funds available, it seems that this provision authorises the setting up of a more global system for the mutualisation of the risk generated by the gradual elimination of synthetic pesticides.

One example of this is the experience of the "Fondo Risemina Mais" in the Italian region of Veneto. Local maize producers undertake to apply the general principles of integrated pest management (noctuid moths, lacewings, etc.) and to follow the recommendations of the field crop protection bulletins of the Veneto Agricultural Institute. In return for a cost of 25 euros per hectare, the farmer benefits from the mutual fund in the form of crop insurance in the event of damage caused to his plots by pests; the cover goes up to 500 euros per hectare with a maximum compensation ceiling of 40,000 euros. This type of formula does not currently exist in France, which could consider using it as a model to accompany the withdrawal of plant protection products.

Although it is necessary for a good number of productions, public support alone is clearly insufficient. Ideally, the market must also be reformed (or be reformed) to integrate the true cost of production, which is higher without pesticides, into the price of the agricultural product. In this way, the various links in the chain, i.e. buyers, distributors and consumers, would bear the economic burden of the transition of the agricultural model.

## **2. Private financial support for farmers**

In order to be economically profitable, agricultural activity requires that the sale price of the products be higher than the full cost of their production (operating costs, structural costs and the farmer's remuneration). However, it is now estimated that there is a substantial yield differential between conventional and organic production methods and that production costs are higher on average for the latter. Securing the shift to "zero phyto" therefore necessarily requires better remuneration for the foodstuffs placed on the market. This should enable farmers to respond to societal demand to eliminate controversial substances without the cost of change being borne solely by them or the State. It is therefore necessary to examine the mechanisms by which the market could be led to value products obtained without chemical products. The market will only be able to play this game if it is not distorted by unregulated imports.

### **2.1. The market valuation of pesticide-free production**

A first approach, which naturally comes to mind, is that of mass certification of French farmers through labels guaranteeing the absence of pesticides. This is the case with organic farming, which provides daily proof that this is technically possible and economically viable. However, in view of a market for certified products that is in danger of becoming commonplace, it is necessary to envisage methods that are undoubtedly more prescriptive: the contractualisation process is one such method.

#### **2.1.1. Guaranteeing a fair price for certified organic farming production**

From the point of view of pesticide suppression, "organic agriculture" certification is the most convincing. It is not that it is totally free of pesticides, but it is the only official label that bans synthetic products. It seems that some farmers are considering converting to organic farming in order to benefit from higher market prices. For example, in August 2021, a tonne of conventional soft milling wheat was selling for 230-250 euros, while a tonne of organic milling wheat was trading at 500-530 euros. These price levels are the result of supply and demand. The demand for organic products remains strong and increasing according to the Agence Bio: 5.9 billion in sales in 2015; 9.7 billion in 2018; 13 billion in 2020. However, if organic wheat develops to the point where it becomes the market standard, its price will inevitably fall to approach the current price of conventional wheat. The farmer's economic objective would not be achieved, as his production costs would no longer be covered, and he would still have to face competition from imported (organic) products (e.g. from Russia).

In this respect, an overproduction of organic milk can be observed in 2021, which leads dairies to slow down the momentum of conversions, as the increase in demand is not sufficient to absorb the increase in supply. Thus, unless we are able to guarantee high

organic prices, for example by regulating the volumes marketed, the generalized switch to organic farming poses a problem on a strictly economic level.

Is it legally possible to regulate the prices of organic products in order to keep them high? In addition to coming up against pressure from imports, it would directly contravene European competition law. It should be remembered that Article 101 of the TFEU prohibits concerted practices relating to price fixing, a prohibition that is similarly aimed at controlling production and outlets, and therefore presumably at regulating the flow of conversions.

The draft reform of the common organisation of the market for the next CAP 2023-2027 does, however, open up some prospects. It would be possible to derogate from the prohibition of anti-competitive agreements when the agreements or practices involve the establishment of environmental standards that are higher than those of the Union or of national legislation (even citing the objective of reducing the use of plant protection products); the condition would be, however, that such agreements only impose restrictions on competition that are indispensable for the achievement of this standard. It remains unclear to what extent this new text would allow the market for organic products to be regulated, more or less directly. Indeed, this type of production is entirely governed by a European regulation, so that it is difficult to see the application of a higher sustainability standard than that of the Union. On the other hand, it is possible to imagine agreements on non-certified products that could be cultivated without certain products (e.g. herbicides).

The moral is that while certification provides the short-term benefit of market valuation, this may be blunted over time by the standardisation of organic products. Intervention measures to correct new imbalances are quite illusory. Hence the interest in using the contracts that farmers conclude within the sectors to achieve a better price structure.

## **2. 1. 2. The necessary change in the construction of the selling price of agricultural products**

The hypothesis is that the market would remunerate, through the price of food products, the costs generated by the absence of "phytos" use, independently of any certification system. The contract for the sale of agricultural products would cover the cost of production and compensate for any losses in yield. According to data from the Observatoire de la formation des prix et des marges, the added value captured by agriculture represents only 5.8 euros per 100 euros of final food consumption. There is therefore considerable room for improvement in terms of price increases by the first buyer, given that he could pass on these increases to the other links in the downstream sector. We know, however, the reluctance of buyers of agricultural products (both industrial and cooperative) to make this kind of financial effort, as they are always looking for cheaper supplies, especially on import markets.

This is why contractualisation, far from being a spontaneous process, was on the contrary orchestrated by the public authorities in order to regulate the content of food exchanges. It should be remembered that in the wake of the 2010 law on the modernisation of agriculture, the written and standardised formalisation of contracts for the sale of agricultural products was imposed by decree in certain sectors (e.g. cow's milk) and by means of interprofessional agreements in others. The more than mixed results of

compulsory contractualisation and the structural economic difficulties of farmers led the so-called EGAlim law to modify the system provided for in article L. 631-24 of the Rural Code. This reform reversed the construction of the price: i.e. it is now proposed by the seller of the product based, in particular, on relevant production cost indicators, but also on quality or composition indicators. The effects of the elimination of pesticides should therefore, in theory, be found at two levels. At the level of production cost indicators when their ban is decreed (all actors are impacted here). At the level of quality indicators, when the producer voluntarily decides to opt for alternatives to chemicals. This can increase the purchase price of products. This is because there is no threat from competition law to this type of strategy.

Unfortunately, practice shows that contractualisation, even if it is strengthened, does not succeed in achieving its goal. The EGAlim law has indeed ended in failure, as DGCCRF controls have highlighted the fraud of certain buyers concerning production cost indicators. The so-called "EGAlim 2" law n° 2021-1357 of 18 October 2021 proposes technocratic solutions that are hardly innovative to get out of the rut. On the price front, we have to make do with the fact that the interprofessions are now required to publish the famous indicators, the non-negotiability, between processors and distributors, of the share of the price corresponding to the cost of agricultural raw materials (C. com., art. L. 443-8), as well as the "remuneration-score" system on the final products sold. Everything suggests, therefore, that not only will the real inversion of price construction be a long time coming, but that the consideration of phytosanitary policies for their setting represents an even more distant "grail".

In fact, the willingness of the internal market to better remunerate the act of production (especially if it is more risky) is to be correlated with the regime of imports from Member States or third countries that have lower production costs and sometimes benefit from products that are prohibited on our soil. The fact is that not all consumers will be ready to show "food patriotism", either through disinterest or simply lack of means.

## **2. 2. Regulation of imports produced with pesticides**

The development of pesticide-free agriculture in France, with or without the AB label, requires the protection of the French market from imports, whether from third countries or from EU Member States. The first disadvantage of these massive arrivals of products is that they drive prices down. Foreign trade data show, in this respect, the growing dependence of our country on imports. Even in the organic market, imports contribute 21% to the supply of the domestic market (excluding tropical products). The second perverse effect of imports is to create distortions of competition, when foreign goods do not meet the same production standards, including the use of pesticides.

### **2.2.1. Regulation at European level: an untapped opportunity**

Regulation can first be undertaken at the European level, in line with the Green Deal objectives of reducing pesticides across the continent. In a context of free movement of goods in the European internal market, this is the most obvious option. It is a question of the Union blocking the entry into the European area of third party products that do not respect Community environmental standards, in our case using products that are banned in Europe.

Measures that impose reciprocity between the production standards of two countries are known as mirror clauses. This type of trade restriction for environmental and health reasons appears to be compatible with the exceptions provided for in the WTO agreements, under certain conditions. This legal opening, which France was in favour of, has however been closed politically. During the European triologue of 24 and 25 June 2021, the Council of Ministers of Europe opposed the addition, within the future Common Market Organisation (CMO), of an article 188a which provided for restrictions on imports of food products that do not comply with European production standards and contain pesticide residues that are prohibited in the EU<sup>26</sup>. The only small step forward is that the European Commission has said it wants to lower the maximum residue limit for two neonicotinoid insecticides - clothianidin and thiamethoxam - which would also apply to imported crops<sup>27</sup>. Faced with Europe's reluctance to protect its external borders economically, the only option left is the temptation to regulate at national level.

### **2. 2. 2. Regulation at national level : a narrow window**

The Egalim law of 30 October 2018 introduced, relatively unnoticed, an article 236-1A into the french Rural Code, which prohibits “offering for sale or distributing free of charge for human or animal consumption foodstuffs or agricultural products for which plant protection or veterinary products or animal feed not authorised by European regulations or not complying with the identification and traceability requirements imposed by these same regulations have been used”. Although it has not yet been implemented, the text promises to do what Europe has not dared to do. However, its scope is limited to imports that do not comply with European standards. It cannot therefore restrict the circulation of products containing substances approved in the Union.

The other lever, this time in the European legal order, is the so-called safeguard clause. It first appears in Regulation n° 178/2002 of 28 January 2002 (articles 53 and 54) laying down general requirements of food law. This allows, in the event of an emergency and a serious risk to animal or human health or the environment, to take measures to restrict the circulation of foodstuffs. This procedure can be implemented by a State alone, in the form of precautionary measures, only after the European Commission has been informed and can judge the relevance of the national decisions and their maintenance.

A similar mechanism is provided for in the pesticides regulation n° 1107/2009 “where it is clear that an approved active substance, safener, synergist or co-formulant or a plant protection product authorised under 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”. Here, a Member State can only ask the European Commission to take restrictive measures concerning the use and/or sale of the offending substance.

It is within this framework that France could demand the suspension of the sale on its territory of food products treated with plant protection products that it prohibits. This

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<sup>26</sup> C. Dehut et T. Pouch, EU trade policy and mirror clauses, ambition or mirage?, *Paysans & société*, vol. 389, n° 5, 2021, pp. 5-13.

<sup>27</sup> The announcement did not fail to provoke a reaction from African producers, who fear that in the future they will be excluded from the European market and will be deprived of the means to protect their crops in tropical areas that are highly exposed to pests.

position is politically defended by certain agricultural unions : “the combination of import ban and economic support for production is a powerful political tool. It should enable progress to be made in the future towards the withdrawal of pesticides without condemning production”. The strategy could be used occasionally, as it was a few years ago for dimethoate. Indeed, following the withdrawal of the authorisation of this insecticide by the Anses, a decree suspended the introduction into France of imported fresh cherries treated with this active substance.

However, it is clear that the European Commission would not validate a general safeguard clause for all active substances approved at Community level, especially since the CJEU recently ruled that European regulations on the marketing of pesticides are perfectly in line with the precautionary principle.

One last way is the bold creation of a reservation of constitutionality. As a Member State of the Union, France has delegated its sovereignty in customs matters to Europe. No national law can therefore derogate from this international commitment, by virtue of the normative superiority of the regularly ratified or approved treaty. On the other hand, an international text does not take precedence, in the internal order, over the constitution. The Council of State refuses not only to review the constitution for conventionality, but also to verify the constitutionality of a treaty.

It is thus theoretically conceivable to modify our constitutional block, in particular through the Charter of the Environment, to create a system of exception relating to the import into France of foodstuffs grown from products prohibited on our territory. The rule could be taken in the name of the precautionary principle, also enshrined in article 5 of the Charter.

In the absence of a parliamentary consensus, case law could be creative. In its famous Solange I decision of 29 May 1974, the German Constitutional Court in Karlsruhe boldly reserved the right to set aside the primacy of Community law in the event of a violation of fundamental rights "as long as" (in German, "solange") European law does not guarantee a protection of the individual equivalent to that of the German fundamental law. In the same way, the French Constitutional Council could rule that, as long as the Union does not prohibit the entry into the Community of food products treated with prohibited substances, France will invoke a reservation of constitutionality to ensure the application of the Charter of the Environment and guarantee the safety of French consumers. Is the right to health and a healthy environment not a fundamental right?

## **Conclusion**

The financial support of producers forced to commit to the ecological transition is unfortunately the poor relation of legal reflection, marked by dogmatism (for or against pesticides!). As our analysis has shown, the deployment of an economic policy backed by a plant health policy is far from self-evident, and comes up against numerous obstacles at different levels of organisation (sectors, State, Europe). That said, there are legal openings that would make it possible to go much further, but which politicians are not taking advantage of for fear of the reactions that such a reorientation of financial priorities could provoke.

