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Implementation of a ban on the export of certain hazardous pesticides from Germany

Legal opinion commissioned by the European Center for Constitutional and Human Rights (ECCHR), the Heinrich Böll Stiftung, the INKOTA-netzwerk, the Pestizid Aktions-Netzwerk (PAN Germany) and the Rosa Luxemburg Stiftung

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A. INTRODUCTION

The goal of an export ban on certain hazardous pesticides is to eliminate double standards in the area of pesticide exports. Double standards arise from the fact that active substances and plant protection products that are not approved or authorised in the EU because of their environmental and health hazards are exported from Germany to countries outside the European Union. This legal opinion examines whether an export ban is legally possible and compatible with applicable law. This document is an abbreviated version of the original legal opinion written in German. The translation does not include the detailed examination of German law contained in the German original.[1]

The content and scope of an export ban depend on the fundamental question of which substances should be covered based on their risks and hazards. This legal opinion compares relevant reference documents and concludes that the linkage of the export ban to both active substances and plant protection products is the most comprehensive in terms of the level of protection and thus the most convincing (see B). Next, the compatibility of an export ban with EU, German and international law is examined (see C). The legal opinion concludes with a draft export ban (see D).

1 The original German version of the legal opinion is available at: www.rosalux.de/pestizidexportverbot.

B. MATERIAL SCOPE OF AN EXPORT BAN

When drafting an export ban, a central preliminary consideration is what the export ban links to for determining its scope, i.e., for the question of what exactly is to be covered by the ban.[2] One possibility would be an export ban that itself lists all substances and products covered by the ban, or else establishes a catalogue of criteria for testing environmental and health effects. In both cases, further decisions by the authorities are necessary to implement the export ban: the authorities must either review the substance catalogue regularly, or assess on request whether a substance may be exported according to the established criteria. A simpler approach – and therefore the subject of the following legal opinion – is to refer to existing regulatory decisions that include an assessment of environmental and health risks to determine the scope of the ban. EU law already provides for comprehensive rules, in particular in Regulation (EC) No 1107/2009[3] (Plant Protection Products Regulation, PPP Regulation), which specifically serve this goal. This legal opinion therefore examines whether the export ban can link to and refer to those rules.

The following assessment deals with pesticides used in plant protection, and thus covers both active substances and plant protection products produced from them. EU law treats pesticides used as biocides differently, even though both groups of pesticides can contain the same or related active substances.[4] Biocides are used for purposes other than plant protection, e.g., for material protection and health-related pest control. This distinction between pesticides for plant protection and biocides is specific to EU law. As a result, some active substances that are no longer approved as pesticides in agriculture may still be used as biocides in the EU. This legal opinion does not deal with biocidal active substances and products manufactured from them. However, for comprehensive protection of humans and the environment, they should be included in an export ban since the product groups do not differ in terms of their hazardous nature for humans and the environment.

The following assessment also does not cover "candidates for substitution" that are approved under Article 24 para. 1 PPP Regulation. They should, however, also be included in a ban or subjected to strong export restrictions until the approval within the EU is revoked.

In the following, a brief overview is given of the existing EU rules for assessing the environmental and health risks of active substances and products made from them (under I). Subsequently, a concrete recommendation is made as to which of these rules the export ban should link to and refer to (under II).

I. POSSIBLE POINTS OF REFERENCE FOR THE MATERIAL SCOPE OF AN EXPORT BAN

The approval of active substances and the authorisation of plant protection products are regulated in the PPP Regulation. Regulation (EU) No 649/2012[5] (PIC Regulation) deals with the export and import of certain hazardous chemicals from and into the EU. Both regulations are presented in the following – the PPP Regulation under 2, and the PIC Regulation under 1 – followed by a comprehensive overview in tabular form, which is the basis for the recommendation (under 3).

1. Approval and authorisation according to the PPP Regulation

Plant protection products must undergo a dual approval procedure in the EU.[6] The PPP Regulation regulates the approval of active substances within the EU and the authorisation of plant protection products containing these actives substances in individual Member States.

Active substances for the use in plant protection products are approved in a process involving Member States, the European Food Safety Authority, and the EU Commission. The approval process is initiated upon request by a manufacturer. The PPP Regulation contains a catalogue of criteria that must be met for the approval of the active substance. The aim of the PPP Regulation is to ensure a high level of protection for human and animal health and for the environment, as well as compliance with the precautionary principle (Art. 1 para. 3 and para. 4 PPP Regulation). In accordance with this, the approval of active substances requires the prior assessment of environmental and health risks. Pursuant to Article 4 para. 1 in conjunction with para. 2 and para. 3 PPP Regulation, the assessment must be based on the expected effects of the use of the plant protection products containing the active substances or on

2 This does not address the question of where the export ban should be anchored, since the legal opinion deals exclusively with the examination of a national regulation. The question of how a national export ban relates to the EU's structure of competences does not play a role at this point, as it only concerns the material scope of the export ban, but will be examined later as a question of the legality of the national export ban, see section C.
3 Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ. L 309 of 24 November 2009, p. 1.
4 The approval of biocidal active substances and the authorisation of biocidal products are governed by 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 June 2012, p. 1. The approval of active substances for the production of plant protection products and the authorisation of plant protection products are governed by the PPP Regulation.
5 Regulation (EU) No 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals, OJ L 201, 27 July 2012, p. 60.
6 Kloepfer, Michael, Umweltrecht, 4th edition, Munich 2016, Sec. 19 marg. no. 241.

the effects of their residues. It is assessed whether the residues of the plant protection products containing the active substances have "harmful effects on human health [...] or animal health [...] [or] on groundwater" or "unacceptable effects on the environment" (Art. 4 para. 2 PPP Regulation). The assessment of the use of plant protection products considers, inter alia, the impact on biodiversity and the ecosystem (Art. 4 para. 3 lit. e iii PPP Regulation). The assessment of whether a substance is sufficiently effective according to Article 4 para. 3 lit. a of the PPP Regulation is also related to environmental and health protection, since it deals, for example, with phytotoxic effects or effects on neighbouring cultures.[7] After completion of the approval process, the approval status of the active substance ("approved"/"not approved") is displayed in an online database maintained by the EU Commission.[8] Active substances approved under the PPP Regulation are also included in the Implementing Regulation (EU) No 540/2011.[9] [10] An approval is always limited in time and must be renewed regularly (Arts. 5, 14 PPP Regulation).

Plant protection products consist of one or more active substances and substances called adjuvants (safeners, synergists, co-formulants), which are required for the completion of the product. The approval or authorisation of these adjuvants is based on Articles 25–27 of the PPP Regulation and also depends on health and environmental protection criteria.

Plant protection products may only be placed on the market and/or used in the EU if they are authorised in the respective Member State in accordance with the PPP Regulation (Art. 28 PPP Regulation).[11] The decisive factor for classification as a plant protection product is the intended use (Art. 2 para. 1 PPP Regulation). Article 29 PPP Regulation contains requirements that must be met for the authorisation of a plant protection product within the EU. According to Article 29 para. 1 lit. a and lit. c of the PPP Regulation, a plant protection product may only be authorised if its active substances, safeners and synergists have been approved and its co-formulants have been authorised. According to Article 29 para. 1 lit. e in conjunction with Article 4 para. 3 PPP Regulation, plant protection products may only be authorised if they have no unacceptable effects on humans, animals, and the environment. The assessment of the effects takes place under consideration of cumulative and synergistic effects[12] and realistic conditions of use.[13] The PPP Regulation provides for a zonal authorisation procedure (Art. 3 para. 17 in conjunction with Annex I to the PPP Regulation).[14]

2. PIC Regulation

The PIC Regulation transposes the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade[15] (Rotterdam Convention) into EU law. The Rotterdam Convention regulates international trade in certain hazardous chemicals between the Parties to the Convention. It obliges exporting countries to provide importing countries with information on ecotoxicological, toxicological and safety information about these substances to ensure safe use (Art. 14 para. 1 lit. a Rotterdam Convention).[16] The substances concerned are listed in Annex III to the Convention; an up-to-date version is available on the Rotterdam Convention website.[17]

The PIC Regulation, which applies to trade between EU countries and with all third countries, goes beyond the Rotterdam Convention for more extensive protection of human health and the environment.[18] Thus, the Regulation applies to substances covered by the Rotterdam Convention as well as other substances (Art. 2 para. 1 PIC Regulation). These include, for example, active substances that have not been approved under the PPP Regulation for reasons of health or environmental protection and that fall within the definition of "chemicals" in Article 3 PIC Regulation. These substances are included in Annex I to the PIC Regulation. Trade in these substances is subject to an export notification in accordance with Article 8 PIC Regulation or requires prior informed consent in accordance with Article 14 para. 6 PIC Regulation.[19] This Annex is reviewed regularly and supplemented as necessary (Art. 23 para. 1 PIC Regulation).

Annex V to the PIC Regulation lists chemicals and products whose use is prohibited in the EU to safeguard human health or the environment and which may not be exported. This Annex refers to the Stockholm Convention on Persistent Organic Pollutants and lists pollutants and chemicals listed in Annexes A and B of the Stockholm Convention.

7 This results, for example, from the efficacy data in section 6, part A of the Annex to Commission Regulation (EU) No 284/2013 of 1 March 2013 setting out the data requirements for plant protection products, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, OJ L 93 of 3 April 2013, p. 1.

8 The database is available at: https://ec.europa.eu/food/plant/pesticides/eu-pesticides-database/active-substances/ (last accessed on 30 November 2022).

9 Commission Implementing Regulation (EU) No 540/2011 of 25 May 2011 implementing Regulation (EC) No 1107/2009 of the European Parliament and of the Council as regards the list of approved active substances, OJ L 153 of 11 June 2011, p. 1.

10 Provided for in Article 13 of the PPP Regulation.

11 A plant protection product may also be produced without authorisation if it is to be exported to another Member State where the plant protection product is authorised or to a third country (Art. 28 para. 2 lit. c and lit. d PPP Regulation).

12 Article 4 para. 3 lit. b PPP Regulation.

13 Article 29 para. 3 PPP Regulation.

14 The authorisation procedure for a plant protection product takes place in one Member State on behalf of an entire zone. Once the product has been authorised for the respective zone, an applicant who wishes to place a plant protection product on the market has to apply for authorisation in each Member State of this zone (Art. 33 para. 1 PPP Regulation). The individual Member States can carry out their own risk assessments and refuse the authorisation for their country if there is an unacceptable risk (Art. 36 para. 3 subpara. 2 PPP Regulation).

15 The EU ratified the Rotterdam Convention in 2003, see Council Decision 2003/106/EC concerning the approval, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, OJ 2003, L 63, p. 27.

16 This procedure is referred to as PIC (prior informed consent) procedure.

17 Available at: http://www.pic.int/TheConvention/Chemicals/AnnexIIIChemicals/ta- bid/1132/language/en-US/Default.aspx (last accessed on 30 November 2022).

18 Cf. recital 4 of the PIC Regulation.

19 A current version of Annex I is available at: https://echa.europa.eu/en/information-on-chemicals/pic/chemicals (last accessed on 30 November 2022).

3. Overview over possible points of reference in existing EU law

The following table shows the two EU Regulations outlined above in overview and in comparison to other databases and documents that carry active ingredients and/or products.

No.	Set of rules or specific part of a rule	Refers to/contains	Regulatory content	Reference to other rules
1a	EU online database containing active substances assessed in accordance with the PPP Regulation	Contains the approval status of active substances according to the PPP Regulation	The authorisation of plant protection products in the EU is subject to, among others, the approval of the active substances they contain.	Active substances that are not approved under the PPP Regulation and fall under the definition of "chemicals" in Article 3 of the PIC Regulation are included in Annex I to the PIC Regulation. Approved active substances are also listed in the Implementing Regulation (see 1b).
1b	Implementing Regulation (EU) No 540/2011	Lists active substances approved for use in plant protection products under the PPP Regulation.	The authorisation of plant protection products in the EU is subject to, among others, the approval of the active substances they contain.	Active substances listed in the Regulation also have the status "approved" in the EU online database (see 1a).
2	Annex I to the PIC Regulation, divided into three parts. An up-to-date version of Annex I is available at: https://echa.europa.eu/en/information-on-chemicals/pic/chemicals	**Part 1:** Lists chemicals that fall into one of the four subcategories of the PIC Regulation and that are banned or severely restricted in the EU (Art. 3 no. 7 PIC Regulation, see Art. 23 para. 2 PIC Regulation). **Part 2:** Lists chemicals that fall into one of the two use categories established under the Rotterdam Convention and that are banned or severely restricted in the EU or a Member State (Art. 3 no. 8 PIC Regulation, see Art. 23 para. 2 PIC Regulation). **Part 3:** Lists chemicals that are subject to the PIC procedure under the Rotterdam Convention.	International trade in these chemicals is subject to the export notification procedure according to Article 8 PIC Regulation or requires prior informed consent according to Article 14 para. 6 PIC Regulation.	Contains chemicals whose approval or authorisation has not been granted or has been revoked for reasons of health or environmental protection under the PPP Regulation. Part 3 implements Annex III to the Rotterdam Convention.
3	Annex V PIC Regulation	Lists chemicals and products whose use is prohibited in the EU to safeguard human health or the environment and which may not be exported (Art. 15 para. 3 PIC Regulation).	The listed chemicals and products may not be exported from the EU.	The Annex refers to the Stockholm Convention on Persistent Organic Pollutants and lists pollutants and chemicals included in Annexes A and B to the Stockholm Convention.

II. RECOMMENDATION

The above discussion shows that linking a German export ban to the granted approval of an active substance according to the PPP Regulation would be the most comprehensive approach. At the same time, a reference to the regulatory decision of the approval has a high informative value and thus legitimacy with regard to health and environmental effects. The approval of active substances requires a prior assessment of their abstract hazardous nature and the resulting risks to human health and life and to the environment. The substances that have received approval and may therefore be exported are listed in the Implementing Regulation (Table No. 1b).

Linking the ban to the approval of active substances would be similar to the approach taken in the French export ban but would be more comprehensive due to the additional coverage of active substances, independent from the products that contain them. Article 83 para. 4 of the French "Law for balanced trade relations in the agricultural and food sector and for healthy, sustainable and accessible food for all"[20] prohibits the production, storage and transfer of plant protection products containing active substances that have not been approved under the PPP Regulation in order to protect the health of humans and animals as well as the environment. Also in the French law, the reason for referring to the approval of active substances according to the PPP Regulation for plant protection products is the consideration that the abstract hazardous nature of active substances has already been assessed during the associated procedure and the refusal of the approval is therefore a good reference point for an export ban.[21]

To close any protection gaps, a German regulation should go beyond the French regulation by prohibiting not only the export of plant protection products but also the export of active substances that have not been approved. By the explicit reference to the approval recommended here, an export ban would already make it unambiguously clear in its wording that the approval of an active substance and thus the examination of the risks to human health and the environment carried out as part of the approval procedure is the basis for a permitted export. Unless the approval has already been refused, an intended export of unapproved active substances would require a prior approval procedure. In this respect, the logic of an export ban with approval reservation for the placing on the market of these substances, which already applies to the EU for plant protection[22], would be extended to exports from Germany to countries outside the EU as well, in order to comprehensively counter the risks posed by the products. If an active substance has not been approved in the EU in accordance with the PPP Regulation, it is also unsuitable for trade with third countries – this is the normative statement of an export ban with a link to the non-approval of an active substance.

To avoid any gaps in protection, this legal opinion suggests including adjuvants in the export ban to cover all substances whose approval or authorisation under the PPP Regulation is based on health and environmental protection criteria.

SIDE NOTE: MANUFACTURING NON-APPROVED ACTIVE SUBSTANCES IN THE EU

The idea of linking an export ban to the approval status of an active substance raises the question of whether non-approved active substances may be manufactured in the EU at all. If they may be manufactured, this is one of the main causes for the double standards an export ban is intended to address. If, however, non-approved active substances are not allowed to be manufactured in the first place, an export ban linked to these active substances would in fact prove futile. The PPP Regulation regulates the placing on the market of active substances. This does not legally cover the manufacture of these substances. Active substances that have not been approved under the PPP Regulation may therefore not be placed on the market in the EU, but they may still be manufactured. The active substances thiacloprid or thiram, for example, are listed in the EU database (Table No. 1a) as not approved in the EU. According to the Toxic Truth database, however, they are manufactured by Bayer AG at its Dormagen production site.[23] The French export ban also suggests that active substances exist that have not been approved in the EU under the PPP Regulation but are at least further processed into plant protection products. The French export ban thus merely eliminates double standards at the plant protection product level.[24]

A legal reference point for the possibility of production despite the lack of approval under the PPP Regulation is Regulation (EC) No 1907/2006 (REACH Regulation)[25]. It regulates the manufacturing and import of substances. Substances must not be manufactured or placed on the market unless they have been registered (Art. 5 para. 1 REACH Regulation). The aim of the REACH registration is to compile information on registration in order to enable risk management.[26] Thus, registration mainly involves the collection of information as a basis for manufacturing without an in-depth approval test. According to Article 15 para. 1 REACH Regulation, active substances and co-formulants for use in

20 Article 83 para. 4 LOI n° 2018-938 du 30 octobre 2018 pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine, durable et accessible à tous.
21 The French Constitutional Council also refers to this question when discussing the compatibility of the French regulation with the French Constitution, see Constitutional Council, Decision No. 2019-823 QPC of 31 January 2020, marg. no. 9, available in English at: https://www.conseil-constitutionnel.fr/en/decision/2020/2019823QPC.htm (last accessed on 30 November 2022).
22 Meßerschmidt, Klaus, Europäisches Umweltrecht, Munich 2011, Sec. 19 marg. no. 243.
23 Toxic Truth database, accessible at: https://blockbayer.org/mapping-action/toxic-truth-datenbank (last accessed on 30 November 2022).
24 They arise from the exemption from the authorisation requirement for export to third countries in Article 28(2)(d) of the PPP Regulation.
25 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, Commission Regulation (EC) No 1488/94, Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396, 30 December 2006, p. 1.
26 See, for example, recitals 14, 17 and 19 of the REACH Regulation.

plant protection products are considered to be registered if they are approved under the PPP Regulation. If a substance is not approved, this fictitious registration under Article 15 of the REACH Regulation does not apply. However, the substance can still be registered under the REACH Regulation, meaning that a manufacturer can apply for registration. The substances thiacloprid and thiram mentioned above are a good example of this. Neither of them has been approved according to the PPP Regulation, but they have a full registration according to the ECHA database for registrations.[27] *An export ban linked to non-approved active substances would therefore not be futile.*

It is also conceivable to link an export ban to Annex I to the PIC Regulation (Table No. 2), which covers both chemicals whose export is prohibited and those that are subject to particularly strong restrictions on use but can still be exported within the EU. The PIC Regulation explicitly refers only to chemicals that are banned or severely restricted to protect human health or the environment (Art. 3 Nos. 10, 11 PIC Regulation). The Regulation itself does not provide for a procedure to assess the abstract hazardous nature of the chemicals covered by the PIC Regulation. Rather, the annexes (Table Nos. 2 and 3) contain substances whose hazardous nature has been assessed under other rules, such as the PPP Regulation. An export ban linked to the PIC Regulation could be designed to prohibit the export of pesticides that are considered banned chemicals under Article 3 No. 10 PIC Regulation and are included in Annex I to the PIC Regulation. It is possible to specifically select pesticides banned in the EU in the online database mentioned above, which contains the current version of Annex I to the PIC Regulation (see Table No. 3). The database therefore constitutes a helpful compilation for an export ban that is designed in this way. The purpose of the PIC Regulation is to regulate the import and export of chemicals to and from the EU.

Since the primary aim is to abolish double standards to protect human health and the environment, linking an export ban to the PPP Regulation is more appropriate. Only this linkage ensures that the same standards apply to exports to third countries that also apply to placing products on the market in Germany and the EU, namely those of the PPP Regulation. A ban linking to the PIC Regulation would merely tighten up the existing export requirements for the chemicals it covers, culminating in a ban. This is not a categorical argument against linking to the PIC Regulation but, for reasons of legal consistency, the reference to the approval procedure provided for in the PPP Regulation seems more appropriate. Ultimately, the fact that the PPP Regulation precisely addresses the substances whose export is to be prevented by the German export ban, namely non-approved active substances for use in plant protection products and plant protection products manufactured from them, also speaks in favour of linking the export ban to the approval under the PPP Regulation.

27 ECHA database of registered substances, available at: https://echa.europa.eu/information-on-chemicals/registered-substances (last accessed on 30 November 2022).

C. LEGAL CONTESTABILITY OF AN EXPORT BAN

An export ban needs to comply with higher ranking laws in Germany, the EU and international law. It also has to respect the rights and freedoms of those affected by the law. Individuals or companies affected by an export ban could assert their rights in court (see I), while affected states could assert their rights before the World Trade Organization panel (see II). The following sections discuss the contestability from a legal point of view with a focus on selected areas.

I. LEGAL PROTECTION BEFORE GERMAN COURTS

The prospects of success of legal proceedings before national courts depend on whether legal actions are formally admissible and legally substantiated. Whether the admissibility requirements are met, in particular whether someone may seek legal protection before a court (legal standing), depends to a large extent on the circumstances of the individual case. Therefore, this legal opinion cannot examine in detail the prospects of success of legal actions for all possible constellations. The following examination is limited to the question of the group of persons who could have legal standing to legally challenge an export ban in court (see 1). In order to be upheld by a court, an export ban also needs to comply with higher-ranking law. This follows from the principle of the rule of law according to Article 20 para. 3 of the German Basic Law[28] (Grundgesetz – GG). This legal opinion therefore examines the compatibility of an export ban with European law (see 2) and higher-ranking German law (see 3).

1. Legal standing

In Germany, access to court is constitutionally guaranteed by the guarantee of judicial protection and generally depends on the ability to assert an infringement of individually enforceable rights.[29] This legal opinion cannot address a specific legal action that has already been filed by a concrete plaintiff whose affectedness can be assessed. It is therefore necessary to first clarify who may be affected by a ban in order to identify the group of potential plaintiffs, also as a precondition to then examine whether an export ban would be compatible with fundamental rights conferred by EU law and the German Basic Law.

The specific market structure in the sector of plant protection products as well as the internal economic structure of a company determine whether and to what extent this company is affected. An export ban from Germany will affect exporting companies. On the one hand, these can be companies that manufacture active substances and plant protection products in Germany. The extent to which they are affected by the export ban may depend inter alia on whether they produce solely for a market outside the EU or also for the European market. On the other hand, it is conceivable that German companies manufacture active substances outside Germany or buy them from abroad, import them and process them in Germany for further export (e.g. by relabelling).

How and to what extent an export ban infringes on rights and whether this infringement is legally justified depends on the circumstances in each individual case. The decisive factor in this respect is how an export ban would change the situation of the respective company. There are different possible constellations:

– Companies based in Germany seeking to export an active substance abroad (both to other EU countries and to third countries) would have to obtain approval for the active substance under the PPP Regulation in order for the ban not to apply. This is also likely to have an impact on manufacturing in the sense that, in effect, the approval would have to be obtained before the (entrepreneurial) decision to manufacture is made, since it is unlikely to make economic sense to manufacture active ingredients that have not been approved and are therefore not likely to be allowed for export from Germany.

– Currently, it is possible to export active substances that have not been approved under the PPP Regulation. If they fall within the scope of the PIC Regulation, their export is, however, subject to certain notification requirements. An export ban would change this, as the export of active substances without approval would no longer be possible at all. The same applies to plant protection products manufactured from active substances that have not been approved and intended exclusively for the non-EU market. At present, such plant protection products can be exported without authorisation, if it is ensured by inspection that they will be exported (Art. 28 para. 2 lit. d PPP Regulation).

– With regard to other EU Member States, active substances can currently be imported or exported without approval under the PPP Regulation. An export ban prohibiting the export of any active substance that has not been approved would change this situation, as active substances could no longer be exported from Germany without an approval; in fact, they would probably no longer be imported to Germany either, since a subsequent export from Germany would only be possible with an approval. This case would be particularly significant as far as processing in Germany for export to non-EU countries or exporting to other EU Member States for

28 Remmert, in: Dürig, Günter/Herzog, Roman/Scholz, Rupert (eds.), Grundgesetz, Kommentar, Loseblattsammlung, Munich, version: 98. EL, March 2022, Art. 80 marg. no. 132.

29 Schmidt-Aßmann, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 19 para. 4 marg. no. 116.

further processing into plant protection products for use outside the EU are concerned.[30]

– It is currently possible to export plant protection products to other EU Member States if the active substance(s) contained is/are approved. An export ban would not change this situation. If a plant protection product lacks authorisation under the PPP Regulation in Germany, it can currently be exported to other EU Member States if it has been authorised there (Art. 28 para. 2 lit. c PPP Regulation). Since plant protection products are only authorised within the EU if the active substances they contain are approved (Art. 29 para. 1 lit. a PPP Regulation), the export ban that is linked to active substances would not change anything in this regard.

However, it can be assumed that manufacturing companies can switch production to approved active substances that are not subject to the export ban, so that the production facilities can continue to be used. It can also be assumed that this also applies to companies that process active substances or plant protection products for export, as the activity itself can be continued (e.g. for approved active substances or other goods).

2. Compatibility with EU law

In legal proceedings against the export ban, national courts will also assess whether the provision is compatible with higher-ranking law. To assess compatibility with EU law, the legal opinion examines the compatibility of a German export ban with the EU rules on competences (see a) as well as with the fundamental freedoms (see b). The compatibility with the EU Charter of Fundamental Rights is not examined, as the export ban is not an implementation of EU law within the meaning of Article 51 of the EU Charter of Fundamental Rights.[31]

a) EU rules on competences

According to the division of competences between the EU and its Member States, Germany has the competence to adopt an export ban.[32] The EU rules on competence, in particular for the common commercial policy in terms of export policy (Art. 207 para. 1 of the Treaty on the Functioning of the European Union[33] (TFEU)), for health (Art. 168 TFEU) and the environment (Art. 192 TFEU), do not preclude national regulation.

According to Article 3 para. 1 lit. e and Article 207 TFEU, the EU has exclusive competence for the common commercial policy. It follows that, according to Article 2 para. 1 TFEU, only the EU has the competence to adopt legislation in this area. If a Member State intends to adopt a law, it requires authorisation by the EU, which may be granted by way of secondary legislation.[34] The EU Export Regulation[35] provides for such an authorisation in its Article 10, which contains an opening clause in favour of the Member States. It states that quantitative restrictions on exports by individual Member States are permissible under certain conditions if they are justified for the "protection of health and life of humans, animals and plants [...]". Complete export bans fall under the term "quantitative restrictions on exports".[36] Germany may thus be exceptionally competent to introduce quantitative export restrictions if the conditions set out in this Article are met. Accordingly, the export ban must serve the "protection of health and life of humans, animals and plants", which is given in the present case, so that Germany can make use of the opening clause. The effects of the plant protection products in question on human health are manifold. In the field of international pesticide policy (e.g. at the level of the United Nations) pesticides that are particularly hazardous to human health are referred to as "highly hazardous pesticides";[37] they have a toxic and, in certain quantities, a lethal effect.[38] For this reason, the World Health Organization considers exposure (occupational[39] as well as accidental) to be a serious public health problem with global reach. The effects caused by these pesticides can result in acute or chronic illnesses and may have effects on reproductive capacity, the nervous system or can cause cancer.[40] There is a particular risk for children.[41] Residues of plant protection products can also be found in foods imported into the EU, which sometimes leads to import refusals.[42] Animal health is also affected: plant protection products adversely affect birds, amphibians, aquatic animals and insects, including pollinator insects that are central to the food supply.[43] In addition, plant protection products have an impact on biodiversity

30 Since the placing on the market of plant protection products within the EU requires an approval of the active substance (Art. 29 para. 1 lit. a PPP Regulation), it can be assumed that the preparation for export of non-approved active substances and their further processing into plant protection products within the EU is not a significant case group.

31 Also see German Federal Constitutional Court (Bundesverfassungsgericht - BVerfG), judgment of 24 April 2013 - 1 BvR 1215/07 -, BVerfGE 133, 277-377, marg. no. 88 (quoted acc. to juris, the German online portal for legal and practical knowledge).

32 The examination before the French Constitutional Council did not address compatibility with EU law.

33 Treaty on the Functioning of the European Union, as amended by the notice of 9 May 2008, OJ C 115 p. 47, last amended by Article 2 amending Decision 2012/419/EU of 11 July 2012 (OJ L 204 p. 131).

34 Calliess, in: Calliess, Christian/Ruffert, Matthias (eds.), EUV/AEUV, Kommentar, 6th ed., Munich 2022, Art. 2 AEUV marg. no. 10.

35 Regulation (EU) 2015/479 of the European Parliament and of the Council of 11 March 2015 on common rules for exports, OJ L 83, 27 March 2015, p. 34.

36 For the EU free movement of goods in Article 35 TFEU, which contains the same wording, see Kingreen, in: Calliess/Ruffert, EUV/AEUV (2022, fn. 34), Art. 36 AEUV marg. no. 128.

37 This is not a legal term; it does not anticipate the debate on the differentiation between danger, hazardous nature and risks.

38 FAO and WHO. 2019. Detoxifying agriculture and health from highly hazardous pesticides - A call for action. Rome, p. 5 et seq., available at: http://www.fao.org/3/ca6847en/ca6847en.pdf (last accessed on 30 November 2022).

39 UNEP. 2012. Global Chemical Outlook - Synthesis Report for Decision-Makers, p. 20, available at: https://bit.ly/3NmGSYO (last accessed on 30 November 2022).

40 UNEP. 2021. Environmental and Health Impacts of Pesticides and Fertilizers and Ways of Minimizing Them, Summary for Policymakers, p. 3, accessible at: https://bit.ly/3neHsx9 (last accessed on 30 November 2022); UNEP. 2019. Global Chemicals Outlook II – From Legacies to Innovative Solutions: Implementing the 2030 Agenda for Sustainable Development, p. 72, accessible at: https://bit.ly/3A4XAsK (last accessed on 30 November 2022).

41 WHO. 2019. Exposure to Highly Hazardous Pesticides: A Major Public Health Concern, accessible at: https://www.who.int/publications/i/item/WHO-CED-PHE-EPE-19.4.6 (last accessed on 30 November 2022).

42 PAN Europe. 2020. Banned and Hazardous Pesticides in European Food, accessible at: https://bit.ly/3njYBWd (last accessed on 30 November 2022); FAO/WHO 2019 (fn. 38), p. 8.

43 UNEP. 2021 (fn. 40), p. 3; FAO/WHO. 2019 (fn. 38), p. 8.

and on the functioning of ecosystems and contaminate environmental media such as water, soil and air.[44]

The area of environmental policy lies within the competence shared between the EU and its Member States (Art. 4 para. 2 lit. e TFEU). Here, too, a national regulation would be possible, since in the case of an export ban there is either no conflicting EU secondary law or, in the case of a conflict with EU law, recourse can be had to a clause allowing more stringent protective measures on a national level (Schutzverstärkungsklausel in German). This clause means that in the event of a conflict between a national provision and EU secondary law in the area of environmental policy, a national provision can go further than EU law if it is intended to achieve a higher level of environmental protection (Art. 193 TFEU). In the present case, however, it is already doubtful whether a German export ban would be in conflict with EU secondary law at all. This requires that an EU rule has what is referred to as a blocking effect and that the Member State's rule conflicts with this. In the absence of such blocking effect, Member States are allowed to adopt measures as long as they comply with the EU fundamental freedoms.[45] The PPP Regulation deals with the export of plant protection products only as an exception to the authorisation requirement (Art. 28 para. 2 lit. c, lit. d PPP Regulation). This does not suggest that it is intended to amount to an exhaustive regulation of exports, especially since special regulations exist, for example under the PIC Regulation. The PIC Regulation regulates the export of certain chemicals covered by the proposed export ban. Since the PIC Regulation does not provide for an explicit opening clause in favour of the EU Member States to legislate export bans, the content of the Regulation must be interpreted to determine whether it has a blocking effect.[46] One argument against an exhaustive[47] regulation by the PIC Regulation is that the Regulation is in itself already more ambitious than the Rotterdam Convention. Therefore, the possibility of more stringent protective measures is already reflected in the Regulation itself.[48] However, a national export ban would conflict with the PIC Regulation's objective to provide uniform rules on the notification procedure for exports from the EU.[49] Nevertheless, if a court were to conclude that the PIC Regulation has a blocking effect, the aforementioned clause in Article 193 TFEU, regulating cases of conflicts between a national provision and secondary EU law in the field of environmental policy, would apply in favour of the national provision that seeks more ambitious environmental protection than the EU level. This applies in particular if the export ban also aims to protect the environment in the EU or Germany via global connections (e.g. climate change).[50] Even if the intended effect of environmental protection measures does not occur in Germany but abroad, the clause contained in Article 193 TFEU would apply.[51] It intends to allow Member States to take account of their own environmental conditions.[52] Another (and not congruent) purpose of the clause is to enable individual Member States to become role models for other Member States in terms of more ambitious environmental protection.[53] It is assumed that the overall level of environmental protection will be increased in the long term if initially only one Member State adopts more stringent protective measures.[54] This idea can also be applied to an export ban, which would provide an impetus for other states to adopt similar provisions, which might even culminate in a European regulation.

In the area of public health, competence formally lies with the Member States. The EU can have a coordinating, supplementary or supporting role (Art. 6 lit. a, Art. 2 para. 5 TFEU). The only exception exists for "measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health" (Art. 168 para. 4 lit. b TFEU). Here, EU action has a blocking effect, as these are common product safety concerns in the area of public health (Art. 4 para. 2 lit. k TFEU).[55] There is no such action by the EU, there is no EU-wide export ban, so it remains within the competence of the Member States.

The rules of competence in the area of agriculture are unlikely to be relevant here, since a possible export ban does not concern agricultural production in the EU and special rules have been established for agriculture-related health protection in the regulations described, which have removed this area from the competence title for agriculture.[56]

b) Fundamental freedoms

Although the fundamental freedom of the free movement of goods is affected by an export ban, such interference is likely to be justified. The fundamental freedoms aim to realise the internal market in the EU[57] and therefore

44 FAO/WHO. 2019 (fn. 38), p. 8 et seq.; UNEP 2019 (fn. 81), p. 72.
45 Nettesheim, in: Calliess/Ruffert, EUV/AEUV (2022, fn. 34), Art. 193 AEUV marg. no. 5.
46 Epiney, in: von Landmann, Robert/Rohmer, Gustav (eds.), Umweltrecht, Kommentar, Loseblattsammlung, Munich, version: 97. Lieferung, December 2021, Art. 193 AEUV marg. no. 8.
47 To assess this question, the following aspects can be considered: minimum requirements, scope of application, exhaustive nature and objective of Union law, cf. Epiney, in: Landmann/Rohmer, Umweltrecht (fn. 46), Art. 193 AEUV marg. no. 8.
48 Cf. recital 4 PIC Regulation.
49 Cf., for example, recital 6 and recital 8 PIC Regulation. With the example of authorisation systems, for example Epiney, in: Landmann/Rohmer, Umweltrecht (fn. 46), Art. 193 AEUV marg. no. 8.
50 With the example of more ambitious climate targets of Denmark and Finland compared to the EU, Calliess, in: Calliess/Ruffert, EUV/AEUV 2022 (fn. 34), Art. 193 AEUV, marg. no. 1.
51 In this respect, the export ban is to be regarded as a measure that is "in conformity with the system" in the structure of the PIC Regulation and the Export Regulation; as regards this requirement see Calliess, in: Calliess/Ruffert, EUV/AEUV (2022, fn. 34, own translation of quote), Art. 193 AEUV, marg. no. 9.
52 Calliess, in: Calliess/Ruffert, EUV/AEUV 2022 (fn. 34), Art. 193 AEUV marg. no. 1.
53 Calliess, in: Calliess/Ruffert, EUV/AEUV 2022 (fn. 34), Art. 193 AEUV marg. no. 3.
54 Geiger, Rudolf/Khan, Daniel-Erasmus/Kotzur, Markus (eds.), EUV/AEUV, Kommentar, 6th ed., Munich 2017, Art. 193 AEUV marg. no. 1.
55 Kingreen, in: Calliess, Christian/Ruffert, Matthias (eds.), EUV/AEUV, Kommentar, 5th ed., Munich 2016, Art. 168 AEUV marg. nos. 5, 18.
56 Kingreen, in: Calliess/Ruffert, EUV/AEUV 2016 (fn. 55), Art. 168 AEUV marg. nos. 5, 21.
57 The internal market is not only brought about through market access, but also through market exit as its counterpart. This includes exports within the EU and the resulting questions regarding restrictions from the state of origin, cf. Kainer, Friedemann/Herzog, Lucina, Der Marktausgang im Konzept der Grundfreiheiten, EuR 2018, pp. 405–428.

confer rights that individuals or companies can invoke before national courts. The realisation of the internal market also covers the free movement of chemical substances.[58] The protective scope of the fundamental freedoms is opened if there is a cross-border element and there is no exhaustive secondary legislation.[59] The export of substances is not exhaustively regulated, neither in the PPP Regulation nor in the PIC Regulation. The EU Export Regulation contains an opening clause for export bans (see above under a).

An export ban has a cross-border element as it would cover all exports from Germany[60], i.e. also those to other EU Member States. This directly affects the free movement of goods as a "quantitative restriction on exports" (Art. 35 TFEU). Companies wishing to export non-approved active substances or products containing such substances to another EU Member State would no longer be allowed to do so from Germany. This restriction is, however, justified under Article 36 TFEU for reasons of environmental and health protection. In any case, the requirements for environmental and health protection of the PPP Regulation also apply in the other EU Member States (in particular, no plant protection product can be authorised without prior approval of the contained active substance, Art. 29 para. 1 lit. a PPP Regulation; the export of non-approved active substances to remain in the EU therefore does not appear to be economically significant), so that no double standards need to be eliminated on this level, provided the substances are used within the EU. If, however, a non-approved active substance is exported to another EU Member State, where it is prepared or processed for export to non-EU countries, the above-mentioned reasons of environmental and health protection apply, and the restriction of the free movement of goods may be justified under Article 36 TFEU. The internal market is not aimed at eliminating competition between legal systems in the EU.[61] Therefore, as long as the requirements outlined above are met, it is irrelevant that companies based in Germany are subject to different legal requirements than companies based in other EU countries.

For companies from other EU Member States, the cross-border element consists in the effect on imports to Germany (e.g. for further processing for export outside the EU). For them, the export ban can constitute a de facto import restriction (Art. 34 TFEU), as a measure with equivalent effect). They would be able to legally produce active substances in other EU countries without an approval, possibly even import them into Germany, but no longer freely place them on the market from Germany.[62] In this case, however, the scope of application of the free movement of goods is already not opened if the rules apply to all economic operators carrying out their activities in the domestic market in Germany and if the placing on the market is affected in the same way.[63]

3. Compatibility with German law

Compatibility with national law requires compatibility with the German Basic Law. In particular, compatibility with fundamental rights must be examined here.

An export ban may interfere with the fundamental rights of freedom of property, occupation and the general freedom of action. Which fundamental right is affected depends on the circumstances of the individual case (see above under). In principle, domestic[64] companies as legal persons under private law can also invoke fundamental rights (Art. 19 para. 3 of the German Basic Law).[65]

An export ban can interfere with the freedom of property under Article 14 para. 1 of the German Basic Law. However, this interference can be justified in accordance with Article 14 para. 1 sentence 1 of the German Basic Law, according to which content and limits of property shall be defined by the laws. The scope of protection of the freedom of property includes all pecuniary legal positions that are "assigned to the holders of those positions by the legal system in such a way that they may exercise the associated powers for their own private benefit and as they see fit".[66] This also covers the right to carry on an established and practiced trade or business, not in the sense of the commercial activity as such or of abstract prospects of profit or earnings, but rather of the existing (tangible) business assets in the sense of a "commercial and business activity concretely put into practise".[67] The interference of an export ban with the scope of the freedom of property is likely to relate primarily to such specific tangible assets or existing contracts. There might be an interference if tangible assets are forfeited as a result of a ban without any long-term transitional periods. Depending on the company, this could be, for example, larger stocks of active substances or plant protection products. It is unlikely that production processes will become completely futile and that a company's machines will become worthless as a result. Likewise, existing production and delivery contracts could fall within the scope of protection of the freedom of property and become futile as a

58 Cf., for example, Article 1 para. 1 REACH Regulation.
59 Epiney, in: Bieber, Roland/Epiney, Astrid/Haag, Marcel/Kotzur, Markus (eds.), Die Europäische Union, 14th ed., Basel/Basel 2021, Sec. 10 marg. nos. 9, 11, 12.
60 Since the export ban affects all companies that export plant protection products from Germany equally and thus irrespective of nationality, there is no discrimination on grounds of nationality as defined in Article 18 TFEU. Arriving at the same conclusion, also see Kainer/Herzog, EuR 2018 (fn. 57), p. 405 (408).
61 Kainer/Herzog, EuR 2018 (fn. 57), p. 405 (407).
62 Marketing regulations can also be regarded as such "measures having equivalent effect" under Article 34 TFEU, see Epiney, in: Bieber/Epiney/Haag/Kotzur, Die Europäische Union (fn. 59), Sec. 11 marg. no. 38.
63 Epiney, in: Bieber/Epiney/Haag/Kotzur, Die Europäische Union (fn. 59), § 11 marg. no. 40.
64 Whether a company is a domestic company depends on its seat, i.e. the location of its centre of activities, cf. Papier/Shirvani, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 14 GG marg. no. 343.
65 Scholz, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 12 marg. GG no. 106 et seq., Papier/Shirvani, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 14 GG Rn. 331.
66 BVerfG, decision of 8 May 2012 - 1 BvR 1065/03 -, BVerfGE 131, 66–88, marg. no. 41 (quoted acc. to juris; own translation of quote), quoted acc. to Papier/Shirvani, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 14 GG marg. no. 160.
67 Papier/Shirvani, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 14 GG marg. nos. 160, 200, 205 (own translation of quote).

result of a ban.[68] These possible infringements by an export ban would be justified as limits of the freedom of property.[69]

The freedom of property can be limited by provisions that define the content and the limitations of property, which in turn must comply with the principle of proportionality.[70] An export ban is such a permissible provision defining the content and the limitations of property, given that it is proportionate, i.e. it serves a legitimate objective, is suitable and necessary to achieve the objective, and is proportional, i.e. when its objectives are weighed against the concrete interferences with constitutional rights.[71]

The aim of the export ban is to prevent the aforementioned risks to human and animal health as well as the environment by ensuring that active substances covered by the ban and products containing them are no longer exported. These are legitimate objectives, especially since they are also protected under the German Basic Law or international human rights instruments (e.g. the constitutional right to life and physical integrity, Art. 2 para. 2 sentence 1 of the German Basic Law).[72] Since the abstract hazardous nature of the active substances already arises in Germany, it is irrelevant that the persons to be protected are located abroad. The export ban is also suitable for achieving these objectives in terms of both environmental as well as health protection: it at least contributes to the achievement of the objectives or increases the likelihood[73] of such an achievement since, at least from Germany, such substances are no longer exported.

The export ban is also a necessary means to achieve the objectives. A measure is necessary if it is the least stringent of several measures that are equally suited for achieving the objective.[74] The aim of the export ban is to prevent the above-mentioned risks to human and animal health and the environment by ensuring that the active substances covered by the ban and products containing them are no longer exported. An export ban is the least stringent means of addressing these risks. With respect to export restrictions, less restrictive measures than a total ban could include, in particular, an export licencing requirement or a limitation to certain goods, countries or persons, quantities or uses.[75] Other possible measures are notification or labelling requirements. However, these measures are not equally suitable for achieving the above objectives, as export would continue to occur. Extensive labelling obligations already exist, both at the national level in Germany and at the EU level.[76] The Rotterdam Convention and the PIC Regulation have introduced a comprehensive notification procedure for the export of hazardous chemicals (see B.I.2). A German export ban takes these provisions into account and strives for a level of protection that goes beyond these labelling and notification requirements. If an active substance is not approved for use in plant protection, it must be assumed that it is hazardous or that there is insufficient information to assess the risks (see B.I.1). In this case, there is thus always an abstract danger. This fact cannot be eliminated by any other involvement of the authorities. In this respect, even a restriction of the export ban to certain countries[77] (depending, for example, on the testing procedures available in the country) or an explicit approval of the export by an official decision is not equally suitable, since the hazardous nature does not result from a lack of monitoring but from the substances themselves, which was examined in the risk assessment undertaken in the approval procedure under the PPP Regulation. This hazardous nature means that the active substances may not be placed on the market in the EU, so that measures in the importing countries are not relevant for the aim of eliminating double standards by aligning exports outside the EU with regulation within the EU. The same applies in the event that no application for approval or a renewed approval is made in the first place. In this case, the manufacturing company prevents an (re) assessment of the health and environmental risks, so that the idea of a prohibition with reservation of approval takes effect ("Verbot mit Genehmigungsvorbehalt" in German). In this case, too, the export ban is suitable to counter the risks arising from the lack of an approval.

To determine whether an export ban is proportional in a strict sense, the protection of human and animal health as well as environmental protection must be weighed against the interests of producers of active substances and products. The arguments for an export ban outweigh the in-

68 The freedom of contract for the sale of property is also protected by Article 14 of the German Basic Law, see Depenheuer/Froese, in: v. Mangoldt, Hermann von/Klein, Friedrich/Starck, Christian (eds.), Kommentar zum Grundgesetz, Bd. 1: Art. 1 bis 19, 7th ed., Munich 2018, Art. 14 GG marg. no. 103.

69 The scope of freedom of property is determined by law. The scope and limits of property as well as the determination of the circumstances and conditions under which owners may deal with their property are defined by law, see Papier/Shirvani, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 14 GG marg. no. 417.

70 On proportionality as a justification requirement for provisions defining the content and limitations of the freedom of property see Papier/Shirvani, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 14 GG marg. no. 429.

71 On the principle of proportionality see Grzeszick, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 20 marg. no. 109 et seq.

72 This was also the conclusion of the French Constitutional Council in its decision on the export ban in question, see Constitutional Council, Decision No. 2019-823 QPC of 31 January 2020 (fn. 21), cl. 10: "By adopting the provision in question […] the legislator has interfered with the right of free enterprise in a way that is directly connected to the pursued constitutional values of the protection of health and the environment".

73 Grzeszick, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 20 GG marg. no. 114.

74 Jarass, in: Jarass, Hans D./Pieroth, Bodo (eds.), Grundgesetz für die Bundesrepublik Deutschland, Kommentar, 16th ed., Munich 2020, Art. 20 GG marg. No. 119. For Sec. 4 para. 4 Foreign Trade and Payments Act (Außenwirtschaftsgesetz – AWG), see Pelz, in: Hocke, Ernst/Sachs, Bärbel/Pelz, Christian (Hrsg.), Außenwirtschaftsrecht, Kommentar, 2nd edition, Munich 2020,, Sec. 4 AWG marg. No. 37.

75 Pelz, in: Hocke/Sachs/Pelz, Außenwirtschaftsrecht (fn. 74), Sec. 4 AWG marg. No. 37.

76 Cf. Sec. 25 para. 1 sentence 1 German Plant Protection Act (Pflanzenschutzgesetz – PflSchG); article 4 para. 3 sentence 4 in conjunction with Annex VI to Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures. Also see FAO and WHO. 2022. Guidance on good labelling practice for pesticides (Second revision) – International Code of Conduct on Pesticide Management, Rome, accessible at: https://www.fao.org/3/I4854E/i4854e.pdf (last accessed on 30 November 2022).

77 Cf., for example, in Secs. 74 et seq. Foreign Trade and Payments Ordinance for the Export of Certain Goods.

terference with the freedom of property as the ban does not result in a complete prohibition of business activities. Instead, it must be assumed that the companies' resources can be used for other purposes (see 1 above). If there are concerns regarding proportionality, longer transitional periods for the entry into force of the ban are possible, at least in the case of surplus stock, in order to prevent hardship.[78] Longer transitional periods would, however, run counter to a rapid response to the significant risks associated with the exports, so that shorter transition periods could be justified depending on the severity of the interference. An interference with existing contracts can also be justified in light of the risks described.[79]

An export ban may also affect the occupational freedom in accordance with Article 12 para. 1 of the German Basic Law. Occupational freedom in the sense of the freedom to pursue an occupation is already affected if a state measure prevents the right holder from exercising their professional activity as before.[80] The freedom of disposition as well as the freedom of production are particularly relevant for an export ban: While the former is affected if the ban interferes with business planning and fundamental decisions, the latter is affected if the ban has an impact on the decision on the type and scope of production.[81]

An export ban that prohibits the export of certain substances produced by a company interferes with the occupational freedom in the form of a regulation on the occupational practice. It affects business decisions about the substances and products to be exported and thus also possible contractual relationships of a company. This can also have an impact on fundamental business decisions, for example if a company is primarily oriented towards producing for the international market. While it was previously possible for the exporting company to export[82] substances that are banned or subject to strict restrictions in the EU if certain export requirements were met (e.g. by complying with the PIC procedure), an export ban prevents exports altogether. Thus, while previously the question of "whether" to export also depended on whether the exporting company was able to provide the necessary information to comply with the procedures, in the case of the export ban there would be no possibility to claim an exception to the ban by complying with special obligations to act. The current legal situation still allows for active substances that are not approved in the EU and products made from them to be exported to third countries. If they fall within the scope of the PIC Regulation, they are only subject to the export notification requirement. An export ban that also prohibits the export of these substances to non-EU countries is thus de facto tantamount to a complete ban on production since production in Germany would make no economic sense if an export of the substances was no longer possible.

This interference can be justified in accordance with Article 12 para. 1 sentence 2 of the German Basic Law, which provides that an occupation may be regulated by or pursuant to a law.[83] Regulations that solely affect the practice of an occupation can already be justified by reasonable considerations of public interest, as long as the interference is proportionate.[84] It has already been shown that the export ban pursues legitimate goals and is proportionate (see above). With regard to interference with the freedom of occupation, the export ban is also proportional in the narrower sense, as it can be assumed that affected companies will be able to reorient their production.

The general freedom of action is affected if the two aforementioned constitutional rights do not apply. Article 2 para. 1 of the German Basic Law also protects economic freedom in the form of freedom of action in the economic sphere. This right may be restricted by a legal provision that is in accordance with the German Basic Law, taking into account the principle of proportionality.[85]

II. COMPATIBILITY WITH WORLD TRADE LAW

The General Agreement on Tariffs and Trade (GATT) of the World Trade Organization (WTO) regulates trade measures by WTO members. Violations of the GATT can be sanctioned by WTO states before a panel of experts.[86] It is likely that a German export ban would violate Article XI:1 GATT, which in principle prohibits any institution of non-tariff quantitative restrictions on imports and exports.[87] However, such a violation may be justified under Article XX GATT. This requires that the measure restricting trade serves to protect one of the policy objectives listed in Article XX lit. a – lit. j GATT and is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade (Art. XX GATT). WTO law also grants states

78 More general information about the necessity of a smooth transition, see Papier/Shirvani, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 14 GG marg. no. 214. The French regulation granted a transitional period of three years.

79 This is also possible in foreign trade law in the narrower sense, see Sec. 4 para. 4 sentence 3 AWG.

80 Scholz, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 12 GG marg. no. 301.

81 Manssen, in: v. Mangoldt/Klein/Starck, GG, Bd. 1 (fn. 68), Art. 12 GG marg. no. 69.

82 According to Article 28 para. 2 lit. c and lit. d PPP Regulation, the production of plant protection products without authorisation is possible if they will be exported. There is no corresponding regulation for active substances lacking authorisation.

83 Scholz, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 12 GG marg. nos. 312, 335.

84 Scholz, in: Dürig/Herzog/Scholz (eds.), Grundgesetz, Kommentar (fn. 28), Art. 12 GG. marg. no. 335.

85 Starck, in: v. Mangoldt/Klein/Starck, GG, Bd. 1 (fn. 68), Art. 14 GG marg. no. 146 et seq.

86 Annex 2 to the Agreement Establishing the World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes.

87 For a detailed discussion of whether an export ban violates the GATT, see Bender, Tobias, Unilaterale Exportverbote von Domestically Prohibited Goods zum Umwelt- oder Gesundheitsschutz im Ausland und ihre Rechtmäßigkeit nach dem GATT, ZaöRV 2003, pp. 1007–1034, 1011 et seqq.

considerable discretion in determining the purpose and level of protection of a measure.[88]

1. Justification of the measure under Article XX lit. b GATT

According to Article XX lit. b GATT, measures may be justified if they serve the protection of human, animal and plant life and health and are necessary for this purpose. The export ban on certain hazardous pesticides from Germany is intended to protect persons exposed to the hazardous substances as well as the environment and ecosystems. This falls under the policy objectives set out in Art. XX lit. b GATT.

One possible problem might be that the legal interests to be protected are primarily located outside the territorial jurisdiction of Germany. First, it should be noted that a ban on the export of certain hazardous pesticides is also necessary to protect German consumers from the exported substances re-entering the food chain via residues in imported food or food products and thus endangering their health. However, the EU has imposed extensive regulations that require an assessment of the maximum residue level in imported food. Since this level is set very low, especially in the case of active substances that are not or no longer approved for health reasons, this argument alone is not sufficient. In addition, it can be argued that environmental degradation contributes to global climate change,[89] and German policy is explicitly aimed at fighting the climate crisis.[90]

Article XX lit. b GATT does not specify whether the legal interests to be protected must be located in the territory of the regulating WTO state. An interpretation that the legal interests pursued must be within a country's own jurisdiction would not be consistent with the purpose of the GATT. When interpreting a treaty provision, the entire treaty, including the preamble, and any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty, must be taken into account.[91] An overall view of the GATT[92] and the WTO agreements in general[93] and the use of WTO case law[94] shows that it would be contrary to the purpose of the WTO in general and the GATT in particular to deny Member States the right to enact regulations for the protection of people and the environment outside their own territory. This would not be proportionate in view of globalized world trade. What is more, such a restriction would lead to WTO Member States not being able to fulfil their obligations under international agreements to protect the environment.[95] In this context, reference can also be made to the Rotterdam Convention and the Stockholm Convention, which explicitly provide for measures to protect the environment and people in importing countries. The Federal Republic of Germany is also committed to achieving the Global Sustainable Development Goals of the 2030 Agenda. The export of certain hazardous pesticides could jeopardize their full achievement.[96]

An export ban does also not limit the sovereignty of the importing state.[97] In the case of an export ban, all the actual facts falling under the export ban and its legal consequence, the prohibition of the export, take place in the state that issues the export ban.[98] An export ban has no patronising effect either. Rather, the Federal Republic of Germany, as a state party to the UN Social Pact[99], is obliged to protect the human rights contained in the Pact not only with respect to its own population, but also with respect to the population outside its territory.[100] In summary, the fact that the policy objectives pursued by the export ban also lie outside the territorial jurisdiction of the

88 See WTO Information Note, Export Prohibitions and Restrictions, 23 April 2020, p. 12. Accessible at: https://www.wto.org/english/tra- top_e/covid19_e/export_prohibitions_report_e.pdf (last accessed on 30 November 2022). It is necessary that the purpose pursued by the measure is evident from the measure, see WTO Dispute Settlement Body Report, European Communities-Tariff Preferences, WT/DS246/R, 1 December 2003, para. 7.201; WTO Appellate Body Report, China-Rare Earths, WT/DS431/AB/R; WT/DS432/AB/R; WT/DS433/AB/R, 7 August 2014, para. 5.96. This is the case in the present case, as the export ban examined here will be implemented within the framework of the German Plant Protection Act, which, according to its Section 1, has the express objective of protecting human health and the environment.

89 Cf. Bundestag Printed Paper 18/8500 of 26 May 2016, p. 227. On the negative impact of the use of certain hazardous pesticides on the environment and/or climate, see also UNEP 2021 (fn. 40), pp. 3, 17; FAO/WHO 2019 (fn. 38), pp. 5, 8; Pisa, Lennard et al, An update of the Worldwide Integrated Assessment (WIA) on systemic insecticides. Part 2: impacts on organisms and ecosystems, ESPR 2017, pp. 11749-11797.

90 Cf., for example, German Coalition Agreement 2021–2025, p. 120. Such an obligation to combat the climate crisis also arises in terms of international law, as states have undertaken to take joint measures to respond to global challenges to human rights, cf. for example Article 1 UN Charter; Articles 22 and 23 Universal Declaration of Human Rights; Preamble to the International Covenant on Civil and Political Rights of 16 December 1966, ratified in Germany on 17 December 1973, Federal Law Gazette 1973 II, p. 1533.

91 Cf. Article 31 para. 2 of the Vienna Convention on the Law of Treaties.

92 The GATT aims to reduce trade restrictions, but Article XX GATT also takes into consideration important state interests, including the protection of human health and the environment and the conservation of exhaustible natural resources.

93 Cf. preamble to the WTO's Umbrella Agreement, which emphasizes that contracting states must consider the objective of protecting the environment when implementing their trade provisions, Agreement Establishing the World Trade Organization, available at: https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (last accessed on 30 November 2022). Cf. also Article 2.2 WTO Agreement on Technical Barriers to Trade and Article 2.1 WTO Agreement on Sanitary and Phytosanitary Measures.

94 WTO case law has repeatedly confirmed that the goal of trade liberalization must not lead to individual WTO states being unable to pursue their own policy objectives. See WTO Appellate Body Report, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996, pp. 30–31; WTO Appellate Body Report, Brazil-Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, 3 December 2007.

95 Cf., for example, Rio Declaration on Environment and Development, 1992, Principle 2; Convention on Biological Diversity of 1992, esp. Articles 4, 8 lit. k, 14 lit. d.

96 In particular Goals 15, 2, 3 and 8.

97 Such an argument could be based on customary international law, according to which the extraterritorial application of norms that impermissibly affect the sovereignty of another state is not permissible. See Bender, ZaöRV 2003 (fn. 87), p. 1007 (1020 et seq.).

98 Also see Bender, ZaöRV 2003 (fn. 87), p. 1007 (1021, with further references), who describes the export bans in question as cases of "intraterritorial jurisdiction with extraterritorial effect".

99 International Covenant on Economic, Social and Cultural Rights of 16 December 1966, ratified by the Federal Republic of Germany on 17 December 1973, Federal Law Gazette 1973 II, p. 1659.

100 UN Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24, para. 27. See also UN General Assembly, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, 30 December 2013, UN Doc. A/HRC/25/53, para. 63 et seq.

state issuing the ban does not prevent a justification of the export ban.

Despite its trade-restrictive effect, a German ban on the export of certain active substances or plant protection products is necessary to reduce the negative effects that the continued export and use of these substances have on the health of humans, the environment, and ecosystems.[101] No alternatives are apparent that could achieve this policy objective at the level pursued by the export ban (see C.I.3). The export ban would thus be justified under Article XX para. b GATT.

2. Justification of the measure under Article XX lit. g GATT

The export ban is also justified under Article XX lit. g GATT, which stipulates that measures are justified if they relate to the conservation of exhaustible natural resources and are made effective in conjunction with restrictions on domestic production or consumption.[102] The export ban aims at the protection of the environment, which includes protecting biodiversity and containing insect decline.[103] The measure is also accompanied by a congruent domestic restriction.[104]

3. No arbitrary and unjustified discrimination or disguised trade restriction

The export ban is intended to prevent companies based in Germany from participating in the global sale of particularly hazardous substances and thus indirectly causing harm to human, animal and plant life and health. Thus, there is neither arbitrary or unjustified discrimination nor a disguised restriction on international trade.

4. Conclusion

A German provision prohibiting, for the protection of humans and the environment, the export of active substances and plant protection products containing them that have not been approved or authorised in the EU under the PPP Regulation or which are considered banned chemicals under Article 3 para. 10 PIC Regulation and are included in Annex I to the PIC Regulation would thus be a restriction on international trade justified by way of exception under Article XX GATT.

101 WTO case law has also found that even measures that are highly trade restrictive may be justified if the measure makes such a substantial contribution to the achievement of the objective pursued that the trade restriction is justified. WTO Dispute Settlement Body Report, Indonesia-Measures Concerning the Importation of Chicken Meat and Chicken Products, WT/DS484/R, 17 October 2017, para. 7.227.

102 "Conservation" must be interpreted broadly to mean the conservation of the environment. See WTO Appellate Body Report, China-Measures Related to the Exportation of Various Raw Materials, WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R, 30 January 2012, para. 355.

103 WTO case law has explicitly recognized the prohibition of activities causing the risk of extinction as justified under this paragraph precisely with a view to conserving endangered species. WTO Appellate Body Report, China-Rare Earths (fn. 88), para. 5.89.

104 The imposition of trade restrictions needs to be balanced. See WTO Appellate Body Report, China-Rare Earths (fn. 88), para. 5.93 et seqq.; WTO Appellate Body Report, US Gasoline (fn. 94), p. 20.

D. DRAFT EXPORT BAN

Based on the above considerations, a possible wording for an export ban is proposed below. However, the subject of this this legal opinion is only the wording of the ban itself. This must be accompanied by further provisions, e.g. further definitions, on the enforcement of the ban (e.g. competence of authorities), on the monitoring of its compliance including provisions on possible sanctions for non-compliance as well as provisions on the entry into force and possible transitional periods.[105]

This legal opinion proposes a draft export ban covering all substances whose approval or authorisation under the PPP Regulation is subject to health and environmental protection criteria. This is intended to avoid gaps in protection that are not related to the active substances but caused by other substances such as safeners, synergists and co-formulants in plant protection products.

In addition, further differentiations of the ban are necessary, which go beyond the scope of this legal opinion, but should be included to avoid any gaps in protection at the expense of environmental and health protection: The content of a legal ban should be extended to biocides and candidates for substitution (see). The case where an active substance has been approved but the approval is linked to further conditions or restrictions for reasons of environmental and health protection (Art. 6 PPP Regulation) has also not been taken into account so far. It must be ensured that these further conditions or restrictions to the approval/authorisation also apply to exports. In general, it is not unusual for chemicals law to provide for restrictions as a precondition for certain actions (see, for example, Art. 3 para. 1 German Chemicals Prohibition Ordinance (ChemVerbotsV)). Compliance with the approval conditions must then be ensured, for example, through additional notification and inspection obligations prior to export. The formulation suggested below for an export ban currently also does not provide for any transitional arrangements (see, for example, Art. 80 PPP Regulation, Sec. 74 of the German Plant Protection Act) that could apply to active substances for plant protection or products containing them.

Following the recommendation that the export ban should cover active substances and adjuvants without approval or authorisation under the PPP Regulation, the following statutory ban specifies the different situations in which a substance is no longer permitted:
– if no approval has been applied for,
– if the approval or renewed approval has been refused,
– if the approval or renewed approval has expired, or
– if either of the two has been revoked.

In cases where no approval has been applied for or the approval has expired, health or environmental protection are not necessarily the reasons for the lack of approval. This might, for example, be due to commercial considerations made by companies, which can lead to a company refraining from applying for (renewed) approval. In this case, too, the ban should take effect since, although the company is not seeking a (renewed) assessment of the effects of the active substance, it could very well do so.

Sec. XX Export ban
To protect humans and the environment, the export of

1. active substances

a. which have not been approved under Article 4 of Regulation (EC) No 1107/2009,

b. whose approval has expired due to the expiry of the period specified in Article 5 of Regulation (EC) No 1107/2009 or Article 4 para. 1 or due to any other restriction in accordance with Article 6 of Regulation (EC) No 1107/2009,[106]

c. whose approval has not been renewed in accordance with Article 14 para. 1 of Regulation (EC) No 1107/2009,

d. whose renewed approval has expired due to expiry of the period defined in Article 14 para. 1, first sentence, of Regulation (EC) No 1107/2009 or due to any other restriction in accordance with Article 14 para. 1, third subparagraph, in conjunction with Article 6 of Regulation (EC) No 1107/2009, or

e. whose approval has been revoked in accordance with Article 21 para. 3 of Regulation (EC) No 1107/2009

2. safeners and synergists,

a. which have not been approved under Article 25 para. 1 of Regulation (EC) No 1107/2009 on grounds of public health or environmental protection,

b. whose approval has expired due to the expiry of the period defined in Article 25 para. 2 in conjunction with Article 5 of Regulation (EC) No 1107/2009 or due to any other restriction in accordance with Article 25 para. 2 in conjunction with Article 6 of Regulation (EC) No 1107/2009,

c. whose approval has not been renewed in accordance with Article 25 para. 2 in conjunction with Article 14 para. 1 of Regulation (EC) No 1107/2009 on grounds of public health or environmental protection,

d. whose renewed approval has expired due to expiry of the period defined in Article 25 para. 2 in conjunction with Article 14 para. 1 sentence 1 of Regulation (EC) No. 1107/2009 or due to any other restriction defined in Article 25 para. 2 in conjunction with Article 14 para. 1 subpara. 3 in conjunction with Article 6 of Regulation (EC) No. 1107/2009, or

105 The Chemicals Prohibition Ordinance (Chemikalien-Verbotsverordnung - ChemVerbotsV) is a good example in this regard.
106 It is assumed that Article 6 of the PPP Regulation, which does not list conditions exhaustively, also permits a shorter time limit (see, for example, Section 36 para. 2 No. 1 of the Administrative Procedure Act for administrative acts in Germany).

e. whose approval has been revoked on grounds of public health or environmental protection in accordance with Article 25 para. 2 in conjunction with Article 21 para. 3 of Regulation (EC) No 1107/2009,

3. co-formulants,

a. which have not been accepted for inclusion in a plant protection product in accordance with Article 27 para. 1 of Regulation (EC) No 1107/2009,

b. whose acceptance as a component of a plant protection product has been revoked in accordance with Article 27 para. 3 of Regulation (EC) No 1107/2009, or

c. which were banned for the Federal Republic of Germany on the basis of Article 27 para. 4 in conjunction with Article 81 para. 2 subpara. 2 of Regulation (EC) No 1107/2009,

4. plant protection products containing one or more of the substances listed in Nos. 1-3

is prohibited.

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