COMMISSION IMPLEMENTING DECISION (EU) 2019/961

of 7 June 2019

authorising a provisional measure taken by the French Republic in accordance with Article 129 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) to restrict the use and the placing on the market of certain wood treated with creosote and other creosote-related substances

(notified under document C(2019) 4122)

(Only the French text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 1907/2006 of the European Parliament and of the Council 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 [1], and in particular Article 129(2) thereof,

Whereas:

(1) By Order of 18 December 2018 on the restriction of the use and the placing on the market of certain treated wood ('the Order'), which was published in the Official Journal of the French Republic on 11 January 2019, France took a provisional measure in accordance with Article 129(1) of Regulation (EC) No 1907/2006 ('the provisional measure') because it considered having justifiable grounds for believing that urgent action was essential to protect the environment from the risks arising for the aquatic and/or terrestrial environmental compartment from wood treated with the substances creosote (CAS No 8001-58-9 and EC No 232-287-5); creosote oil (CAS 61789-28-4; EC No 263-047-8); distillates of coal tar, naphthalene oils (CAS 84650-04-4; EC No 283-484-8); creosote oil, acenaphthene fraction (CAS 90640-84-9; EC No 292-605-3); upper distillates of coal tar (CAS 65996-91-0; EC No 266-026-1); anthracene oil (CAS 90640-80-5; EC No 292-602-7); crude coal tar acid oils (CAS 65996-85-2; EC No 266-019-3); wood creosote (CAS 8021-39-4; EC No 232-419-1); and alkaline extract residues (coal) (CAS 122384-78-5; EC No 310-191-5), on their own or in a mixture with one or several other substances ('treated wood').

(2) The provisional measure consists in a prohibition, with effect from 23 April 2019, of the placing on the market and the installation of treated wood. Under the provisional measure, treated wood cannot be reused nor put to another use by the person who used it. These prohibitions apply regardless of the date when the treatment of the wood took place.

(3) On 25 February 2019, France informed the Commission, and on 5 March 2019 it informed the European Chemicals Agency ('the Agency') and the other Member States about the provisional measure, in accordance with Article 129(1) of Regulation (EC) No 1907/2006.

(4) The Order allows, by way of derogation, wood treated with creosote (CAS 8001-58-9; EC No 232-287-5) to be placed on the market and installed for use as railway sleepers, and allows such wood already used as railway sleepers to be reused by its holder for the same use for an indefinite period of time. Moreover, the Order allows wood treated with that substance and intended for use as electrical or telecommunications transmission poles to be placed on the market and installed until 23 October 2019, with a possibility for certain operators to apply for an extension of that time-limit under certain conditions.

(5) The Commission examined the Order together with the relevant scientific and technical information submitted by France. Moreover, the Commission gave the competent authorities of the Member States and stakeholders the opportunity to provide their views on the Order in the framework of a meeting of the Competent Authorities for Registration, Evaluation, Authorisation and restriction of Chemicals (REACH) and Classification, Labelling and Packaging (CLP) ('CARACAL') held on 19 March 2019.

[1] OJ L 396, 30.12.2006, p. 1.

(6) Given the short time limit within which the Commission is required to take a decision on a provisional measure pursuant to Article 129(2) of Regulation (EC) No 1907/2006, the Commission must base its decision predominantly on the information submitted to it by France.

(7) Entry 31 of Annex XVII to Regulation (EC) No 1907/2006 already prohibits the placing on the market of wood treated with the nine substances referred to in the Order, or with mixtures containing them, due to their known carcinogenic effects. Furthermore, concerns regarding those substances also arose due to the fact that some of their components are poorly degradable. Nevertheless, paragraph 2(b) of that entry allows wood treated in industrial installations or by professionals according to paragraph 2(a) of that entry which is placed on the market for the first time or retreated in situ, to be used for professional and industrial use only, for example on railways, in electric power transmission and telecommunications, for fencing, for agricultural purposes (for example stakes for tree support) and in harbours and waterways. Moreover, paragraph 2(c) of that entry allows treated wood which was treated before 31 December 2002 to be placed on the second-hand market for reuse.

(8) By Commission Directive 2011/71/EU ([2]) creosote (CAS 8001-58-9; EC No 232-287-5) was approved as an active substance for use in biocidal products of product-type 8 until 30 April 2018, based on an assessment of whether wood preservatives containing creosote may be expected to satisfy the requirements laid down in Article 5 of Directive 98/8/EC of the European Parliament and of the Council ([3]). By Commission Implementing Decision (EU) 2017/2334 ([4]), the expiry date of approval of creosote for use in biocidal products of product-type 8 was postponed to 31 October 2020. The other eight substances mentioned in entry 31 of Annex XVII to Regulation (EC) No 1907/2006 have not been approved as active substances for use in biocidal products nor do they benefit from the transitional provisions of Article 89 of Regulation (EU) No 528/2012 of the European Parliament and of the Council ([5]) and therefore biocidal products containing them may not be placed on the market or used in the Union.

(9) Following applications for mutual recognition of three authorisations granted by Sweden for biocidal products containing creosote in accordance with Regulation (EU) No 528/2012, France authorised the products covered by those applications only for the treatment of railway sleepers, but refused authorisation for other wood treatment uses ([6]). In Implementing Decision (EU) 2018/1297 ([7]), the Commission concluded that France's derogation from mutual recognition was justified on grounds of protection of the environment and of health and life of humans as referred to in points (a) and (c) of Article 37(1) of Regulation (EU) No 528/2012, in conjunction with the second subparagraph of Article 37(1) of that Regulation.

(10) Despite France's refusal to authorise the use of biocidal products containing creosote for wood treatment uses other than the treatment of railway sleepers, neither entry 31 of Annex XVII to Regulation (EC) No 1907/2006, provided the conditions laid down in paragraph 2(b) of that entry are met, nor Regulation (EU) No 528/2012 precludes such wood treated with creosote from being placed on the market for the first time or installed in the territory of France, or any wood treated with creosote before 31 December 2002 from being placed on the French second-hand market for re-use.

(11) According to the scientific-technical elements brought forward by France, the exposure levels linked to the outdoor use of wood treated with creosote and coming into contact with the soil or installed in fresh or salt water, as estimated by the Swedish authorities and evaluated by ANSES for the purposes of the authorisations for biocidal products containing creosote (CAS 8001-58-9; EC No 232-287-5) ([8]), exceed the relevant Predicted No-Effect Concentrations (PNECs) which implies that the risk to the such environmental compartments is not adequately controlled. The French measure is taken to protect the environment from the resulting risk. However, exposure levels linked to railway sleepers, which are used outdoors but do not come into contact with the soil nor are installed in fresh or salt water, do not exceed the relevant PNECs. In order to limit in time as far as

([2]) Commission Directive 2011/71/EU of 26 July 2011 amending Directive 98/8/EC of the European Parliament and of the Council to include creosote as an active substance in Annex I thereto (OJ L 195, 27.7.2011, p. 46).

([3]) Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market (OJ L 123, 24.4.1998, p. 1).

([4]) Commission Implementing Decision (EU) 2017/2334 of 14 December 2017 postponing the expiry date of approval of creosote for use in biocidal products of product-type 8 (OJ L 333, 15.12.2017, p. 64).

([5]) Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ L 167, 27.6.2012, p. 1).

([6]) Decisions FR-2017-0034, FR-2017-0035 and FR-2017-0036, all dated 23 April 2018 and based on evaluation conclusions by the French 'Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail' (ANSES) dated 19 May 2017, replaced by evaluation conclusions by ANSES dated 30 May 2018.

([7]) Commission Implementing Decision (EU) 2018/1297 of 25 September 2018 on a derogation from mutual recognition of the authorisation of biocidal products containing creosote by France in accordance with Article 37 of Regulation (EU) No 528/2012 of the European Parliament and of the Council (OJ L 243, 27.9.2018, p. 19).

([8]) As reported by the Conseil général du l'environnement et du développement durable, Evaluation des impacts d'une interdiction d'utilisation de la créosote en France, Rapport n° 010963-01, May 2017 [http://cgedd.documentation.developpement-durable.gouv.fr/documents/cgedd/010963-01_rapport.pdf].

possible the impacts on the environment due to such uses of treated wood, the measure taken by France should be considered urgent in the meaning of Article 129(1) of Regulation (EC) No 1907/2006. The French decisions not to authorise the relevant biocidal products for wood treatment uses other than the treatment of railway sleepers, found justified by the Commission in Implementing Decision (EU) 2018/1297, will start producing their protective effects as from 23 April 2019. However, risks from the use of such treated wood will remain partially unaddressed if such treated wood can still be placed on the market and installed on the French territory following treatment outside the French territory. It is therefore urgent to restrict such placing on the market and installation in the same timeframe, namely as from 23 April 2019.

(12) Accordingly, the provisional measure can be considered as justified in accordance with Article 129(1) of Regulation (EC) No 1907/2006 with regard to wood treated with creosote (CAS 8001-58-9; EC No 232-287-5).

(13) France also stated that the calculation of the Derived Minimal Effect Level (DMEL) for the non-threshold substance creosote in accordance with the Agency's guidance corresponds to a risk to the workers of 10^{-5} and that, in accordance with the evaluation made by Sweden under Regulation (EU) No 528/2012, the risk to consumers is negligible.

(14) Based on supplementary scientific and technical information submitted by France, the eight substances other than creosote mentioned in entry 31 of Annex XVII to Regulation (EC) No 1907/2006 are similar to creosote due to the similarity of the chemical, toxicological and ecotoxicological profiles of their components, so that the risks to the environment from the use of any wood treated with any of those substances are similar. Accordingly, the provisional measure can also be considered as justified in accordance with Article 129(1) of Regulation (EC) No 1907/2006 with regard to wood treated with any of those substances.

(15) The Order imposes obligations for the treatment of waste from treated wood. As waste is not a substance, mixture or article within the meaning of Article 3 of Regulation (EC) No 1907/2006, the Commission considers that the provisions of the Order imposing such obligations, including the qualification of such waste as hazardous, fall outside the scope of this Decision.

(16) As the provisional measure consists in a restriction on the placing on the market or use of substances, even if satisfying the requirements of Regulation (EC) No 1907/2006, more particularly those of entry 31 of Annex XVII of that Regulation, Article 129(3) of that Regulation requires that France initiate a Union restriction procedure by submitting to the Agency a dossier, in accordance with Annex XV ('Annex XV dossier'), within three months of the date of this Decision. That Annex XV dossier should also provide justifications for any proposals for derogations in line with the provisional measure as well as an assessment of the risk to human health.

(17) Consequently, the provisional measure should be authorised.

(18) In view of the time limit set in Article 129(3) of Regulation (EC) No 1907/2006 for initiating a Union restrictions procedure by the submission of a dossier to the Agency and in order to allow sufficient time for a decision to be taken in accordance with Article 73(2) of Regulation (EC) No 1907/2006, the authorisation should apply for a duration of 27 months.

(19) This Decision does not prejudice in any way a Commission decision under Article 73 of Regulation (EC) No 1907/2006 if the conditions laid down in Article 68 of that Regulation are fulfilled.

(20) This Decision is in accordance with the opinion of the Committee established under Article 133 of Regulation (EC) No 1907/2006,

HAS ADOPTED THIS DECISION:

Article 1

1. Subject to paragraph 2, the provisional measure notified to the Commission by France on 25 February 2019 concerning the restriction of the use and the placing on the market of certain treated wood ('the provisional measure'), is authorised for a duration of 27 months from the date of effect of this Decision.

2. The authorisation shall expire on the earlier of the following dates if any of them occurs before the expiry of the duration specified in paragraph 1:

(a) where the Union restrictions procedure initiated with regard to the provisional measure results into an amendment of Annex XVII to Regulation (EC) No 1907/2006, the date on which that amendment becomes applicable;

(b) six months after the Union restrictions procedure initiated with regard to the provisional measure is finalised without the Commission proposing a draft restriction.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 7 June 2019.

For the Commission
Elżbieta BIEŃKOWSKA
Member of the Commission